



TECHNICAL RELEASE TR 03/2016

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## **COMPANIES ACT 2014**

### **Reporting Company Law Offences: Information for Statutory Auditors**

Readers of this document should note that the Companies Act 2014 is a significant and new piece of legislation whose interpretation and meaning is as yet untested. This document cannot be relied upon to identify all changes from existing company law nor provisions which are newly introduced by the Companies Act 2014. CPA Ireland is continuing to consider the implications of various provisions of the Companies Act 2014 and may issue further commentary in due course.

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## 1. INTRODUCTION

The Companies Act 2014 ('CA 2014') was signed into law on 23 December 2014. The vast majority of the provisions of CA 2014 commenced on 1 June 2015. With limited exceptions, the accounting and auditing related provisions commenced for financial statements approved on or after 1 June 2015<sup>1</sup>.

This Technical Release addresses the obligation on a statutory auditor to report to the Director of Corporate Enforcement<sup>2</sup> in accordance with section 393 of CA 2014. Information Sheet IS 06/2009 '*Reporting Company Law Offences; Information for Auditors*' was jointly developed by the ODCE and the professional accountancy bodies. This Technical Release has been developed by the professional accountancy bodies on the same basis as IS 06/2009.

The purpose of this Technical Release is to assist the statutory auditor in applying judgements required to determine whether a duty to report to the ODCE arises under section 393 of CA 2014 and to highlight certain areas of company law in which, should a reportable offence occur, relevant information may come to the statutory auditor's attention in the course of normal audit procedures. This Technical Release replaces IS 06/2009.

Primary guidance for the statutory auditor in this area is Bulletin 2007/2 "*The Duty of Auditors in the Republic of Ireland to Report to the Director of Corporate Enforcement*" (Bulletin 2007/2)<sup>3</sup> and International Standards on Auditing (UK and Ireland) issued by the FRC and applicable in the UK and Ireland (ISAs (UK and Ireland)), particularly ISA (UK and Ireland) 250 (A) "*Consideration of laws and regulations in an audit of financial statements*" and ISA (UK and Ireland) 250 (B) "*The auditor's right and duty to report to regulators in the financial sector*". This Technical Release presumes knowledge of those documents.

References to 'section(s)' are references to the relevant sections of CA 2014, unless otherwise indicated.

**Members should note that this Technical Release is intended to assist them, should issues regarding the obligation to report to the ODCE arise, and does not give, or purport to give, legal advice. It should, accordingly, not be relied upon as such. The issues addressed can be complex and members are advised to seek independent legal advice as appropriate.**

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<sup>1</sup> The Companies Act 2014 (Commencement) Order 2015 (S.I. No. 169 of 2015).

<sup>2</sup> Referred to throughout the Technical Release as reporting to the ODCE.

<sup>3</sup> Bulletin 2007/2 addresses the reporting obligation to the Director of Corporate Enforcement under s194(5) of the Companies Act 1990. Note that the methodology and approach recommended in that Bulletin continue to be relevant when deciding if a report to the ODCE is required although the company law offences and references have changed with the commencement of the Companies Act 2014.

## **2. DUTY TO REPORT**

### ***Duty to report***

Section 393(1) sets out the duty as follows:

“Where, in the course of, and by virtue of, their carrying out an audit of the financial statements of the company, information comes into the possession of the statutory auditors of a company that leads them to form the opinion that there are reasonable grounds for believing that the company or an officer or agent of it has committed a category 1 or 2 offence, the statutory auditors shall, forthwith after having formed it, notify that opinion to the Director and provide the Director with particulars of the grounds on which they have formed that opinion.”

### ***Category of offences***

Section 871(1) defines a category 1 offence as one which could give rise to either:

- A summary conviction, a Class A<sup>4</sup> fine or a prison term not exceeding 12 months or both; or
- A conviction on indictment, a fine not exceeding €500,000 or a prison term not exceeding 10 years or both.

Section 871(2) defines a Category 2 offence as one which could give rise to either:

- A summary conviction, a Class A<sup>4</sup> fine or a prison term not exceeding 12 months or both; or
- A conviction on indictment, a fine not exceeding €50,000 or a prison term not exceeding five years or both.

While the terminology has changed, the obligation on the statutory auditor to report to the ODCE continues to relate to offences that can be tried on indictment.

### ***Protection from liability for breach of confidentiality***

Section 393(4) protects the statutory auditor from liability for breach of confidentiality or any other legal or professional duty when they comply with section 393. The statutory auditor is reminded that such protection may not exist if the statutory auditor makes a report without forming an opinion that there were reasonable grounds to believe that a category 1 or 2 offence has been committed. The statutory auditor should therefore ensure that a clear decision making process is followed in the formation of an opinion that gives rise to a report to the ODCE and that the process followed is documented. Section 3 of this document outlines the decision process involved in determining whether a duty to report arises.

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<sup>4</sup> The Fines Act 2010 sets a Class A fine as a fine not exceeding €5,000 but exceeding €4,000.

## **Reportable offences**

Section 4 of this document sets out examples of the reportable offences which CPA Ireland considers more likely to come to the attention of the statutory auditor in the course of the audit work. These examples include a small number of newly reportable offences (see for example the offences in sections 291, 292, 294, 295 and 324). As compared to the equivalent examples in IS 06/2009 there are also a number of offences which are no longer reportable to the ODCE (e.g. the offence under section 1111 of not convening an EGM where there is a serious loss of capital<sup>5</sup> and the offence of a director or secretary not notifying the company in writing of all interests or changes in interests in shares or debentures – are now category 3 offences and not reportable to the ODCE in accordance with section 393). In the case of each offence included, section 4 of the Technical Release attempts to highlight information which may come to the attention of the statutory auditor, in the normal course of the audit, causing the statutory auditor to undertake a decision process which may result in a report to the ODCE.

The inclusion of offences in section 4 of the Technical Release is not intended to exclude other offences that may be reportable to the ODCE should relevant information come to the statutory auditor's attention.

