# Compliance Ireland

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## Newsletter 9 (May 2006)

***Summary of recent corporate governance, money laundering, compliance and data protection news***
***May 2006 (2/2006)***

- To view the upcoming training programme go to http://www.complianceireland.com/Training.html
- To view the full Newsletter go to http://www.complianceireland.com/News.html

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## 1. Anti-Money Laundering News

### (i) Implementation of the new 3rd EU Anti-Money Laundering Directive

The final text of the 3rd EU Anti-Money Laundering Directive (the "3rd Directive") was formally adopted on 20 September and came into force on 15 December 2005. Member States have until 15 December 2007 to implement its provisions into national law. In addition to the financial and insurance sectors, the 3rd Directive applies to lawyers, notaries, accountants, real estate agents, casinos, trust and company service providers, and all providers of goods (whenever payments are made in excess of EUR15,000). The 3rd Directive imposes new requirements and consolidates, into one document, the 1st and 2nd EU Anti-Money Laundering Directives. Indeed some Member States have already enacted certain parts of the 3rd Money Laundering Directive into national law, e.g. criminalising the financing of terrorism.

*What is the 3rd Directive?* The 3rd Directive builds on existing EU legislation and incorporates into EU law the June 2003 revision of the Forty Recommendations of the Financial Action Task Force (FATF), the international standard setter in the fight against money laundering and terrorist financing. During the final stages of adoption by the European Commission the Internal Market and Services Commissioner Charlie McCreevy said: *"I am delighted that close cooperation between the European Parliament, the Council and the Commission has enabled the swift adoption of this crucial Directive which will boost the fight against terrorist financing and organised crime as well as preventing damage to the stability and reputation of the financial sector and the single market. These are top political priorities for the EU and I congratulate all parties on this final adoption."*

The 3rd Directive requires credit institutions, financial institutions and other persons regulated for money laundering purposes to: (a) identify and verify the identity of their customer and of its beneficial owner and to monitor transactions with the customer, while taking into account a risked-based approach; (b) to report suspicions of money laundering and terrorist financing to their national authorities; and (c) to take supporting measures, such as record keeping, training of personnel and the establishment of internal policies and procedures. The 3rd Directive is completed with a section on supervision and monitoring by national authorities. Member States must establish appropriate penalties where those regulated for (anti) money laundering and (anti) financing of terrorism purposes fail to meet their obligations.

In response to calls from the regulated community, the European Commission released a working document on the 3rd Directive seeking comments by 21 October 2005 to 16 questions on customer due diligence (CDD). For example the EU Commission asks 'would the application of the risk based approach in connection with normal CDD procedures be in your view enough for institutions and persons covered by the directive to deal normally with the low risk situations' (see Question 1). The European Commission also asks a range of questions on the preferred approach to identifying business relationships with Politically Exposed Persons ('PEPs') and their family and associates. In particular readers are asked whether a close list of categories of persons should be established in helping the regulated community identify business relationships with PEPS (and their families and associates) (see Question 8).

*To whom does the 3rd Directive apply?*
The 3rd Directive is applicable to the financial sector as well as lawyers, notaries, accountants, real estate agents, casinos, trust and company service providers. Its scope also encompasses all providers of goods, when payments are made in cash in excess of €15,000.

Those subject to the 3rd Directive must:

- identify and verify the identity of their customer and of its beneficial owner, and to monitor their business relationship with the customer;
- report suspicions of money laundering or terrorist financing to the public authorities -usually, the national financial intelligence unit; and
- take supporting measures, such as ensuring a proper training of the personnel and the establishment of appropriate internal preventive policies and procedures.

*When will Ireland adopt the 3rd Directive into local law?*
The Irish Government has not stated publicly the date by which Ireland will comply with the requirements of the Directive. However in its Strategic Plan for 2006 the Irish Financial

Services Regulatory Authority ("IFSRA"), now known as the **Financial Regulator** stated its expectation of implementation before June 2007.

In general the 3rd Directive will prohibit money laundering as well as terrorist financing offences which some Member States, such as Ireland and the UK have already outlawed (in Ireland our latest response to prohibiting financing of terrorism was the Criminal Justice (Terrorist Offences) Act 2005). The 3rd Directive is applicable not just the financial sector but also to many non-financial

professionals (e.g. lawyers, notaries, accountants, auditors, tax advisors, trust and company service providers, real estate agents and casinos, as well as all providers of goods to the extent payments are made in cash in excess of €15,000). Excluding trust and company service providers, the other non-financial professionals referred to above were captured under the 2nd EU Anti-Money Laundering Directive which Ireland and the UK implemented in September 2003 and March 2004 respectively.

