Corporate Compliance Matters

Information Bulletin
Winter 2004

Office of the Director of Corporate Enforcement
Oifig an Stiúrthóra um Fhorfheidhmiú Corparáideach

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COMPANIES REGISTRATION OFFICE
AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ

Directors' Compliance Statements – Will They Apply to You?

Paul Appleby, Director of Corporate Enforcement

Introduction

Section 45 of the Companies (Auditing and Accounting) Act 2003 will, when operative, introduce a new obligation on the directors of certain companies to prepare a Compliance Policy Statement and an Annual Compliance Statement for inclusion in the Directors' Report that accompanies the company's audited financial statements.

To whom will this obligation apply?

This obligation will only apply to a minority of company directors, specifically those of:

- all public limited companies (whether listed or not), and
- all private companies limited by shares whose turnover exceeds ˇ15.23 million or whose balance sheet total exceeds ˇ7.6 million.

However, all directors are expected to ensure that they and their companies comply with their legal obligations at all times.

Compliance with what?

The Directors' Compliance Statements will report on compliance with the company's "relevant obligations". This term is defined as:

- the Companies Acts;
- tax law; and
- any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements.

Why has this obligation been introduced?

This requirement has arisen as a result of the recent disclosures of widespread non-compliance with tax, company and other legislation by banks and other companies.

Why are there two compliance statements?

The Compliance Policy Statement looks forward to identify what policies, arrangements and procedures are in place to secure the company's compliance with its present and future relevant obligations. Specifically, directors will be required to provide details of the company's:

- policies respecting compliance with its relevant obligations;
- internal financial and other procedures for securing compliance with its relevant obligations;
- arrangements for implementing and reviewing the effectiveness of the company's policies and procedures.

In contrast, the Annual Compliance Statement looks back to report on the company's compliance with its relevant obligations in the preceding financial year. Specifically, directors will be required to:

- acknowledge that they are responsible for securing the company's compliance with its relevant obligations;
- confirm that the company has internal financial and other procedures in place designed to secure compliance with the company's relevant obligations or, if this is not the case, specify the reasons;
- confirm that they have reviewed the effectiveness of the company's procedures during the year or, if this is not the case, specify the reasons; and
- specify whether, based on the company's procedures and their review of those procedures, they are of the opinion that they have used "all reasonable endeavours" to secure the company's compliance with its relevant obligations or, if this is not the case, specify the reasons.

Do auditors have a role?

Yes. The company's auditors must annually review the Directors' Compliance Statements in order to determine if, in their opinion, the Statements are "fair and reasonable". This opinion must be associated with the Auditors' Report on the company's audited financial statements.

Is guidance available?

Yes. The Directors' Guidance deals, among other things, with the following matters:

- which companies will be subject to the new compliance obligation;
- what reporting requirements will apply to the relevant directors;
- how directors might identify the legislation on which they will have to report;
- what internal financial and other procedures might be put in place to secure compliance;
- how directors might review the effectiveness of these control procedures;
- what is expected of directors in reporting that they have used "all reasonable endeavours" to secure compliance;
- an overview of the role of the company's auditors in determining whether the directors' compliance statements are "fair and reasonable"; and
- the consequences of non-compliance with these provisions.

The Directors' Guidance is available from the ODCE at www.odce.ie or on request at info@odce.ie, 01 858 5800 or Lo-call 1890 315 015.

The related Guidance for Auditors is available from the Auditing Practices Board website at www.frc.org.uk/apb.

At the time of writing (October 2004), both sets of guidance are available in draft form, but are expected to be finalised before the end of 2004.

When will this take effect?

At the time of writing, the Minister for Trade and Commerce has not yet made a decision on the commencement date or in relation to whether he will exempt any classes of qualifying company from this obligation. However, this decision is expected before the end of 2004.

Use Your CRO Filings As A Compliance Check

Paul Egan, Partner in Mason Hayes & Curran, Solicitors.
He is the representative of the Law Society of Ireland on the Company Law Review Group, and co-author of Jordans Irish Company Secretarial Precedents.

By now just about all directors and secretaries know that there are a number of fundamental CRO filing obligations.