Scenarios described in this document are intended to highlight the decision making process which the statutory auditor goes through in determining whether a duty to report under section 393 arises. The Technical Release outlines scenarios of which the statutory auditor may be more likely to become aware in the course of an audit and does not cover every potential category 1 or 2 offence which falls to be reported under section 393. Each instance of information which may suggest a possible reportable offence should be considered in the context of the specific circumstances of the company and related events before concluding whether or not to report to the ODCE. The following are examples of some issues which fall within the ambit of the audit and which may also be considered by the statutory auditor in the context of reporting to the ODCE:

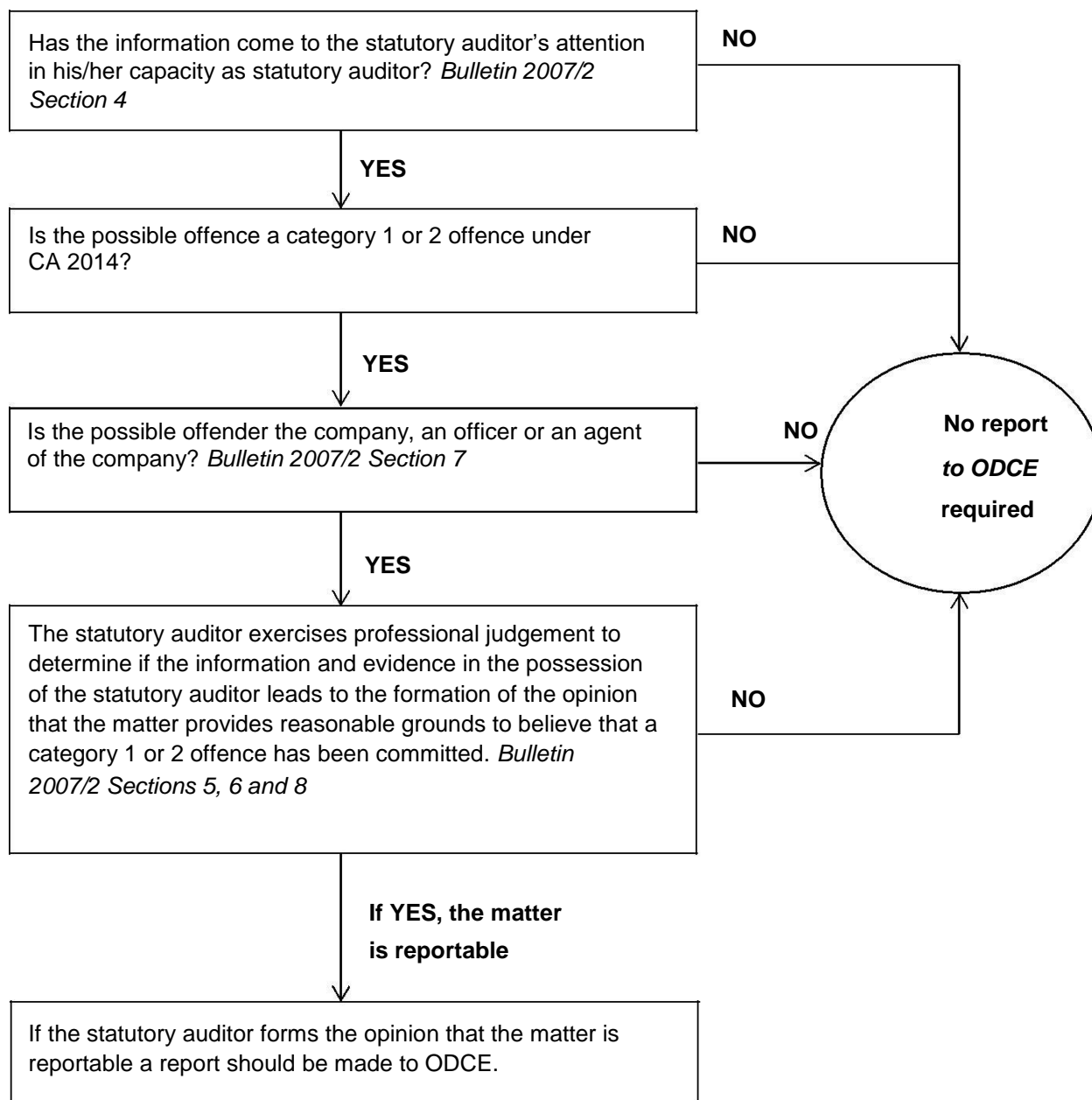
- Questions in relation to completeness of accounting records;
- Impact of tax irregularities;
- Transactions between a company and its directors; and
- Transactions between a company and persons/companies connected with its directors.

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<sup>5</sup> Note that under CA 2014 the requirement to convene an EGM only applies to PLCs

### 3. THE STATUTORY AUDITOR'S DECISION PROCESS

The steps involved in the statutory auditor's determination of whether a duty to report under section 393 to the ODCE<sup>6</sup> arises may be described as follows:



<sup>6</sup> Please see page 9 on other reporting obligations

***Has the information come to the statutory auditor's attention in his/her capacity as statutory auditor?***

The statutory auditor is only obliged to report a category 1 or 2 offence which comes to the statutory auditor's attention "in the course of, and by virtue of,... carrying out an audit of the financial statements of the company". Therefore, the reporting obligation does not apply to persons/firms providing non-audit services. However, as discussed in Bulletin 2007/2<sup>7</sup> section 4 and ISA (UK and Ireland) 250(B) Appendix 2, where a person/firm performs, or has performed, non-audit work for a company for whom that person/firm also acts, or subsequently accepts appointment, as statutory auditor, that statutory auditor, acting as such, has certain responsibilities in relation to any information suggesting the commission of a category 1 or 2 offence, which came to the statutory auditor's attention during the course of the non-audit work. Both documents advise that it will be prudent to make enquires in the course of audit work to establish if such instances have arisen.

***Is the possible offence a category 1 or 2 offence under CA 2014?***

The reporting obligation under section 393 relates only to category 1 and 2 offences under CA 2014. Consequently, there is no obligation to report to the ODCE where the statutory auditor becomes aware of a possible category 3 or 4 offence or breach of other legislation such as the Taxes Acts. However, it is possible that a reportable offence might arise from events giving rise to a breach of other legislation.

***Is the possible offender the company, an officer or an agent of the company?***

For the possible category 1 or 2 offence to be reportable in accordance with section 393, the statutory auditor must have information to form an opinion that there are reasonable grounds to believe that the offence was committed by the client company, its officers or its agent. Reference should be made to section 7 of Bulletin 2007/2 for more information in this regard.