To download a copy of the 3rd Directive go to http://www.antimoneylaundering.ie/3MLDir.html

## (ii) New IFSRA Anti-Money Laundering webpage

Towards the end of 2005 the Financial Regulator updated the Anti-Money Laundering section of its website by adding a 'News/Newsletter' section. The webpage explains the Financial Regulator's anti-money laundering role as one of assessing the adequacy of procedures adopted by institutions it regulates and the degree of compliance with such procedures. The Financial Regulator will use the Guidance Notes as criteria against which it assesses the adequacy of institutions internal controls, policies and procedures to counter money laundering. Further the Financial Regulator will conduct inspections of institutions to assess their compliance with the Guidance Notes. You can download a copy of the Guidance Notes go to http://www.antimoneylaundering.ie/GNDownload.html

A failure to comply with the Criminal Justice Act 1994 (as amended recently by the Criminal Justice Act (Terrorist Offences) Act 2005) (the "CJA") is dealt with by the Financial Regulator in a number of ways, including:

(1) requiring the regulated institution/person to undertake remedial action. A number of banks (retail, wholesale and investment) and fund administrators have recently found themselves facing a grilling from the Financial Regulator and have consented to reviewing their customer records to ensure, and strengthen, their 'know your customer' requirements and other internal AML controls at considerable expense.

(2) reporting firms and persons which it supervises to the Garda Síochana (Irish Police) and Revenue Commissioners (Irish Tax Office) for suspected breaches of sections 31 and 32 of the CJA. Between May 2003 and December 2004 eighteen (18) regulated firms were reported to the Garda Síochana and Revenue Commissioners for suspected money laundering breaches, including failing to verify the identity of customers, failing to implement internal controls, policies and procedures to counter money laundering and financing terrorism, failing to train staff on how to identify suspicious transactions/activities and failing to report suspicious transactions/activities.

Those who do not think that the Financial Regulator takes its anti-money laundering role seriously are advised to consider the following:

(a) if the Financial Regulator suspects that a firm is not complying with its anti-money laundering and financing of terrorism obligations and does not report such suspicions to Garda and Revenue, the Financial Regulator (and its executives) may be punished by imprisonment of up to five years or a fine, or both. Given this outcome it is not likely that the Financial Regulator (or its staff) will not report errant firms and individuals to the authorities; and

(b) regulated institutions/persons (including their executives) face criminal prosecutions, including jail terms of up to five years or an unlimited fine, or both, for breaching sections 32 and 57 of the Act. In early 2005 it was reported that Garda were investigating a financial institution for a breach of section 32 of the CJA. Separately, in October 2005, a former manager of a financial institution appeared before Court charged with 45 counts of money laundering (see below for further information).


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## (iii) Anti-Money Laundering forms part of IFSRA's 2006 Strategic Plan

In its Strategic Plan for 2006, the Financial Regulator announced that it will continue with its programme of on-site focused reviews on areas such as corporate governance, internal audit, operating risks, actuarial assessment processes, and compliance with client asset and anti-money laundering rules. At the same time the Financial Regulator will review necessary enhancements arising from the 3rd EU Anti-Money Laundering Directive for customer identification requirements and will examine the impact of the Directive on Ireland's trust and company service providers including measures to combat terrorist financing.

## (iv) UK Money Laundering Reporting Officer charged with the illegal transfer of more than £30,000

The UK's *Complinet* (Martin Coyle) and *Guardian Unlimited* (Simon Bowers) report that a former money laundering reporting officer and compliance officer at City Index appeared in court in November 2005 charged with the illegal transfer of more than £30,000.

Stephen Judge, who appeared before a City of London magistrates court, denied breaching the Proceeds of Crime Act 2002 and will now stand trial at Southwark Crown Court.

Mr Judge is believed to be the first person to be charged with this particular offence under the United Kingdom's Proceeds of Crime Act 2002 (the Irish equivalent being the Criminal Justice Act 1994). The court heard that at the beginning of 2005, Judge became concerned about a City Index account that he believed was opened with forged banking documents. He wrote to the City of London Police fraud squad outlining his concern. Judge later discovered that the accountholder, who had requested his money back, had three separate accounts containing a total of £30,787.26.

