

## **New Companies (Amendment) Bill 2009 Published**

The Government has proposed important changes to the Companies Acts with the publication of this new Bill. The Minister for Enterprise, Trade and Employment has indicated that the Bill be enacted as a matter of priority.

The aim of the new legislation is to amend the Companies Acts in three important ways: -

- to expand the powers of the Director of Corporate Enforcement by clarifying the rights of access and of search and seizure. This includes the ability to seize information considered to be protected by legal privilege;
- to increase the disclosure obligations of certain transactions between a company and any of its' directors, and to remove provisions that currently allow banks to avail of a different disclosure regime to non-banking companies in respect of such transactions; and
- to modify the residency requirements of directors.

### **Expansion of the powers of the Director of Corporate Enforcement ('ODCE')**

- (i) Directors' interests in contracts or proposed contracts with their company must be disclosed in a specific register kept for that purpose (Section 194 Companies Act 1963). The Bill will give the ODCE a specific right of access to and the power to take copies of such registers.
- (ii) The ODCE's power to require the production of records from third parties, where these records relate to the business of a company under investigation (Section 19 Companies Act 1990) has been clarified. The ODCE must give a direction to the third party (ies) as to which books and documents are required and the time and place they are to be produced.
- (iii) The ODCE's power of search and seizure will be considerably strengthened. At the time of a search if it is not clear whether documents and material are

relevant, provisions are made for the removal of such paper and electronic information from a premises to allow for an off-site investigation. If this provision is exercised, regard must be made as to whether the property would be damaged as a result and the cost of an off-site examination compared to an on-site one.

Before this extended power is implemented, the ODCE must make arrangements for the storage and safeguarding of the information retrieved, must allow reasonable access to the owner and provide for confidentiality to be maintained.

Provisions are made to allow an extension of the period of a search warrant can be sought from and granted by the Court.

- (iv) In an aggressive change, the ODCE will be entitled to seize information, whether this be a hard copy or information in electronic form, which previously could be excluded by reason of legal professional privilege. An officer of the ODCE may seize privileged information on a sealed and confidential basis, pending adjudication by a Court as to whether or not the information is in fact privileged.

### **Directors Disclosure Obligations**

The Bill proposes to increase disclosure obligations and in this context apply special rules for disclosure by “licensed banks”.

- (i) Section 31 of the Companies Acts 1990 prohibits a company from making loans to its’ directors. Section 40 of the same act governs the penalties imposed for a breach of this section. If breached the officer of the company who authorised the loan is guilty of an offence. Under a new provision when a company enters into a transaction or arrangement that contravenes Section 31, every officer of the defaulting company will be guilty of an offence.

- (ii) 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 set out in their annual accounts all transactions or agreements with directors or connected persons, which existed at any time during the financial year. Meanwhile banks were largely excluded from this obligation and were only required to disclose aggregate amounts outstanding at the end of the financial year. The Bill would see a new statutory obligation on banks to disclose in their annual accounts the particulars of such transactions and not merely aggregate amounts. In respect of a connected person aggregate amounts remain the only information to be disclosed. The Bill makes it clear that where a company or bank is in default of their disclosure obligations, that the company and every director will be guilty of an offence.
- (iii) All licensed banks must maintain a register of loans to directors and this must be available for inspection by the ODCE. A statement based on the information in the register will also have to be prepared and made available prior to and at an AGM, unless the information is clearly disclosed in the accounts.

### **Directors' Residency Requirement**

Section 43 of the Companies (Amendment) (No.2) Act 1999 provides that, subject to some exceptions, 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. For this reason the Bill proposes replacing this requirement so that at least one director must be resident in a member state of the EEA.