***The statutory auditor exercises professional judgement***

The statutory auditor exercises professional judgement to determine if the information and evidence in the statutory auditor's possession leads to the formation of the opinion that the matter provides reasonable grounds to believe that a category 1 or 2 offence has been committed.

As set out in Bulletin 2007/2 (paragraph 5.1), the reporting obligation in section 393 does not require the statutory auditor to seek out possible category 1 or 2 offences as part of the audit process. However, the statutory auditor reacts to information coming into the statutory auditor's possession which suggests that a possible category 1 or 2 offence has occurred and makes any necessary enquiries to enable the formation of a considered opinion on the matter. Where the statutory auditor detects the suspected commission of an offence, professional standards require that such further investigations into the matter are carried out as to provide an understanding of the nature of the act and to allow an evaluation of the possible effects on the financial statements. Depending on the offence and the circumstances, a conviction on indictment of a company or its officers could potentially impact materially on the company's financial statements reflecting fines,

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<sup>7</sup> This Bulletin may be updated in due course.



penalties and possibly the consequences of disqualification of directors or resulting claims on the company.

The statutory auditor considers the information acquired as a result of the audit and determines if this information leads to the formation of an opinion that there are reasonable grounds to believe that a category 1 or 2 offence has been committed by the company, its officers or agents.

Where there are matters giving rise to a qualification of an audit opinion, the statutory auditor considers whether a report to the ODCE is required – for example, where the matter relates to a failure to keep adequate accounting records (see example 4.3) or to financial statements which do not give a true and fair view or otherwise comply with the Act (see examples 4.4 and 4.5).

On occasion the statutory auditor may come across information which would not normally be requested in the course of an audit and which leads the statutory auditor to consider a report under section 393. For example, the statutory auditor may become aware of the falsification of a book or a document not normally sought for the purposes of the audit – see examples 4.8 and 4.12.

***If the statutory auditor forms the opinion that the matter is reportable a report should be made to ODCE***

For details in relation to the timing and content of a report to the ODCE, reference should be made to Bulletin 2007/2 sections 10 and 11.

***Reporting more than one offence***

When considering information suggesting that a report under section 393(1) may be required, the statutory auditor is alert to the possibility that in certain circumstances more than one Category 1 or Category 2 offence may have been committed.

As previously noted the Act does not require the statutory auditor to seek out possible reportable offences as part of the audit process. However the statutory auditor reacts to information coming into the possession of the statutory auditor which suggests that one, or possibly more than one, reportable offence has occurred. The statutory auditor will make any necessary enquiries to enable a determination as to whether there is information to form an opinion that there are reasonable grounds to believe each of the suggested reportable offences has been committed. The statutory auditor will exercise professional judgement to determine if the information and evidence in the possession of the statutory auditor leads to an opinion that there are reasonable grounds to believe that each Category 1 or Category 2 offence was committed, leading to a report to the ODCE.

The sections below addressing reporting issues that might arise under:

- Section 330;
- Section 406; and
- Sections 291, 292, 294 or 295;

give examples of circumstances that may prompt the statutory auditor to consider an obligation to report more than one Category 2 offence.

### ***Implications for other reporting obligations***

In considering issues which may require a report under section 393 the statutory auditor is reminded of the many “whistleblowing” requirements imposed by several other pieces of legislation. Depending on the circumstances of the matter, there may be reporting obligations under section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, section 42 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, section 19 of the Criminal Justice Act 2011, section 1079 of the Taxes Consolidation Act, 1997 or in the case of a regulated entity a report may be required to a regulator such as the Central Bank of Ireland. These reporting obligations have differing thresholds of evidence and proof prior to the reporting obligation being triggered. At times these “whistleblowing” obligations are inconsistent with each other requiring caution on behalf of the statutory auditor. The statutory auditor is also aware of his/her right to report to the Central Bank of Ireland under section 58 of the Central Bank (Supervision and Enforcement) Act, 2013.

## Example of the decision-making process

*Scenario:* During a statutory audit, the statutory auditor is informed that the company has recently settled with the Revenue Commissioners in relation to unpaid taxes<sup>8</sup>. This information draws the statutory auditor's attention to the possibility of a matter requiring a report in accordance with section 393. The statutory auditor goes through the decision process to arrive at an opinion as to whether or not there is an obligation to make a report.

### *1. Has the information come to the statutory auditor's attention in the capacity as statutory auditor?*

In the scenario described, the information came to the statutory auditor's attention in the course of the audit work.

### *2. Is the possible offence a category 1 or 2 offence under CA 2014?*

The possible breach of tax legislation which may have occurred prior to the settlement is clearly not a Companies Act offence or reportable under section 393. However the statutory auditor considers whether there are possible related breaches of companies legislation such as section 286, the offence of failing to keep adequate accounting records, or section 389 in relation to false statements to the statutory auditor.

### *3. Is the possible offender the company, an officer or an agent of the company?*

In the scenario described, the statutory auditor may decide that any offence related to the settlement is likely to have been committed by the client company or its officers or agents.

### *4. Formation of opinion*

The statutory auditor makes enquiries of management and reviews available records and correspondence to understand the nature of the tax issue giving rise to the settlement and to allow a proper evaluation of the possible effects on the financial statements. The statutory auditor may find evidence that the settlement related to amounts not adequately recorded by the company in which case there may be reasonable grounds to believe that a breach of section 286 has been committed. It is possible that the statutory auditor may find evidence that materially false or misleading information was provided to the statutory auditor in prior years giving rise to reasonable grounds to believe that a breach of section 389 has been committed. Alternatively, it may be that the Revenue settlement followed adjudication on a matter of tax law interpretation relating to amounts which were reflected properly in the accounting records of the company. Based on information and evidence gathered, the statutory auditor exercises professional judgement to arrive at an opinion as to whether or not the matter is reportable. If the statutory auditor forms the opinion that the matter is reportable a report should be made to ODCE.

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<sup>8</sup> The statutory auditor is aware of the other reporting obligations to which the statutory auditor may be subject, such as in accordance with section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001, section 42 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 and section 19 of the Criminal Justice Act 2011. Such reporting obligations are not discussed in this document.