Following the accountholder's request Judge notified the fraud squad and the National Criminal Intelligence Service ("NCIS") and said that he believed the money was criminal and wanted to know what to do. The magistrates heard that having notified the authorities Judge returned the money to the accountholder, before the NCIS' time limit for holding on to the money expired.

In an interview with City of London police, Judge said that if he had not returned the funds he would have committed the criminal offence of "tipping off'. He was mistaken in this belief, the court heard. There is no suggestion that Judge knew the accountholder or made any financial gain from the alleged offence.

Judge has been granted bail until 19 January 2006. A trial date has not been set.

Mr Judge has not been subject to disciplinary findings by the FSA, which has no responsibility for monitoring money laundering activities.

To read more from Guardian Unlimited go to
http://business.guardian.co.uk/story/0,3604,1582360,00.html

## (v) Former Irish financial manager charged with money laundering offences.

Tom Healy of the *Irish Independent* reported in October 2005 of a former building society manager appearing in court charged with laundering more than €1.1million. The former EBS Marino manager, Shane Sutton of Dublin, faced 45 counts of money laundering under Section 31(3) of the Criminal Justice Act 1994 and three under the Criminal Justice (Theft and Fraud Offences) Act) 2001. It is alleged Mr Sutton handled sums of money knowing or believing it directly or indirectly represented another person's criminal activity between December 2000 and March 2003 by lodging it in an account in his own name.

Those with long memories will note that Mr Sutton is not the first official of an Irish financial institution to be charged with money laundering. In 1998 the *Irish Examiner* carried the story of an unnamed assistant bank manager who was arrested on suspicion of money laundering as part of the joint Interpol/ Garda investigation into a £6 million tax-evasion scam operated by six Irish emigrants in Australia. The person was Ireland's first bank official to be arrested under the Criminal Justice Act 1994. The charges against this person were subsequently dropped.

## (vi) The Financial Services Authority (FSA) imposes its first penalty (£30,000) on a senior executive of a regulated financial business for anti-money laundering failures at the firm.

On 9 November 2005 the FSA announced that it had fined Investment Services UK Limited (ISUK) £175,000 for conducting its business without due skill, care and diligence and for failing to control its business effectively in relation to anti-money laundering (AML) systems and controls. The firm's Managing Director, Ram Melwani, was fined £30,000. He is the first approved person to be fined for AML-related breaches. The FSA press release stated that Mr Ram Melwani failed to act with due care, skill and diligence, failed to ensure his firm
complied with AML requirements and was knowingly concerned in the actions taken by ISUK.

In its findings the FSA confirmed that "Senior managers are ultimately responsible for managing their firm's risks. Where a firm fails to mitigate a high money laundering risk, sanctions against senior management may follow." Here in Ireland, can we expect the Financial Regulator to adopt a similar style of enforcement as it continues to implement its anti-money laundering and regulatory sanction powers?

To read more from the FSA's website go to
http://www.fsa.gov.uk/Pages/Library/Communication/PR/2005/117.shtml

## (vii) ABN AMRO Bank N.V penalised $80 million for anti-money laundering failures in the US.

On 19 December 2005, ABN AMRO Bank N.V received an unwelcome Christmas present in the form of $80 million worth of civil penalties from US anti-money laundering authorities.

ABN AMRO Bank N.V. is the first European bank group to be hit by a FINCEN fine in the US. The fine follows similar penalties levied against Arab Bank ($48m in 2005) and Riggs Bank ($50m in 2003). US Regulators show no signs of slowing down their current enforcement actions as demonstrated by Oppenheimer & Company Inc's (a New York securities broker-dealer) early New Year's present of a $2.8 million penalty for violations of the Bank Secrecy Act.

In addition to the penalty, ABN AMRO must undertake remedial action in its worldwide banking operations and pay $80 million in penalties to U.S. federal and state regulators.

