

Ireland's Sarbanes-Oxley: The Companies (Auditing and Accounting) Act 2003

Speedread

Very significant changes to Irish company law are provided for in the Companies (Auditing and Accounting) Act 2003.

New annual certifications will be required to be published by many Irish companies and their directors regarding compliance with laws, accounting policies and relations with auditors. Audit-committee requirements will apply to all public and large-private companies, and the accounts of those companies will now be subject to oversight by a new accounting and audit regulator. All of these provisions will carry criminal penalties for default, including penalties applicable to directors personally. These provisions are expected to take effect in autumn 2004, following issuance of the necessary Commencement Order.

The Companies (Auditing and Accounting) Act 2003 is certainly the most significant Irish company-law initiative of the last ten years. It was enacted on 23 December 2003, and those of its provisions summarised in this briefing are expected to become effective in the autumn of 2004 when the necessary Commencement Order is made.

The Act is Ireland's response to the Enron and WorldCom collapses, as well as to a number of serious corporate-governance and compliance failures at domestic level. Like many of the similar laws that have been passed or are being prepared for enactment in other jurisdictions, it was extensively criticised throughout the legislative process for the harsh and unprecedented nature of some of its governance and compliance provisions.

Some of this criticism led to material relaxations in the enacted text, relative to earlier drafts. The most significant concessions relate to the provisions on Directors' Compliance and Responsibility Statements, and Audit Committees, each as described below. The Act will, nonetheless, impose very important new duties on many Irish companies, and their directors personally, related to their financial statements, compliance with laws and relations with auditors.

Governance Provisions

The main provisions of the Act related to corporate governance and compliance are:

Directors' Compliance and Responsibility Statements

- the directors of all Irish public limited companies, and all Irish 'large'-private (see below) companies limited by shares, will be obliged regularly to prepare, update and publish detailed statements regarding the company's compliance with certain relevant laws (see below)
- specifically, the directors will be obliged in these statements to describe the company's policies and "internal financial and other procedures" for securing compliance with those relevant laws and its arrangements for implementing and reviewing the continuing effectiveness of those policies and procedures; and further to acknowledge their personal respon-

sibility for such compliance, to confirm whether or not such policies and procedures exist, to confirm whether they so reviewed continuing effectiveness during the relevant financial year, and to state whether they personally used "all reasonable endeavours" to secure the company's compliance with those relevant laws in the relevant financial year

- for these purposes, relevant laws are the Irish Companies Acts, all Irish revenue laws and "any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements"
- these provisions do not apply to private companies limited by shares that had gross assets of less than €7,618,429, and turnover of less than €15,236,857, in the relevant financial year; nor do they apply to unlimited companies, or to private companies limited by guarantee
- the initial statements will be required to be issued "as soon as possible" after the date on which these provisions are brought into force by Commencement Order (or after the date on which a company becomes subject to them)
- the company's auditors will be obliged to conduct an annual review, and to issue an annual fairness opinion, with respect to the statements

Accounting Standards and Policies

- all Irish companies will be required to state in their annual accounts (and where relevant group accounts) whether applicable accounting standards, issued by prescribed bodies, have been adopted (noting both the fact and the effects of any material departures)
- all Irish companies will be required to disclose in their annual accounts all of the accounting policies (including those related to asset-depreciation) applied in their preparation

Audit Committees

- the directors of all Irish public limited companies (excluding certain plcs which are not the ultimate parent of their corporate groups) will be required to establish an Audit Committee with wide-ranging duties related to the annual accounts, audit and financial management
- the directors of large (see below) private companies lim-

ited by shares and certain other forms of undertaking including certain unlimited companies will be required either to establish a committee operating on the same basis or explain in their annual report why they have decided not to do so

- these provisions do not apply to 'small' private companies limited by shares that, in both their most recent and the preceding financial year, and together with their subsidiary undertakings, had gross assets of less than €25,000,001, or turnover of less than €50,000,001; nor do they apply to certain unlimited companies, or to private companies limited by guarantee
- there are detailed rules regarding eligibility for Audit-Committee membership

Auditors' Independence

- all Irish companies will be required annually to disclose details of the remuneration paid to their auditors and their affiliates, giving sub-totals for audit work, audit-related work and non-audit work, and particulars of the nature of any non-audit work
- where the remuneration for non-audit work exceeds the remuneration for audit work plus audit-related work, officers' statements will be required in the annual report related to the independence of the auditors, and the reasons for their engagement on the non-audit work

IAASA Oversight Rights

- a new Irish audit/accounting regulatory authority (the "IAASA," being established under Act) will be conferred with oversight-rights related to the accounts of all Irish public limited companies, all Irish 'large' (similar definition as applies for Audit-Committee purposes) private companies limited by shares and certain other forms of undertaking which are 'large' including some unlimited companies, and certain of each of their subsidiary undertakings
- IAASA may notify such companies of perceived non-compliances of their accounts with the Companies Acts
- if complaint not resolved to IAASA's satisfaction, it may apply to court, and court may compel revision of accounts, and grant certain other relief, including payments of costs by directors personally

Comment

These new provisions will force many Irish companies (both public and private) and their directors fundamentally to re-examine their approach to compliance and governance. The process will be a little easier for those who have already assimilated the Company Law Enforcement Act 2001 (another

law targeted at an historical culture of non-compliance).

Although the Act arguably does over-regulate to a certain extent, some commentators have overstated its severity. Many of its general company-law provisions (as summarised above) tend to amplify or extend (rather than fundamentally to alter) existing statutory or common-law duties. In some respects, the Act stops well short of what might have been: for example, the Act proposes no absolute prohibition on the use of audit firms for any forms of non-audit work (contrast Sarbanes-Oxley).

The Act is notably prescriptive in its approach and close attention to its detailed provisions will be highly advisable when planning for compliance. For example, as well as requiring issuance of the Directors' Compliance and Responsibility Statements, the Act addresses in some detail the "policies and procedures" to be established by directors so as to facilitate issuance. A failure to adhere to these behind-the-scenes requirements would certainly place directors in a far worse position in the event of prosecution or a civil action.

Compliance Programme

KLW is offering programmes designed to assist Irish companies and their directors with compliance with this Act. The following points are likely to be covered in a programme:

- review of existing compliance and governance arrangements
- drafting the policies and procedures required by the law
- dealings with auditors on non-audit/audit-related work
- audit-committee selection
- training for directors and employees.

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CONTACT DETAILS

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