#### **4. EXAMPLES OF OFFENCES WHERE RELEVANT INFORMATION MAY BE IDENTIFIED IN THE COURSE OF A STATUTORY AUDIT**

This section of the Technical Release sets out some examples of category 1 and 2 offences which, should they exist, may be more likely to come to the statutory auditor's attention in the course of audit work. It does not cover all category 1 and 2 offences in CA 2014. Should relevant information on other potential category 1 and/or 2 offences come to the statutory auditor's attention, consideration will need to be given as to whether a reporting obligation arises in accordance with section 393.

The summary of offences set out below is not a substitute for referring to actual legislation and the commentary cannot be construed as a legal interpretation of the relevant provisions. In particular circumstances the statutory auditor may consider obtaining legal advice in relation to the obligations under section 393.

The category 1 and 2 offences set out below are presented in section order from CA 2014 and not in any order of perceived importance or likelihood of occurrence.

The text in the grey boxes at the beginning of each example is intended to give an overview of the requirements of the relevant section(s) and is not in all cases directly extracted from the legislation. Reference should be made to the relevant section(s) of CA 2014.

#### **4.1      Section 82: Financial assistance for acquisition of shares**

In general, companies are prohibited from giving financial assistance, directly or indirectly, by means of a loan, guarantee, the provision of security, or otherwise, for the purposes of the subscription of shares in a company, or where the company is a subsidiary company in its holding company.

There are certain exemptions however:

- Providing financial assistance in accordance with the Summary Approval Procedure<sup>(note 1)</sup>;
- The payment of a dividend or any distribution out of profits of the company available for distribution which is then applied for the purpose of subscription of shares;
- The discharge of a liability lawfully incurred by the company;
- In respect of the purchase or redemption of own shares under section 105 or 108;
- Where the lending of money is part of the ordinary business of the company;
- The provision by a company of money in respect of shares to be held by or for the benefit of employees or former employees of the company or any of its subsidiaries, in accordance with a scheme set up for this purpose;
- The making by a company of loans to employees of the company or any subsidiary with a view to enabling those persons to purchase or subscribe for fully paid shares for their own benefit;
- The giving of a loan or guarantee, provision of security or otherwise the discharge of a liability to refinance any arrangement or transaction that gave rise to financial assistance provided under the Summary Approval Procedure;
- The making or giving representations, warranties or indemnities to a person, or a person connected to that person, for the purpose of or in connection with a past or proposed purchase of, or subscription for, shares in the company or its holding company;
- The payment by a company of fees and expenses of the advisers to any subscriber of the company or its holding company that are incurred in connection with that subscription or purchase;
- The incurring of any expense by a company in order to facilitate the admission to, or the continuance of, a trading facility of securities of its holding company on a stock exchange or securities market;
- The incurring of any expenses by a company in order to ensure compliance with certain Irish/EU Takeover regulations or laws;
- The reimbursement by a private limited subsidiary of an offeree of expenses of an offeror pursuant to an agreement approved by, or on terms approved by, the Irish Takeover Panel;

#### **4.1 Section 82: Financial assistance for acquisition of shares (contd.)**

- In connection with an allotment of shares by a parent public company, the payment by a private limited subsidiary of that company of commissions, not exceeding 10 per cent of the money received in respect of such allotment, to intermediaries, and the payment by that subsidiary of professional fees;
- To the extent that provision of this kind is not authorised by exemptions allowing assistance for employees to purchase shares, as set out in section 82(f) and (g) and summarised above, the provision of financial assistance by a holding company or a subsidiary of it in connection with the holding company or subsidiary purchasing or subscribing for shares in the holding company on behalf of present or former employees, an employees' share scheme; or an employee share ownership trust.

If a company acts in contravention of this section every officer of the company who is in default shall be guilty of a category 2 offence.

##### **Note 1:**

*Although this cannot be used, unless permitted by Ministerial Regulation, by a private limited subsidiary to provide financial assistance for the purpose of acquisition of shares in its parent public company.*

#### **Commentary**

Financial assistance can be a complex area and is only permitted in very particular circumstances.

In the course of an audit of financial statements, the statutory auditor assesses the risk of material misstatement in amounts due from third parties and in doing so may examine the terms of a loan in order to determine whether interest and repayments are appropriately recorded. Such details may indicate that monies have been provided by a company for the purpose of acquiring the company's shares.

Financial assistance may be given by providing security for a shareholder's loan. While there is no obligation to do so, the statutory auditor may carry out a search of the company's records at the Companies Registration Office which could reveal a charge over the assets of a company. In circumstances where there is no loan on the company's books corresponding to such a charge on the company's assets it may be that security has been provided by the company to assist a shareholder obtain a loan to purchase company shares.

#### **4.2      *Section 248: Substantial property transactions / loans to directors or connected persons***

Section 248 sets out the penalties for a breach of section 239. Section 239 sets out a series of provisions designed to provide protection for creditors by prohibiting, in general, the making of certain arrangements by a company to that company's directors or connected persons and by preventing the company from giving any form of credit, by any means, to a company director or connected persons.

The following transactions between a company and a director or a connected person are not permitted, by section 239, except as provided for by section 240 and sections 242 to 245:

- Making of a loan or a quasi-loan to a director of the company or its holding company or to a person connected with such a director;
- Entering into a credit transaction as creditor for such a director or a person so connected;
- Entering into a guarantee or providing any security in connection with a loan, quasi-loan or credit transaction made by any other person for such a director or a person so connected;
- Arranging for an assignment to it or the assumption by it of any rights, obligations or liabilities under a transaction, which, if the company had entered into it, would have contravened this section.

A company shall not take part in any arrangement whereby:

- (i) Another person enters into a transaction which, if it had been entered into by the company, would have contravened section 239;
- (ii) That other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the company or its holding company or a subsidiary of the company or its holding company.

The penalties for breach of section 239 are set out in section 248 as follows:

If a company enters into a transaction or arrangement that contravenes section 239, any officer of it who is in default shall be guilty of a category 2 offence.

In addition there are significant disclosure obligations for all companies (and special disclosure obligations for licensed banks) under sections 307, 308, 309 and 311. Breaches of these disclosure requirements would also represent category 2 offences under sections 291(9), 293(3), 294(9) or 295(3), as appropriate.