The Board of Governors of the Federal Reserve System, the New York State Banking Department, and the Illinois Department of Financial and Professional Regulation announced the issuance, together with De Nederlandsche Bank N.V. (the regulator of Dutch banks), of a consent Cease and Desist Order against ABN AMRO and its branches in New York, New York and Chicago, Illinois. The Order requires ABN AMRO to make improvements to its global compliance and risk management systems to ensure adequate oversight, effective risk management, and full compliance with applicable U.S. laws and regulations. The Order supersedes a previous Written Agreement (dated July 2004) among ABN AMRO, its New York branch, the Federal Reserve Bank of New York, the Federal Reserve Bank of Chicago, the New York State Banking Department, and the Illinois Department of Financial and Professional Regulation.

In addition, the Federal Reserve Board, the Financial Crimes Enforcement Network, the New York State Banking Department, the Illinois Department of Financial and Professional Regulation, and the Treasury Department's Office of Foreign Assets Control (OFAC) announced the assessment of penalties against ABN AMRO. The agencies have assessed penalties based on findings of unsafe and unsound practices; on findings of systemic defects in ABN AMRO's internal controls to ensure compliance with U.S. anti-money laundering laws and regulations, which resulted in failures to identify, analyse, and report suspicious activity; and on findings that ABN AMRO participated in transactions that violated U.S. sanctions laws. ABN AMRO is also required to take ongoing measures to ensure compliance with U.S. sanctions laws.

The Federal Reserve Board and OFAC assessed a penalty in the amount of $40 million, payment of which will satisfy the penalty concurrently assessed by the Financial Crimes Enforcement Network in the amount of $30 million.

In addition, the New York State Banking Department assessed a monetary payment of $20 million, the Illinois Department of Financial and Professional Regulation assessed a monetary payment of $15 million, and ABN AMRO will make an additional $5 million voluntary payment to the Illinois Bank Examiners' Education Foundation.

To read more from FINCEN's website go to http://www.fincen.gov/abnamro.html


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## 2. Compliance

### (i) New Chief Executive for the Financial Regulator

The Financial Regulator has adopted a 'steady as she goes' approach with the appointment of Mr Patrick Neary as Chief Executive designate of the Financial Regulator. Mr Neary is currently the Prudential Director of the Financial Regulator and will take up the position of Chief Executive on 1 February 2006 when his predecessor, Liam O'Reilly, retires from the post.

When announcing Mr Neary's appointment the Chairman of the Financial Regulator said *"We are delighted to announce the appointment of Patrick Neary to this crucial post. He has extensive experience across the full range of the financial regulatory spectrum. As a member of our top management team he has played a central role in the shape and direction the Financial Regulator has taken since its establishment in 2003". "Pat is ideally suited to take the Financial Regulator through the next phase of its development."*

Mr Neary's appointment is seen as a non-contentious appointment and has been generally welcomed by industry participants.

To read more from IFSRA's website go to http://www.ifsra.ie/index.asp

### (ii) Consumer Protection Code

At long last the journey of Consultation Paper 10 on the draft Consumer Protection Code appears close to being finanlised.

*Implementation date:* The draft Code was originally issued in February 2005 and at the time it was expected to come into force in mid 2005. That date was subsequently revised to the end of 2005. However following the public release of both the Financial Regulator's *Public Response to CP10* and the associated *Regulatory Impact Assessment* on 12 December 2005, it now appears that the final version of the Code will be approved by the Financial Regulator in April 2006 before being formally issued in July 2006. The Code is not likely to be implemented in one block, rather those provisions in the Code which have been carried forward from previous Codes will apply with immediate effect, while new provisions will be effected in stages. On page 4 of the *Public Response to CP10* the Financial Regulator states that *"the general principles of the Code and those provisions that are imported directly from existing codes will apply with immediate effect after the new Code is issued. We will discuss with interested parties the implementation programme for new provisions, taking into account issues such as the time needed to train staff and adapt computer systems. It is our intention to allow a reasonable period for necessary adjustments"*.

Although this statement by the Financial Regulator is helpful, it should be noted that only a handful of provisions in the draft Code are true reflections of previous code provisions and some entities will be caught by the regulatory net for the first time. Therefore ***Compliance Ireland*** recommends regulated firms and persons request the Financial Regulator to create an implementation schedule which sets out clearly the date upon which each provision of the final Code takes effect. ***Compliance Ireland*** believes that an implementation schedule is vitally important given that breaches of the Code are subject to administrative sanctions under Part IIIC of the Central Bank Act, 1942.

