



Client Update

COMPANIES (AMENDMENT) ACT 2009

(July 2009)

The Companies (Amendment) Act 2009 (the “**Amendment Act**”) was signed by the President and came into force on 12 July 2009. The Amendment Act makes significant changes to the Companies Acts affecting all companies, and in particular companies operating as licensed banks. Under the revised Companies Acts (now correctly cited as the “Companies Acts 1963 – 2009”):

- the Office of the Director of Corporate Enforcement (the “**ODCE**”) has significant new powers to access and seize records of companies under investigation;
- all directors of a company could potentially be criminally liable for contravention of the company's obligations in relation to transactions with directors and the disclosure in the company's accounts;
- companies will no longer be required to have an Irish-resident director, provided that they have a director that resides in a member state of the European Economic Area (“**EEA**”); and
- licensed banks will now be required to disclose all transactions with directors in their group accounts, including the maximum amount of any outstanding liability in relation to these loans during the reporting period.

INCREASE IN ODCE'S POWERS

Legal professional privilege: Formerly, the ODCE was not able to compel a person to disclose or to take possession of any information which that person would be entitled to refuse to produce on the grounds of legal professional privilege. Under the Amendment Act, information which is subject to legal professional privilege may now be seized, although such seizure must be on the basis that its confidentiality is maintained. Matters relating to privilege will be determined by a court.

Rights of access: The Amendment Act expands the scope of records of a company to which the ODCE has an express right to access. They now include the register of directors' interests in contracts or proposed contracts with the company which all companies must maintain, and the register of transactions with directors and their “connected persons” which must be maintained by all licensed banks.

Power to compel third party production: The Amendment Act clarifies the ODCE's power to compel third parties to produce records relating to a company under investigation and the procedural requirements for the exercise of this power. Where the ODCE exercises its power to direct a third party to produce information, it will now be a criminal offence for that person to destroy, mutilate, falsify or conceal any book or document which is the subject of the direction.

Duration of search warrants: The period of validity of search warrants issued to the ODCE may be extended beyond one month, if an order extending the period is granted by a judge of the District Court.

Powers of seizure: The ODCE's powers of seizure have been significantly expanded. Subject to applicable safeguards, an officer of the ODCE can now seize anything at the premises named in the warrant (or in the custody or possession of any person found on the premises). These expanded powers of seizure will apply where:

- the officer has reasonable grounds to believe that what he has found may contain material information, for the purposes of determining whether it falls within the scope of the warrant (if it is not reasonably practicable to make this determination on the premises); or

- what the officer has found falls outside the scope of the warrant, if it contains material information and it is not reasonably practicable for it to be separated from that material information on the premises.

Subject to limited exceptions, these extended powers of seizure can only be exercised if the officer has made arrangements for storage of the relevant material, has ensured that the lawful owner has reasonable access to it, and has provided for the maintenance of its confidentiality. The officer must carry out the determination of whether information is material, or must separate information from material information, within the prescribed period (currently 3 months) after the seizure of the information, and return any non-material or separated information within the prescribed period (currently 7 days) after determination or separation. The ODCE's extended powers of seizure are subject to judicial review.

CRIMINAL LIABILITY FOR CONTRAVENTION

“Related party” transactions: Section 31 of the Companies Act, 1990 (the “**1990 Act**”) prohibits, subject to certain exceptions, a company from entering into certain transactions including loans with related parties such as its directors and persons “connected” with them. Previously, in order to successfully prosecute an officer of a company in connection with a contravention of section 31 by a company, the prosecutor would have had the difficult task of proving that the person knew, or had reasonable cause to believe that the company was contravening that section. The prosecutor’s onus is now reduced, and if a company contravenes section 31 every officer who is “in default” (i.e. who authorises or who, in breach of his duty, permits, a transaction) is guilty of an offence, regardless of whether they were aware that the company was contravening section 31.

Disclosures in accounts: If a company contravenes its obligations relating to disclosure of related party transactions in the company’s accounts under section 41 and (for licensed banks) section 43 of the 1990 Act, the company and every director of the company at the time will be guilty of an offence. A director will only be able to avoid liability if they can prove that they took all reasonable steps to secure compliance.

IRISH RESIDENT DIRECTOR

The requirement that at least one director of a company must be resident in Ireland has now been changed to require that such a director be resident in a member state of the EEA (which is all of the European Union plus Iceland, Norway and Liechtenstein). This change was needed to address concerns that the previous requirement was inconsistent with the freedom of establishment, as provided for in the EC Treaty.