#### **4.2      *Section 248: Substantial property transactions / loans to directors or connected persons (contd.)***

##### ***Commentary***

The area of directors' loans and credit transactions is complex.

The statutory auditor reviews the disclosures in the financial statements including those concerning substantial property transactions/loans with directors. Additionally, section 336(8) places an obligation on the statutory auditor to include a statement in the statutory auditor's report of required disclosures concerning directors' loans and transactions, should these not be included in the financial statements.

Circumstances may prompt the statutory auditor to consider whether there is a possible breach of section 248 when transactions/loans with directors of the company are significant in relation to assets of the company. The statutory auditor is reminded that the "10%" test in section 240 is a total test applied to all relevant transactions with directors or connected persons and not to each individual transaction. The statutory auditor may also be prompted to consider whether there are possible breaches of sections 307, 308, and/or 309 (and/or in the case of licensed banks section 311) where disclosures made in the financial statements do not comply with the provisions of those sections.



#### **4.3      Section 286: Failure to keep adequate accounting records**

Every company is required to keep or cause to be kept adequate accounting records which:

- Correctly record and explain the transactions of the company;
- Enable the financial position and the profit/loss of the company to be determined with reasonable accuracy; and
- Enable the directors to ensure that the financial statements and the directors' report, as required, comply with the requirements of the Act.

##### **Adequate accounting records should be:**

- Kept on a continuous and consistent basis including timely recording of entries;
- Guarded by adequate precautions from falsification, or if falsification occurs, by facilitation of discovery, where entries are made in a means other than a bound book<sup>(note 1)</sup>;
- Preserved for a period of six years from the last financial period to which the return was signed;
- Written in either the official language of the State or readily accessible and convertible into the official language of the State;
- Available for inspection, without charge, by officers and other entitled persons as conferred by statute or by the company's constitution or authorised by the directors. Directors are permitted to determine the timing, location, extent and conditions for inspection by non-directors of the company;
- Kept at the registered office or other such place as directors think fit.

##### **Accounting records should contain:**

- Daily entries of all sums of money received and expended including the matter in respect of such receipt/expenditure;
- A record of the assets and liabilities of the company;
- A record of all transactions of purchases and sales including sufficient details of the identity of the buyers and sellers and records of invoices of all the purchases and sales and also statements of year end stock held and stocktaking records, if the company's business involves dealing in goods;
- A record of all transactions providing or purchasing such services including sufficient details of the identity of the provider/purchaser of the service and corresponding invoices, if the company's business involves the provision/purchase of services.

#### **4.3 Section 286: Failure to keep adequate accounting records (contd.)**

**Server Computers** - A server computer providing services to a computer in the State should be kept in the State so that accounting records and other information and returns on the computer can be accessed at all times. Where accounting records are kept outside the State (including server computers), then sufficient information and returns should be kept within the State to disclose with reasonable accuracy the financial position and the profit or loss, for intervals not exceeding six months to enable the preparation of the company's financial statements and the directors' report as required by the Act. The Minister may make regulations in this regard.

**Group Accounts** - Directors of holding companies should ensure subsidiaries keep records that enable the preparation of group accounts as required by the Act. For example, a holding company should take "all reasonable steps" to secure that a subsidiary undertaking, even if not incorporated in the State, keeps such adequate accounting records as will enable the directors of the holding company to ensure that any group financial statements required to be prepared under Part 6 comply with the requirements of CA 2014 and, where applicable, Article 4 of the IAS Regulation (section 282(8) and (9)).

Section 286 provides that any company that contravenes sections 281 to 285 shall be guilty of a category 2 offence. In addition a director who fails to take all reasonable steps to ensure compliance with the above, or who has intentionally been the cause of default by the company of the above, shall be guilty of a category 2 offence.

In both these instances, in limited circumstances, the above offences could be elevated to a category 1 offence.

#### **Note 1 – Precautions where entries are made other than in a “bound book”**

*CA 2014 specifically recognises the possibility that the books of account may be kept in other than a hard-copy format. There is an ancillary proviso in section 282(2) that, in such situations, "adequate precautions shall be taken for guarding against falsification and facilitating discovery of such falsification, should it occur". During the course of the audit the statutory auditor may be prompted to consider reporting obligations in this regard.*

#### **Commentary**

Circumstances may prompt the statutory auditor to consider whether there is a suspected breach of this section where adequate accounting records as described above were not maintained at any time.

An example of failure to maintain adequate accounting records would be a failure to maintain stock sheets when a year-end financial stocktake has been conducted. The statutory auditor may also consider, whether there has been a breach of section 282, where a client has made a Revenue settlement indicating that certain sales were not recorded in the accounting records or the financial statements of the company.

### **4.3      *Section 286: Failure to keep adequate accounting records (contd.)***

#### *Section 392 – Notification to the Company and to the Registrar of Companies*

The statutory auditor is reminded that where they form the opinion that the requirements for adequate accounting records, as outlined above, have not or are not being met, they are required under section 392 to notify that opinion to the company, by recorded delivery. If the directors do not take steps to ensure compliance with their requirements to keep adequate accounting records, within seven days of that notification<sup>9</sup>, the statutory auditor notifies the Registrar of Companies in the prescribed form. The statutory auditor is not required to make these notifications if the statutory auditor is of the opinion that the contravention concerned is minor or otherwise immaterial in nature.

#### *Section 393 – Reporting to the ODCE*

A statutory auditor is obliged by section 393(1) to report to the ODCE, if the statutory auditor forms the opinion that there are reasonable grounds to believe that the company has not kept adequate accounting records. There are a number of situations that may give rise to a statutory auditor reporting the opinion to the ODCE that adequate accounting records were not maintained and in some circumstances such an opinion may also require the audit report on the financial statements to be qualified if, in the statutory auditor's opinion, the accounting records did not permit the financial statements of the company to be readily and properly audited. However a report to the ODCE that adequate accounting records were not maintained may not always result in a qualification of the audit report that the accounting records did not permit the financial statements to be readily and properly audited.

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<sup>9</sup> Please note, the period of seven days to “take steps to ensure compliance” applies to the section 392 notification to the Registrar of Companies only, and is not relevant to the report required to be sent to the ODCE under section 393.