*Compliance Monitoring*: It is interesting to note the requirement to conduct compliance monitoring is not mentioned in the *Public Response to CP10*. Rule 74 of Chapter 2 of the Code effectively requires firms to have Compliance Functions which regularly verify the adequacy of policies and procedures to ensure compliance with the Code and any other consumer protection legislation. The *Regulatory Impact Analysis* states Rules 71 to 75 of Chapter 2 of the Code will be redrafted to take account of the fact that small firms will not have a dedicated compliance function.

To read more from IFSRA's website go to http://www.ifsra.ie/index.asp

### (iii) IFSRA's Strategic Plan for 2006

On 16 November 2005 the Financial Regulator published its Strategic Plan for 2006. This document represents the final annual update of the original three-year plan and sets out the key new actions for 2006.

The key tasks to be undertaken by the Financial Regulator in 2006 include:

- the introduction of a unified Consumer Protection Code. The Code will set out the new rules that regulated firms must comply with in their dealings with their customers, ensuring that


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consumers will have the same level of protection regardless of the type of firm they deal with.

- other consumer initiatives will include a new consumer website and an information initiative on maturing Special Savings Incentive Accounts (SSIAs).
- a new Fitness and Probity framework will also be introduced to ensure there are common requirements for managers and directors in positions of power in financial institutions.
- new regulatory capital requirements for banks and asset management companies will be set out and a supervisory regime for re-insurance companies will be introduced in line with new EU Directives.
- preparation for changes to the regulation of securities and funds under the Markets in Financial Instruments, Transparency and UCITS III Directives.
- extension of the web based credit union reporting system for off-site analysis and risk assessment to all credit unions.

To read more from IFSRA's website go to http://www.ifsra.ie/index.asp

## (iv) Planning for MiFID

*What is MiFID?*

The Investment Services Directive (Directive 93/22/EEC) ("ISD"), for long the regulatory centre piece for European investment business firms and financial markets, will be replaced by the Markets in Financial Instruments Directive ("MiFID") (Directive 2004/39/EC). In Ireland the Financial Regulator originally expected MiFID to be implemented by October 2006. However given the huge amount of work required from governments, regulators and, of course, regulated firms and persons an October 2006 implementation date is unlikely. The UK FSA believes that MiFID is likely to apply from 1 November 2007.

*Who does MiFID affect?*

In general, MiFID will cover most if not all firms currently subject to the ISD, plus some that currently are not. It will include:

- investment banks;
- portfolio managers;
- stockbrokers and broker dealers;
- corporate finance firms;
- many futures and options firms; and
- some commodities firms.

But the position is not clear cut. For example retail banks and building societies will be subject to MiFID for some parts of their business such as, the sale of securities, or investment products which contain securities but not for others.

In Ireland little has been published by the Government or the Financial Regulator on the scope and impact of MiFID on Irish regulated firms. For further insight we need to look across the sea to the UK where the FSA suggests that following types of firms are likely to fall outside MiFID although these firms are warned by the FSA that they are likely to be affected to some extent by local regulatory changes:

- operators of collective investment schemes when acting as such – for example, operators of hedge funds and private equity funds (a special regime applies to UCITS management companies);
- occupational pension scheme firms;
- life companies and friendly societies;
- financial advisers that do not hold client assets; and
- authorised professional firms.

*What does MiFID mean for those firms caught by its provisions?*

In short MiFID will lead to the harmonisation of authorisation, operating requirements and conduct of business rules for investment firms across Member States. MiFID will also introduce a comprehensive regulatory regime governing the execution of transactions in financial instruments.

A number of senior executives and compliance officers of UK FSA regulated firms have likened the workload of implementing MiFID to that of N2.

To read a detailed document prepared by ***Compliance Ireland*** on MiFID go to http://complianceireland.com/downloads/readyformifid_v1_1.pdf

## 3. Data Protection

(i) Your website Privacy Statement

On 5 December 2005 the Data Protection Commissioner ("DPC") released further information on the requirement to maintain a data privacy statement on certain websites. If you answer 'Yes' to any of the three questions below and do not maintain an appropriate data privacy statement on your website then you are likely in breach of the Data Protection Acts 1988 & 2003 (the "Acts") and Statutory Instrument Number 535 of 2003 European Communities (Electronic Communications Networks and Services)(Data Protection and Privacy) Regulations 2003 ("SI 535/2003").