What all directors and secretaries should know also is that CRO filings are meant to be reflective of matters to be recorded in underlying company documents and registers – often called "the statutory registers" – many of which, by law, must be kept at a specified place in the State. You can use the CRO filings as a quasi-audit tool to check whether you are keeping these statutory registers.

As a solicitor in practice dealing with acquisitions and disposals of and investments in companies, I often find that CRO filings of a company may be relatively satisfactory, but the underlying company documents and registers are not.

Therefore, I set out in the table below the registers required to be kept by private limited companies, and the CRO filing requirements that are relevant to the maintenance of those registers.

The table is not exhaustive as to filing requirements. However, you should ask yourself every time you make a CRO filing – have I updated the company's own registers?

Register/Document	To be kept at	Filing requirement
ACCOUNTS		
Accounts	Registered office or somewhere else in the State	***Accounts or abridged accounting information*** must be attached to the ***annual return*** (B1). The accounts must be audited unless the company qualifies for audit exemption
CONSTITUTIONAL DOCUMENTS		
Memorandum and articles of association	No particular location, but must be provided to members on request	***Resolutions*** (G1 – special, G1Q special – change of name, G2 – ordinary) amending the memorandum or articles, together with the ***amended memorandum and articles*** must be filed within 15 days ***Certain alterations in share capital*** must in addition be separately notified within one month – consolidation, division, conversion, redemption, cancellation (B7 or 28)
DEBENTURES AND CHARGES		
Register of debenture holders	Registered office or anywhere in the State	None – uncommon in private companies*
Debenture Trust Deeds	No particular location, but must be provided to members on request	None – uncommon in private companies
Copies of instruments creating charges	Registered office	***Particulars of a charge*** (C1) must be filed within 21 days
DIRECTORS		
Register of directors and secretaries	Registered office	***Change of director and/or secretary, or in their particulars*** (B10) must be filed within 14 days ***Annual return*** (B1) must reflect this register as at the Annual Return Date
Book containing particulars of directors' interests in company contracts	Registered office	None
Register of directors' and secretaries' interests in group/company securities	With register of members	None. Note that registers of members and of directors and secretaries can be cross-referred to create this register *
Copies of certain service agreements of directors or secretary	Registered office or with register of members or at principal place of business	None*
MEETINGS		
Minute book of proceedings of meetings of board and board committees	Anywhere	None, but ***any matter triggering a CRO filing requirement*** generally implies the need for the passing of a board resolutio n
Minute book for proceedings at general meetings	Registered office	***Ordinary resolutions concerning share capital*** (B2), and ***special resolutions*** (G1, G1Q) must be filed within 15 days
MEMBERS		
Register of members	Registered office or anywhere in the State	***Annual return*** (B1) must reflect this register as at Annual Return Date, together with changes since the previous Annual Return Date.* ***Allotments*** (B5), ***re-issue of treasury shares*** (H5a), ***redemptions***, ***cancellations*** (B7 or 28) must be filed within one month, ***repurchases*** (H5) within 28 days.
Index of members (for companies with more than 50 members)	With register of members	None
Contracts to purchase own shares	Registered office	***Repurchases*** (H5) must be filed within 28 days

** Annual return (B1) must state address where kept if not the registered office and where there is at any time a change in that address Form B3 is required to be filed.*

He's Making A List. He's Checking It Twice.

Paul Farrell, Registrar of Companies

If you have a bad track record in filing your annual returns with the CRO you will be on a list, and you will be receiving a late filing penalty or worse.