**4.4      *Section 291(9): Companies Act entity financial statements, Section 292(3): IFRS entity financial statements, Section 294(9): Companies Act group financial statements, Section 295(3): IFRS group financial statements***

If Companies Act entity or group financial statements or IFRS entity or group financial statements, as applicable,

- Are not prepared in compliance with the applicable reporting framework, or
- Do not give a true and fair view of the assets, liabilities and financial position at the balance sheet date or of the profit or loss for the year then ended, or
- Do not give the information required by the applicable standards or the Companies Act 2014,

the company and any officer of it who is in default shall be guilty of a category 2 offence.

***Commentary***

The Act requires directors to prepare company financial statements in accordance with section 290 and group financial statements in accordance with section 293. Company financial statements may be 'Companies Act entity financial statements' prepared in accordance with section 291 or 'IFRS entity financial statements' prepared in accordance with section 292. Group financial statements may be 'Companies Act group financial statements' prepared in accordance with section 294 or 'IFRS group financial statements' prepared in accordance with section 295. Such financial statements so prepared are required to:

- Comply with the applicable financial reporting framework;
- Give a true and fair view of the assets, liabilities and financial position of the company or group at the financial year end and of the profit or loss of the company or group for the financial year;
- Give all the information required by the Act.

If a company fails to comply with the applicable sections above, the company and any officer of it who is in default shall be guilty of a category 2 offence.

Section 336 sets out the matters that the statutory auditor must address in the audit report including the requirement to state clearly his/her opinion as to whether the financial statements:

- Give a true and fair view of:
  - The assets, liabilities and financial position of the company or group at the end of the financial year;
  - The profit or loss of the company or group for the financial year
- Were properly prepared in accordance with the relevant financial reporting framework and, in particular, with the requirements of the Act (and, where applicable Article 4 of the IAS Regulation).

The statutory auditor also has regard to the ISAs (UK and Ireland) when preparing the audit report.

#### **4.4 Sections 291(9), 292(3), 294(9) and 295(3) (contd.)**

##### Qualified audit report

Both section 336(7) and ISA (UK and Ireland) 705 recognise that circumstances may occur when the statutory auditor may not be in a position to give an unqualified opinion on the matters set out above.

##### *Disagreement*

Circumstances may occur that lead the statutory auditor to give a modified opinion, due to disagreement, in respect of:

- (i) The truth and fairness of the financial statements. In this instance circumstances may lead the statutory auditor to express:
  - A qualified opinion concluding that misstatements in the financial statements, individually or in the aggregate, are material but not pervasive to the financial statements; or
  - An adverse opinion concluding that the misstatements in the financial statements, individually or in the aggregate, are both material and pervasive to the financial statements;
- or
- (ii) Whether the financial statements were prepared in compliance with the relevant financial reporting framework and, in particular, with the requirements of the Act (and, where applicable Article 4 of the IAS Regulation).

Where the statutory auditor decides to modify the audit report in relation to a matter addressed by (i) or (ii) above, the statutory auditor will be in a position to consider whether there is information to form an opinion that there are reasonable grounds to believe that the entity or group financial statements:

- ☐ Are not prepared in compliance with the applicable reporting framework, or
- ☐ Do not give a true and fair view of the assets, liabilities and financial position at the balance sheet date or of the profit or loss for the year then ended, or
- ☐ Do not give the information required by the applicable standards or the Companies Act 2014.

Where the statutory auditor forms the opinion that there are reasonable grounds to believe that the company and any officer have committed a breach of any of sections 291(9), 292(3), 294(9) and 295(3), section 393 requires that a report be made to the ODCE.

#### **4.4 Sections 291(9), 292(3), 294(9) and 295(3) (contd)**

##### *Limitation of scope*

Should a statutory auditor be unable to obtain sufficient audit evidence to conclude that the financial statements as a whole are free from material misstatement, the statutory auditor will modify the audit report. In this situation, in accordance with ISA (UK and Ireland) 705, the statutory auditor will either disclaim the opinion on the financial statements or qualify that opinion depending on the statutory auditor's assessment of the possible effects of undetected misstatements should any exist.

The qualification or disclaimer in this instance arises as the statutory auditor does not have sufficient audit evidence to form an opinion that the financial statements:

- Give a true and fair view of the assets, liabilities and financial position and the profit or loss of the company; or
- Were properly prepared in accordance with the relevant financial reporting framework and, in particular, with the requirements of the Act (and, where applicable Article 4 of the IAS Regulation).

In these circumstances the statutory auditor is unlikely to have reasonable grounds to believe that an offence under sections 291(9), 292(3), 294(9) or 295(3), as appropriate, was committed.

However, in situations where the statutory auditor is unable to obtain sufficient audit evidence due to a management imposed limitation, the statutory auditor will be in a position to consider whether such a limitation would provide, in his/her opinion, reasonable grounds to believe that an offence under section 387 (*Right to information and explanations concerning company* – see example 4.9) was committed and whether section 393 would therefore require a report to be made to the ODCE.

##### Emphasis of Matter

The statutory auditor includes an emphasis of matter in the audit report when the statutory auditor's judgment is that a matter presented or disclosed in the financial statements is fundamental to the users' understanding of the financial statements. It is not a qualification of the audit opinion. ISA (UK and Ireland) 706 provides that an emphasis of matter is included in these circumstances provided the statutory auditor has obtained sufficient appropriate audit evidence that the matter is not materially misstated in the financial statements. Thus an emphasis of matter will not ordinarily give rise to an offence under sections 291(9), 292(3), 294(9) and 295(3) and a requirement to report to the ODCE.

#### **4.4 Sections 291(9), 292(3), 294(9) and 295(3) (contd)**

##### Voluntary Revision of Defective Financial Statements

Section 366 permits directors of a company to voluntarily revise the statutory financial statements of a company where it appears to them that the financial statements in respect of a particular year<sup>10</sup> did not comply with the requirements of the Companies Act 2014 or, where applicable, Article 4 of the IAS Regulation. Where the directors revise statutory financial statements, by virtue of section 366, due to non-compliance with the Companies Act 2014, the statutory auditor is required by section 370(6) to state in a report on the revised financial statements whether, in the statutory auditor's opinion, the original financial statements failed to comply with the requirements of the Companies Act 2014, in the respects identified by the directors. Where the statutory auditor gives such an opinion, in the report on the revised financial statements, this would lead the statutory auditor to consider if there were reasonable grounds to believe that the company and any of its officers in default had committed an offence under sections 291(9), 292(3), 294(9) or 295(3), as appropriate, as at the date of approval of the original financial statements. Where the statutory auditor forms such an opinion that there were such reasonable grounds, section 393 would require that a report be made to the ODCE.