(1) Is your website used to collect personal data (e.g. visitor filing in web forms, feedback forms, etc)?

(2) Does your website use cookies or web beacons?

(3) Do you covertly collect personal data (IP addresses, e-mail addresses etc)?

If you answer Yes to any of these three questions you must maintain an appropriate website Privacy Statement on your website

*What must your Privacy Statement say?*

- you need to specifically inform visitors that their personal data will be processed and for what purpose.
- the way in which you (i.e. the credit union) comply with your data protection obligations.

*What information must you include in your Privacy Statement?*

- Identity – the name of your business and useful contact details, such as an email address and postal address.
- Purpose – you need to set out both overt and covert purposes. An overt purpose is a purpose which is generally obvious to a visitor; for example, you might use there data to effect a transaction with the visitor. A covert purpose is one where you process data for a non-obvious purpose; for example, profiling or mining the data for future marketing. Remember, if a purpose for which you process a visitor's personal data is not clear then you could be breaking the law.
- Disclosure – if you plan to release personal data to a third party then you should inform the visitor of this action.
- Right of Access – section 4 of the Data Protection Acts provides individuals the right to be given a copy of his/her personal data. Therefore you should reference your Access Request procedures on your website.
- Right of Rectification - section 6 of the Data Protection Acts requires you to correct inaccurate data held on a data subject. The section also requires you to erase the personal data if you have no legitimate reason for retaining the information. Therefore your Privacy Statement should make reference your obligations under section 6.
- Extent of data being processed – if different data are used for different purposes, this should be clearly referred to in your Privacy Statement.
- Right to refuse Cookies – if it is not necessary to use cookies in the context of a transaction, the user should be informed of this and be given the opportunity to refuse to have a cookie placed on his/her computer.

*Where should your Privacy Statement appear on your website?*

- The Privacy Statement should be placed in an obvious position and not be contained in another document (e.g. in should be separate from your website terms and conditions and other legal type notices). As a minimum, a Privacy Statement should be placed in the upper half of the entry page to a website.

*What is a 'cookie'?*

- A 'cookie' is a technical term for a block of data that some websites place on a visitor's computer. For example, the file 'cookie:oakesp@www.unison.ie' is a cookie automatically stored on the author's computer when visiting the Irish Independent Newspaper's online at www.unison.ie (as at 16 November 2005).
- Typically a cookie is used to ease navigation through a website. However some cookies allow the website to identify the user, tracking the user's path through the site and


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identifying repeat visits to the site by the same user/s. This can lead to a website owner being able to profile an individual user's browsing habits – and all potentially performed without the knowledge or consent of the user.

*Does the Data Protection Commissioner approve Privacy Statements?*

- There is no need to submit your Privacy Statement to the DPC.
- As a minimum, a Privacy Statement should be placed in the upper half of the entry page to a website.

### (ii) Data Protection Commissioner to move to Portarlington, Co. Laois under government decentralisation scheme: All but one staff member elect against relocating to Portarlington

Released on 12 December 2005, the DPC updated decentralisation his plan for his office's relocation to Portarlington, Co. Laois from the Irish Life Centre in Dublin by the third quarter 2007.

In his release the DPC states that only one staff member has elected to move to Portarlington under the decentralisation scheme. The DPC's risk analysis and assessment of mitigating factors associated with decentralisation includes references to:

- the scale of the staff turnover now envisaged as presenting real risks for the office in terms of maintaining standards and service levels.
- reduced public access – the current city centre location provides ready access for the public and organisations that wish to visit the office. Some 50 per cent of registered data controllers are based in Dublin. Reduced public access to Portarlington can be offset by increased public awareness activities both in Dublin and throughout the country.
- isolation from Representative Groups, Media and Departments - this will have to be countered by proactive communications with these groups and a willingness to keep a profile in Dublin and will entail some additional costs.
- dilution of Business Expertise due to loss of experienced staff – the DPC see this item being an issue in the medium term and will be addressed by way of training.