As a result of this amendment, a company which does not have an Irish resident director will no longer require a bond or a certificate of a real and continuous link with one or more activities in Ireland, as long as it has a director who is resident anywhere in the EEA. The Amendment Act also clarifies the conditions required to be satisfied to demonstrate a real and continuous link, where this is necessary.

INCREASED SCOPE OF DISCLOSURE OBLIGATIONS OF LICENSED BANKS

Disclosure of transactions with directors and “connected persons”: A licensed bank was previously not subject to the same obligation as other companies to disclose detailed information in relation to transactions with its directors and their “connected persons” in its accounts, as a result of the exception in section 41(6) of the 1990 Act. Rather, the accounts would set out an aggregate figure showing the outstanding amount of relevant transactions for all directors at the end of the relevant financial period. The accounts would also include an aggregate figure for transactions with “connected persons”, although this figure would exclude certain transactions entered into in the ordinary course of business on normal commercial terms. As a result of these limitations, shareholders of a licensed bank did not have full transparency in relation to the transactions that had been entered into by the bank with its directors or their “connected persons”, or any variations in the outstanding amount of such transactions occurring during the reporting period.

Licensed banks are now subject to the same requirements as all other companies in relation to disclosure of transactions with directors. They must disclose in their annual accounts all transactions with their directors above a de minimis threshold, including those which are entered into within the ordinary course of business and on normal commercial terms, and provide detailed particulars of these transactions. These particulars must include the amount of outstanding liability at the end of the reporting period, and the maximum amount of the liability during the reporting period.

Increased disclosure obligations will also apply in relation to certain transactions by a licensed bank with “connected persons” of directors. The accounts must include a statement disclosing the aggregate outstanding amount of any relevant transactions with “connected persons” which are above the de minimis thresholds, and which are not entered into in the ordinary course of business and on normal commercial terms. The disclosure must indicate the outstanding amounts at the end of the reporting period, and the maximum amounts outstanding during the course of the reporting period.

In addition to their disclosure obligations under the Companies Acts, licensed banks will also remain subject to applicable rules, directions or requirements imposed by the Financial Regulator.

Register of transactions with directors of licensed banks: The ODCE have now been granted an express right to access the register which licensed banks must maintain under section 44 of the 1990 Act, which will include all transactions which a licensed bank is required to include in its accounts under subsection 41(1) or 41(2) of the 1990 Act, or which they would be required to include, but for the exception in subsection 41(6), except certain transactions that are entered into with a “connected person” of a director in the ordinary course of business and on normal commercial terms. Subject to limited exceptions, transactions or arrangements other than those described in section 31 of the 1990 Act, or agreements to enter such transactions, with the company or with a subsidiary of the company in which a director of the company or its holding company had, directly or indirectly, a material interest, will now also be required to be included in the section 44 register. Any transaction reflected in the register maintained under section 44 will not need to be included in the statement presented at the licensed bank’s AGM if it is already disclosed in the accounts by a company either on a voluntary basis or as a result of a separate requirement by the Financial Regulator.

The changes to the Companies Acts made by the Amendment Act highlight the importance of compliance by a company and its directors with their obligations in respect of transactions (and in particular loans, quasi-loans, credit transactions or guarantees) with directors and their “connected persons”. In the limited circumstances in which such transactions will be permitted, they must be properly accounted for in accordance with the requirements of section 41 and (for licensed banks) section 43 of the 1990 Act. Failure to do so could result in an investigation by the ODCE (with its newly expanded investigatory powers), and potentially expose the company and each of its directors to criminal penalties.

For further information, please contact:

Robert Heron
Corporate and Commercial Department
Matheson Ormsby Prentice
70 Sir John Rogerson’s Quay
Dublin 2
T: +353 1 232 2250
E: robert.heron@mop.ie
W: www.mop.ie

Lora Shaw
Corporate and Commercial Department
Matheson Ormsby Prentice
70 Sir John Rogerson’s Quay
Dublin 2
T: +353 1 232 2338
E: lora.shaw@mop.ie
W: www.mop.ie

or any other member of the Corporate and Commercial Department at Matheson Ormsby Prentice.

The Information in this document is provided subject to the Legal Terms and Liability Disclaimer contained on the Matheson Ormsby Prentice website. The material is not intended to provide, and does not constitute, legal or any other advice on any particular matter, and is provided for general information purposes only. Updates or changes to the information in this document may be published on the Matheson Ormsby Prentice website from time to time.