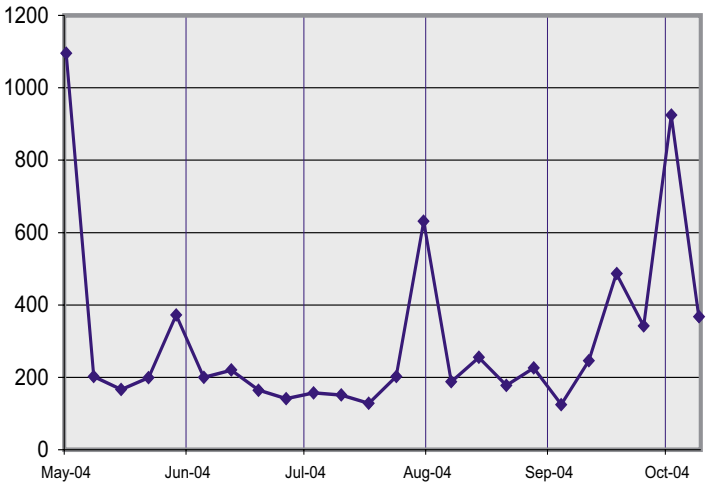
There are two important components of the new Integrated Enforcement Environment (IEE). The first is that companies are now selected for action on a weekly basis giving a small number of companies being processed at any one time. The second is that, as we contemplate more serious enforcement measures, selection is on the basis of a company's filing history.

The basis of selection is the time since the most recent ARD (annual return date) missed by the company. We commenced the first phase of the IEE last May by initiating the strike off process for a significant number of companies with missed ARDs from March 2002 (the start of the ARD regime) to June 2002.

After this initial clear out of cases we moved forward each week by one week of ARDs. We recently increased progress by proceeding at the rate of two weeks' missed ARDs each week. We will continue to reduce the time from a missed ARD to the commencement of strike off until it is down to 400 days.

Strike off initiated

The following graph shows the strike offs initiated per week since the IEE commenced.



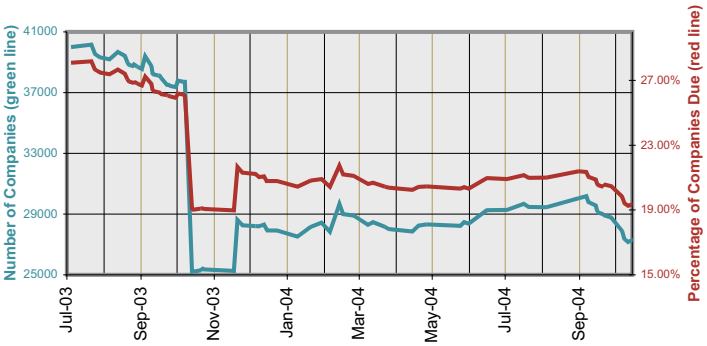
We are working on a long strike off cycle. Apart from the March to June 2002 clear-out, we are issuing a notice 16 weeks before the first strike off notice issues. The first notice gives an effective five weeks before the statutory notice issues. That in turn is five weeks before the first notice in Iris Oifigiúil which is five weeks before the company is struck off.

Thus a full strike off process that commences in November 2004 will not conclude until June 2005.

The actual effects of the process are only now being felt although our advertising campaign earlier this year may have impacted on the number of returns filed on time.

Companies out-of-date

The position at various times over the past year.



The big drop in the number out-of-date in October 2003 was due to the initiation of the strike off process for a large number of companies.

As the number of companies out-of-date has declined the amount paid in late filing penalties has also fallen. The total paid for January to September 2003 was ˇ19 million whereas the equivalent figure in 2004 was ˇ13 million. The total for all of 2003 was ˇ28 million and we now projecting ˇ18 million for 2004.

The next phase of the IEE will be the selection of the enforcement process to be applied to companies that remain out-of-date at the end of this year.

The following table shows the number of companies that have paid a late filing penalty over the past four years. We will focusing our efforts on those companies that have a history of late filing and are still out-of-date. We will be giving special attention to specific directors who have more than one company with a poor filing record.

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	Year late filing penalty was paid			
No. of companies	2001	2002	2003	2004
9758				Y
21633			Y	
5129			Y	Y
11330		Y		
2148		Y		Y
5036		Y	Y	
1445		Y	Y	Y
1861	Y			
223	Y			Y
628	Y		Y	
181	Y		Y	Y
254	Y	Y		
67	Y	Y		Y
123	Y	Y	Y	
29	Y	Y	Y	Y

Getting off the non-compliant list is easy; just make sure your company's annual returns are kept up-to-date. If you have any doubts check with your professional advisor, contact us at info@cro.ie or visit www.cro.ie.