To read more from the Data Protection Commissioner's office http://www.dataprivacy.ie

## 4. Corporate Governance

### (i) Section 45 Companies (Auditing & Accounting) Act 2003 Directors Compliance Statements killed off for the time being: Roll on 2007/2008

As readers will no doubt know the legislation intended to enact a Directors Compliance Statement ("DCS") (section 45 of the Companies (Auditing & Accounting) Act 2003) is dead. It is now intended that new companies legislation will be drafted implementing a DCS regime which will:

- apply to:
  - public limited companies (whether listed or not), and
  - private companies limited by shares with both a balance sheet total of over €12.5 million and a turnover of over €25 million in the financial year in question;
- require directors to address the company's obligations under:
  - tax law, and
  - company law, where the failure to comply is an indictable offence under the Companies Acts;
- be published in the annual directors' report to shareholders;
- contain the following main elements:
  - an acknowledgement that the directors are responsible for securing the company's compliance with its relevant obligations;
  - confirmation that the company has in place a compliance policy statement that is, in the opinion of the directors, appropriate for the company, and if not, specify why;
  - confirmation that the company has in place appropriate arrangements or structures that are, in the opinion of the directors, designed to secure material compliance with its relevant obligations, and if not, specify why;
  - confirmation that the company's arrangements or structures have been reviewed during the financial year and if not, specify why.
- no longer require auditors to opine if the DCS is fair and reasonable. Overall, the provision represents in aggregate a reduction in its scope and effect compared with the original DCS.

- cause the ODCE to develop revised guidance on the DCS provision once the Government publishes the associated amending Companies Bill.

*But how realistic is it to expect to see a new DCS regime in 2006 or 2007?*
Recent press releases issued by Minister Michael Ahern, T.D and government agencies state that a revised DCS regime will be enacted under new law. The Minister does not, of course, have power to make substantive law (as opposed to administrative regulations, commencement orders and the like). This law-making power is reserved to the Oireachtas. In short the Minister's statement of 1 December 2005 means merely that he will push for new DCS legislation in terms similar to that recommended by the Company Law Review Group.

Before we assume that a new DCS law will rise from the ashes of the old, we should not forget three points. Firstly, the process of enacting new law is not swift; secondly, Irish companies will lose no sleep should this law disappear from the regulatory horizon forever; and thirdly, a general election in 2006 (or 2007) will fundamentally shelve, at least for the time being, the progress of the DCS regime. The first two points can be taken as read. For our third point consider the following. The Irish Government is rapidly approaching the end of its electoral life and is looking to hold a general election in the near future. Ireland is currently enjoying a feel good factor; low unemployment, fast moving economy, the maturation of €15 billion in Special Savings Incentive Accounts (which start to flow from May 2006) and historically low interest rates. The Government will be hoping that voters think of these things when entering the polling booths. For these reasons Government strategists are looking at a late 2006 or early 2007 general election, although a snap election cannot be ruled out. When the election is called the machinations of Ireland's legislative body (the Oireachtas) will be put on hold.

Law is not passed overnight. The Minister must draft and submit his proposed legislation to Government for approval. Thereafter a process of consultation with Government departments and groups likely to be affected by the Bill is undertaken before it is before the Dáil for general debate at which time members of the Dáil may make suggestions for amendments and additions to the Bill. Once the Bill passes through various examination committees further amendments may be made to the Bill. The final stage in the process is a debate in the Dáil, confined to the contents of the Bill. The members of the Dáil will then vote on whether to pass the Bill. Once passed by the Dáil the Bill is sent down to the Seanad to go through the entire process of debate and committee examination again. The Seanad has 90 days (or any longer period agreed by both Houses) to consider the Bill and do one of the following:

a. pass the Bill without any amendment or
b. reject the Bill completely or
c. return the Bill to the Dáil with amendments.

If the Seanad rejects the Bill or returns it to the Dáil with amendments that the Dáil does not accept, the Bill will lapse after 180 days. The Dáil may, within those 180 days, pass a resolution declaring that the Bill is deemed to have been passed by both Houses. This

provision means that the Seanad cannot generally stop the Dáil from introducing legislation - it can only cause delays.

Not until the Bill has been passed by both Houses does the Taoiseach (Irish Prime Minister) present a copy of the Bill to the President for signature. Once the President has signed the Bill it becomes an "Act" and has legal force.

As readers will appreciate from the above, a non-contentious Bill takes a great deal of time to become law. Should a general election interrupt the process the progress of a Bill will slow down significantly.