##### Prior Year Adjustment due to error

Circumstances may arise where it becomes apparent to the directors in a financial year that the financial statements of the previous year<sup>10</sup> contained an error. The correction of such an error may lead to a prior year adjustment under the applicable financial reporting framework adopted in preparing the financial statements. Where the statutory auditor agrees that the error which was discovered gives rise to a prior year adjustment, these circumstances may prompt the statutory auditor to consider if there are, therefore, reasonable grounds to believe that the prior year's financial statements did not comply with the applicable financial reporting framework, as at the date of approval of the financial statements, and that the company and any of its officers in default had committed an offence under sections 291(9), 292(3), 294(9) or 295(3) as appropriate. Where the statutory auditor forms such an opinion that there were such reasonable grounds, section 393 would require that a report be made to the ODCE.

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<sup>10</sup> Where prepared in accordance with the Companies Act 2014.

**4.5 Section 324(6): Approval of financial statements which do not give a true and fair view or otherwise comply with the requirements of the Companies Act 2014 / Article 4 of the IAS Regulation**

If statutory financial statements are approved which do not give a true and fair view or otherwise comply with the requirements of the Companies Act 2014 or, where applicable, of Article 4 of the IAS Regulation, every director of the company who was party to their approval, and who knows that they do not give such a view or so comply or is reckless as to whether that is so, shall be guilty of a category 2 offence.

***Commentary***

Qualified audit report

For an offence to be committed under this section, the directors must know that, or be reckless as to whether, the financial statements they approve do not give a true and fair view or otherwise comply with the Act (or, if applicable, Article 4 of the IAS Regulation).

The statutory auditor is required by ISA (UK and Ireland) 260 “Communication with those charged with governance” to communicate with the directors significant findings from the audit, which include matters which the statutory auditor believes will lead to a modification of the audit opinion. Therefore, the directors are likely to know about the issues leading to the modification. The statutory auditor considers any such communication in assessing whether there are reasonable grounds to believe that a category 2 offence under section 324(6) was committed.

*Disagreement*

Where the statutory auditor forms the opinion that there are reasonable grounds to believe that the company and any of its officers have committed an offence under one or more of sections 291(9), 292(3), 294(9) or 295(3) – see example 4.4 above - these circumstances may prompt the statutory auditor to consider if there are reasonable grounds to believe that an offence under section 324(6) has been committed by the directors party to the approval of the financial statements.

*Limitation of scope*

As discussed in example 4.4, where a statutory auditor qualifies the audit report on the basis of a limitation of scope or a disclaimer, the statutory auditor is unlikely to have reasonable grounds to believe that an offence under sections 291(9), 292(3), 294(9) or 295(3), as appropriate, was committed.

In such circumstances, if the statutory auditor is unable to form an opinion as to whether or not the financial statements give a true and fair view, then it is unlikely that the statutory auditor would have reasonable grounds to believe that an offence was committed under section 324(6).



### Voluntary Revision of Defective Financial Statements

Whilst considered unlikely, where the directors of a company voluntarily revise financial statements in accordance with section 366, the statutory auditor considers whether the information on the matter giving rise to the revision would lead to the opinion that there were reasonable grounds to believe that the directors knowingly approved financial statements which did not give a true and fair view or were reckless in so doing.

### Prior Year Adjustment due to error

Should a report to the ODCE be required under sections 291(9), 292(3), 294(9) or 295(3) arising from a prior year adjustment due to error as set out in example 4.4 above, the statutory auditor considers whether there are reasonable grounds to believe that an offence under section 324(6) has also been committed as at the date of approval of the original financial statements. The statutory auditor may form the opinion that the directors did not approve those financial statements knowing (or being reckless in that regard) that the financial statements did not give a true and fair view or otherwise comply with CA 2014. Such an opinion may be formed, for example, if the statutory auditor considers that the appropriate adjustment would have been made by the directors in the original financial statements if the information had been known at the time. In this situation, an additional report with regard to an offence under section 324(6) is not required.

#### **4.6      *Section 324(8): Approval and signature of statutory financial statements by board of directors***

Statutory financial statements should be approved by the board of directors and signed on their behalf by two directors where there are two directors or more. Where there is only one director, the statutory financial statements should be approved and signed by that sole director. The signature/s evidencing approval of the statutory financial statements shall be inserted on the face of the entity balance sheet and any group balance sheet.

Every copy of every balance sheet laid before members in a general meeting or otherwise circulated, published or issued or delivered to the Registrar shall be signed, stating the names of the persons who signed the balance sheet on behalf of the board of directors. Where any copy of a balance sheet is in default of this, the company and any officer (including any shadow director and defacto director) shall be guilty of a category 2 offence.

#### ***Commentary***

Circumstances may prompt the statutory auditor to consider whether there is a possible breach of this section where, during the course of the audit work, the statutory auditor becomes aware that financial statements were submitted to the Companies Registration Office without the appropriate approval signature of the director(s).

Stating the names of the persons who signed the balance sheet on behalf of directors is a new requirement introduced by CA 2014. There is no requirement to sign the profit and loss account.

**4.7      *Section 330: Directors' report: statement on relevant audit information (commencing for accounting years beginning on/after 1 June 2015)***

Directors are required, in their report, to make a statement that:

- As far as each director is aware, there is no relevant audit information of which the statutory auditor is unaware; and
- Each director has taken all steps to make himself or herself aware of all relevant audit information and to establish that the statutory auditor is aware of such information.

Should a report containing a false statement to this effect be approved, every director who knew the statement was false or was reckless as to whether it was false and failed to take reasonable steps to prevent the report from being so approved shall be guilty of a category 2 offence.

***Commentary***

Circumstances may prompt the statutory auditor to consider whether there is a possible breach of this section if the statutory auditor becomes aware of information relevant to the audit after that audit is complete and the statutory auditor further understands that such information was available to the directors prior to the completion of the audit. An example might be where a valuation report on company assets dated prior to the date of approval of the financial statements became available to the statutory auditor after the date of the audit report and that valuation had not been disclosed to the statutory auditor or addressed in the management representation letter prior to the signing of the audit report.

