

Company law update

The Companies (Amendment) Act 2009

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The Companies (Amendment) Act, 2009 (the “Act”) was signed into law on 12 July 2009. The Act provides for significant changes to company law compliance and enforcement. It gives increased powers of search and seizure to the Office of the Director of Corporate Enforcement (“ODCE”) and expands disclosure obligations with regard to transactions between a company and its directors (including specific changes for licensed banks). The Act also relaxes the requirement that at least one director of an Irish company must be resident in the State.

Directors’ disclosure requirements

The Act introduces criminal penalties for companies (including licensed banks) and their directors who do not comply with the disclosure requirements regarding loans to directors and connected persons. However it will be a defence for a director or a company to show that they took all reasonable steps to secure compliance with the requirements of the Act. The Companies Acts had previously required a director of a company to disclose any interest he or she had in contracts or proposed contracts with that company and for this information to be recorded in a statutory register. The Act now requires licensed banks to keep similar records.

In addition, the ODCE is granted a right of access to these registers in the case of both licensed banks and non-banking companies.

Additional changes for licensed banks

The Act brings the disclosure rules relating to loans to directors of licensed banks into line with the rules that currently apply to non-banking companies. Every loan to each individual director of a licensed bank will have to be disclosed separately in the annual accounts as opposed to the aggregate amount of all such loans to directors which was previously the requirement. In addition the aggregate amount of loans to persons connected

with a director (including immediate family members, business partners etc.) will have to be similarly disclosed where such loans are given on more favourable terms than are generally available to customers of the bank and subject to a minimum threshold amount of €3,174.35. The maximum amount of such loans outstanding during an accounting period must also be disclosed and not simply the outstanding amount at the end of the financial year.

In March of this year, the Financial Regulator introduced new disclosure requirements which obliged banks and building societies to detail in their annual accounts information regarding loans to each director and connected persons. The provisions of the Act are stated to be in addition to any other such regulatory rules. With these additional compliance rules the disclosure of loans by banks to their directors becomes a relatively complex area.

Changes to residency requirements

The Act amends the previous requirement that a least one director of an Irish company must be resident in the State or that a company must alternatively post an insurance bond with the CRO (to cover any fines which may be levied on that company in respect of breaches of the Companies Acts or the Taxes Acts). To address European Commission fears of incompatibility with the EC Treaty this residency requirement has been relaxed

so that it will now be satisfied if at least one of the directors of an Irish company is resident in an EEA member state (i.e. the EU plus Iceland, Liechtenstein and Norway). The Act also clarifies the basis on which a company may be regarded as having a real and continuous link with an economic activity in the State.

Increased powers of enforcement

The courts are given the power to extend the validity period of a search warrant granted to the ODCE. The ODCE now has the power to remove documents and electronic information from premises to another location in order to determine their relevance to an investigation. This power is subject to certain logistical considerations detailed in the Act.

Significantly, legally privileged documents may also be seized by the ODCE on a sealed basis. An application may then be made to the High Court for it to determine whether legal privilege attaches to those documents.

The Act clarifies the power of the ODCE to require the production of books and records from third parties where such documents relate to the business of a company under investigation.

Should you require further advice on this or any other company law matter, please contact one of the members of the Landwell corporate/commercial team whose details are set out on front.

Summary - Companies (Amendment) Act 2009

- **Loans to directors:**
New penalties for all and new disclosure and record keeping obligations on banks.
- **Director of Corporate Enforcement:**
Increased powers to remove documents, even those legally privileged and to require production of records.
- **Directors residency:**
At least one director of an Irish company must be resident in an EEA member state only.

Disclaimer

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