Therefore it is unlikely that the new DCS regime will become effective in 2006. Given that companies should expect some lead-in time before the DCS regime becomes operational and that different companies have different financial year ends, it is not outside the realm of possibility that some companies may not be required to prepare a DCS until 2008. Of course a returning Government or indeed a new Government may decide that the DCS regime no longer fits its political objectives and bury the DCS regime prior to passing by both Houses.

## (ii) Directors of a company disqualified for 5 years for operating a company bank account outside of official books and records; appropriation of assets for personal use

On 21 December 2005 the ODCE announced that it had secured the disqualification of two construction company directors in the High Court. The Directors, Paul Rogers and Patrick Rogers,

are disqualified (from being directly or indirectly concerned in the promotion, formation or management of a company) for a period of five years arising from their misconduct as directors of Barnroe Limited. The disqualification proceedings followed an ODCE examination of company's books and documents of the company pursuant to section 19 of the Companies Act 1990. The ODCE investigation commenced following complaints received by it regarding the company's affairs.

The High Court delivered its judgement in three separate cases. Click the following links to read the High Court records on this matter - High Court record number 490 COS/2004; High Court record number 638 JR/2004; and High Court Record No. 639 J.R./2004.

In High Court record number 490 COS/2004 the High Court found that the directors (a) failed to maintain proper books and records; (b) operated a bank account in the company's name outside the company's books and records; (c) failed to disclose this account to the company's auditor; (d) appropriated company money for personal use operating; (e) failed to lodge certain tax returns with Revenue Commissioners; and (f) caused the company to trade whilst insolvent. In determining the appropriate penalty the High Court referred to a question raised in a previous case[1]:

> *'What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the* [law] *is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies has shown them to be a danger to creditors and others.'*

The High Court went on to find that the matters raised by the ODCE, in particular the operating of a bank account in the company's name outside the books and records of the company, the failure to disclose this account to the auditor and the appropriation of company funds, each are a lack of evidence of commercial probity. Taken together they represent a formidable body of evidence on the lack of commercial probity of the respondent directors.

To read more from the ODCE's website go to
http://www.odce.ie/new/article.asp?NID=434&NCID=42

[1] *Re Lo-line Electric Motors* [1998] 2 All ER 692 (confirmed in *The Matter of CB Readymix Cahill v Grimes* (Unreported, Supreme Court, 1st March 2002)

### (iii) ODCE collects further corporate and director scalps in 2005

"Improving market behaviour remains our key objective" stated Director Paul Appleby, the Director of Corporate Enforcement, at the publication (on 6 January 2006) of his Interim Review of ODCE Activity in 2005.

During 2005:

- 21 company officers were disqualified following legal proceedings initiated by the ODCE.
- improvements were made to the recording of disqualified persons in the Register of Disqualified Persons maintained by the Companies Registration Office. The Register now contains the identity of over 1,000 disqualified persons;
- 109 charges were determined by the District Court.
- 49 criminal convictions were secured and 16 further criminal cases await decision (18 civil cases were pending at the start of 2006).
- fines imposed by the District Court rose by 66% in conjunction with the convictions (some €35,700 in fines last year relative to €21,500 in 2004);
- 94 directors were restricted on foot of actions taken by liquidators in compliance with their company law duties;
- the volume of alleged misconduct reported to the ODCE rose by 21% causing the ODCE to carry over to 2006 the evaluation of more than 1,000 complaints;
- an additional 20 staff were added to the ODCE's office to address the growing workload of suspected misconduct cases;
- visits to the ODCE's website increased by 53% to almost 179,000;
- new market research suggested that 75% of company directors and accountants rate the ODCE as effective in discharging its remit.

Interestingly, in one case involving complaints from members about the failure of directors to convene a annual general meeting the ODCE instituted proceedings in the High Court against the defaulting directors. The High Court will deal with the proceedings in early 2006

Looking forward, the ODCE said his plans for 2006 include:

- the development of compliance guidance in a number of new areas, e.g., audit committees;
- the re-launch of the ODCE website in order to provide better accessibility to the available compliance and enforcement information;
- the continuing development of the ODCE's administrative, civil and criminal enforcement work at an increased level of activity, where practical and feasible.
- publishing a detailed Annual Report in May 2006 for the 2005 calendar year.

To read more from the ODCE's website go to
http://www.odce.ie/new/article.asp?NID=434&NCID=42
To read this Newsletter in Adobe Format go to http://www.complianceireland.com.

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