Is Your Company Your Personal Bank?

Paul Appleby, Director of Corporate Enforcement

Introduction

Company directors occasionally use company assets for personal purposes unrelated to the company's business, e.g. the purchase of family holidays or contributing to the purchase of a home. However, some of these transactions are legally prohibited.

Why?

The purpose is to prevent unscrupulous directors from divesting the company of its assets for their personal benefit. The rules in the Companies Acts are a "creditor protection" mechanism and are designed to ensure that company assets remain within the business to meet its ongoing commitments or are otherwise available for distribution to creditors in the event of its liquidation. By encouraging compliance with these obligations, the Office of the Director of Corporate Enforcement (ODCE) wishes to reduce creditor losses and overall business risks and thereby improve the commercial environment for sound business development.

What is permitted?

While the general rule is that directors are prohibited from using company assets for personal purposes, there are a number of exemptions:

- arrangements not exceeding 10% of "relevant assets" (see the Illustration across);
- arrangements approved by special resolution and accompanied by a statutory declaration describing the circumstances;
- arrangements between group companies;
- directors' expenses properly incurred in developing the business;
- transactions made in the ordinary course of business, e.g. by banks.

Any transaction (whether prohibited or not) must be disclosed in the company's financial statements by way of a note disclosure.

What are the consequences of non-compliance?

The company auditor is required by law to report non-compliance to the ODCE. No matter how the transaction comes to attention, the Office considers if the circumstances of the offence warrant legal action against the directors and other relevant persons. In some (but not all) cases, the ODCE will be satisfied by evidence that the directors have voluntarily corrected the default.

The principal legal options open to the ODCE include prosecution of the directors and other relevant persons or High Court proceedings to remedy the default. A decision to pursue legal action is likely to be made where the available evidence suggests, among other things, that the directors knowingly breached the law in undertaking any transaction, the aggregate amount of the transactions was large, there was persistent default and/or satisfactory evidence of rectification has not been forthcoming. The ODCE has already prosecuted one director who obtained several €100k from his company, and other similar cases are planned.

If an insolvent company ceases to trade and a transaction remains outstanding, the directors may also face High Court restriction or disqualification proceedings by the company's creditors, its liquidator or the ODCE.

The ODCE also reserves the right to inform the Revenue Commissioners of selected cases, particularly where the transactions are of a high value, in order to enable Revenue to assess if a tax liability arises.

Illustration: The 10% of "Relevant Assets" Rule and its Effect

Arrangements at or below 10% of "relevant assets" are permitted. This term is defined as:

- the company's net assets (i.e. its total assets less total liabilities) according to the most recent preceding balance sheet to have been laid before the company's annual general meeting (AGM), or
- where no preceding balance sheet has been laid before the company's AGM, the called up share capital.

If a company's net assets, as defined, are €250,000, this allows arrangements to be made to directors and connected persons (e.g. family members) up to a limit of €25,000 (i.e. €250,000 x 10%). If, however, no relevant balance sheet has been laid before an AGM and the company has only a nominal called up share capital (e.g. €2), the maximum permitted arrangement would only be 20 cent (i.e. €2 x 10%).

The 10% rule applies to the aggregate amount of all loans, "quasi-loans" and credit transactions benefiting directors or connected persons.

Where can I get more information?

In order to improve compliance by directors with this obligation, the ODCE has produced a booklet on "Transactions Involving Directors" which is available at www.odce.ie or on request at info@odce.ie, 01 858 5800 or Lo-call 1890 315 015.

Readers wanting advice about their personal situation should consult their professional adviser.

You Are a Company Director!

This information bulletin is sent to all company directors in the State at the residential addresses the CRO has on record.

If you cannot recall the name of the company/ies you have been appointed to, please take note of your director identification number below the barcode on the envelope and contact the CRO by email at info@cro.ie or telephone at 01 804 5200.

If you are no longer a director of the company you should ask the company to file a Form B10. If the company fails to do this, consult Information Leaflet No.18 (www.cro.ie > Downloads) for instructions on how to notify your own resignation.