

Companies (Amendment) Act 2009

The Companies (Amendment) Act 2009 was recently passed by the Oireachtas and signed into law by President McAleese on July 12 2009.

The enactment of the 2009 Act means that the body of company law in Ireland now comprises the Companies Acts, 1963 to 2009. Accordingly, the appropriate citation in the auditors' report and in financial statements signed on or after 12th July 2009 should be the "Companies Acts, 1963 to 2009".

The primary objectives of the amendments to the new Act focus on:

1. Improving the transparency of loans made by companies to their directors and to persons connected with them; and removing the provisions that previously allowed banks to avail of a different disclosure regime to non-banking companies in respect of such transactions with directors.
2. Supporting the Director of Corporate Enforcement ("The Director") in his efforts to enforce compliance with company.
3. Modifying the residency requirements of directors.

1. Directors Disclosure Obligations

Section 31 of the Companies Act 1990 prohibits a company from making loans to its directors while Section 40 governs the criminal penalties imposed for a breach of this section.

Previously only the director of a company who authorized a loan in contravention of Section 31 was guilty of an offence.

Under the new Act if the company is in breach of Section 31, all the directors of the company may be prosecuted thereby removing the requirement for the Office of the Director of Corporate Enforcement (ODCE) to prove that directors were "knowingly and willfully in breach".

As a result directors should take the time to review the financial position of the company on a regular basis to ensure that the company is not in violation of Section 31. If the director determines that a breach has occurred, immediate action should be taken to rectify the situation.

It is worth noting that the ODCE are constantly reviewing the financial statements of companies and investigating cases where a breach has occurred. In these cases the ODCE may write to

the company directors requesting proof that they have rectified the situation.

New Disclosure Obligations for Banks

Prior to March 2009 licensed banks could avail of a different disclosure regime relating to directors transactions than non-banking companies.

Non-banking companies were obliged to provide details in their annual accounts of all transactions or agreements with directors or connected persons, which existed at any time during the financial year.

Meanwhile banks didn't have as onerous an obligation and were only required to disclose aggregate amounts outstanding at the end of the financial year.

The Act imposes a new statutory obligation on banks to disclose in their annual accounts the particulars of such transactions and not merely the aggregate amounts. In respect of a connected person, aggregate amounts remain the only information required to be disclosed. The Act clarifies that where a company or bank is in default of their disclosure obligations, the company and every director will be guilty of an offence.

2. Support the Director of Corporate Enforcement in his efforts to enforce compliance with company law

Under the existing Act all directors are obliged to declare any interests they may have in contracts or proposed contracts with the company. These interests must be disclosed in a specific register kept for that purpose (section 194 Companies Act 1963). The new Act gives the ODCE a right of access to this register and the power to take copies of such registers.

The Act also clarifies the power of the ODCE to access third party records relating to a company under investigation.

The ODCE's power of search and seizure has also been significantly strengthened. The Act makes a provision for the removal of paper and electronic information from a company's premises to facilitate an off site examination. Furthermore the Act allows for the extension of the period of a search warrant obtained by the ODCE for entry and search of a company's premises.

Finally, the most aggressive change in expanding the powers of the ODCE is that the ODCE are now entitled to seize information over which a claim of legal professional title is asserted by the company. The information is to be placed in a sealed envelope on a confidential basis, pending adjudication by a Court for determination as to whether privilege properly applies to the information or not.

3. Non-Resident Directors

Section 43 of the Companies (Amendment) (No.2) Act 1999 provides that, every company must have at least one director who is an Irish resident. The European Commission had concerns that certain elements of this section were not compatible with the EC Treaty. The Act now requires all companies to have a director who is resident in a "Member State of the European Economic Area" (EEA). This change removes the onerous and costly requirement to put in place a bond to secure compliance with the Companies Acts.

New Companies Consolidation & Reform Bill

It is also worth noting that the publication of the Companies Consolidation & Reform Bill is now expected in 2010. The Bill is expected to simplify many of the existing procedures, making company law more accessible to directors and shareholders of companies.

The vast majority of companies in Ireland today are small private companies limited by shares however under current legislation governing

company law these companies are placed under the same regulatory burden as publicly quoted companies.

Ultimately the aim of the new bill will be to reduce much of the excessive regulation imposed by the existing legislation. Some of the main features of the proposed new bill are as follows:

- The replacement of the Memorandum and Articles of Association with a single document called a Constitution
- The introduction of single director private companies on condition that the company has a separate company secretary
- Fiduciary duties of directors to be given a statutory basis
- Change in the criteria for classifying small and medium sized companies
- Extension of the power of the Director of Corporate Enforcement to petition the Court to wind up a company

It is hoped that these changes will make doing business in Ireland easier, less expensive, and more attractive to foreign companies.

If you require any further information or assistance on how this issue might affect you please contact us.

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