The statutory auditor considers how the newly available information would have influenced the audit, carried out in accordance with ISAs (UK and Ireland), of the financial statements when considering if the newly available information is relevant audit information. The statutory auditor is reminded that, for an offence to be committed under this section, a false statement in the Directors' Report must be made:

- Knowingly or recklessly by a director; and
- As a result of a failure by the director to take reasonable steps to prevent the approval of the directors' report containing the statement.

In addition to the offence under section 330, where circumstances suggest that the withholding of relevant audit information by a director, as in the example above, meant that the directors knowingly or recklessly made a statement that was misleading or false in a material particular, these circumstances may prompt the statutory auditor to consider a possible breach of section 389 (see 4.11 below).

#### **4.8      Section 355: Approval and signing of abridged financial statements**

Section 355(7) provides that every director of a company that is party to the approval, of abridged financial statements that are not prepared in accordance with the Act, and knows or is reckless regarding such approval is guilty of a category 2 offence.

Section 355(9) sets out that a breach of section 355(6) of that Act is a category 2 offence. Section 355(6) set out a series of requirements that apply to the documents annexed to the annual return under section 352, as follows:

- The copy of the abridged financial statements shall state the names of the directors who signed the abridged balance sheet;
- The information extracted from the directors' report shall be accompanied by a certificate of the secretary of the company stating that it is a true copy of the information laid before the members in general meeting;
- The copy of the directors' report shall state the names of the directors who signed the report;
- The copy of the special auditor's report shall state the name of the statutory auditor who signed the report and, if different, the name of the statutory auditor who signed the report on the statutory financial statements.

#### **Commentary**

The statutory auditor will be aware that when certain matters are included in the statutory financial statements, they must be extracted for the purpose of the abridged financial statements.

The statutory auditor is not obliged to inspect the annual return filed with the Registrar as part of the audit work. However, in the normal course of audit work, the statutory auditor may inspect the annual return or become aware of an omission of one of the requirements set out in 355(6) and these circumstances may prompt the statutory auditor to consider whether this information would lead to the opinion that there are reasonable grounds to believe that an offence under section 355(9) was committed by the directors party to the approval of the abridged financial statements and whether a report under section 393(1) is required.

#### **4.9      *Section 387: Delay in providing information to the statutory auditor***

It is a category 2 offence for an officer of a company, which includes an employee, shadow director and de facto director, to fail to provide the statutory auditor of the company, within two days of the statutory auditor's request, with any information or explanation that is within the knowledge of or can be procured by the officer.

##### ***Commentary***

When assessing situations which may result in a limitation of scope modification and other situations in which obtaining information for the purpose of the statutory audit has not been possible, or has not been provided as soon as reasonably possible after the request for such information has been made, the statutory auditor may be prompted to consider whether there is a possible breach of section 387. Should the statutory auditor form an opinion that there were reasonable grounds to believe that such a breach occurred, section 393(1) would require a report to the ODCE.

#### **4.10 Section 388: Right to information and explanations concerning subsidiary undertakings**

Section 388(1)(a) provides that when a holding company has a subsidiary, either an Irish company, partnership or unincorporated body of persons with its principal place of business in the state, it is the duty of the subsidiary and its statutory auditor to provide information and explanations to the statutory auditor of the holding company as they may reasonably require.

Section 388(1)(b) provides that a holding company of a subsidiary has a duty to take all steps that are reasonable to obtain any information and explanations requested by its statutory auditor from the subsidiary undertaking.

It is a category 2 offence for an undertaking, body or other person and any officer of that undertaking or body to fail to provide the statutory auditor of the holding company, within five days of the statutory auditor's request, with any information or explanation that is within the knowledge of or can be procured by the officer.

Any officer for the purpose of an undertaking or body includes any employee of the undertaking or body and, if it is a company, includes any shadow director and de facto director of it.

#### **Commentary**

The statutory auditor of a holding company may become aware of situations which may result in a limitation of scope modification and other situations in which obtaining information, from subsidiaries, for the purpose of the statutory audit of the holding company has not been possible or has not been provided as soon as reasonably possible after the request for such information has been made of a holding company's subsidiaries. Such circumstances may prompt the statutory auditor to consider if the information leads to the opinion that there are reasonable grounds to believe that an offence under section 388 has been committed and section 393(1) requires that opinion to be reported to the ODCE.

In relation to a breach of section 388(1)(a) it appears that a report by the statutory auditor of the holding company would not be required under section 393<sup>11</sup>. However, the statutory auditor of a subsidiary may consider if there is information to form an opinion that there are reasonable grounds to believe that an offence under section 388(1) was committed where the subsidiary or an officer thereof failed to provide information or explanations to the statutory auditor of its holding company.

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<sup>11</sup> Although likely to be rare, circumstances may arise, however, whereby the subsidiary company is believed to be acting as an officer or agent (for example a shadow director or de facto director) of the holding company. In such a situation the statutory auditor of the holding company will consider if a report is required by virtue of the subsidiary company being an officer or agent of the holding company, the statutory auditor of which has not received the information requested of the subsidiary company.

#### **4.11 Section 389: Making false statements to the statutory auditor**

It is a category 2 offence for an officer of a company, which for the purposes of this section includes an employee and de facto directors, to knowingly or recklessly make a statement that is misleading or false in a material particular to the statutory auditor of a company. This applies to statements (whether orally in writing) which convey, or purport to convey, any information or explanation which the statutory auditor requires under the Companies Acts or is entitled to require as statutory auditor.

##### ***Commentary***

When information comes to the statutory auditor's attention which reveals, for example, false invoices, suppression of sales or other false accounting, the statutory auditor may be prompted to consider whether there is a possible breach of section 389. Such information may come to the statutory auditor's attention, for example, on becoming aware of a Revenue settlement, settlement of a legal claim against the company or otherwise as a result of normal audit work.

The false statement must be made knowingly or recklessly by the officer for there to be an offence under section 389.

#### **4.12 Section 406: False statements in returns, financial statements etc.**

If a person in any return, statement, financial statement or other document required by or for the purposes of any provision of Part 6 of the Companies Act 2014 intentionally makes a statement, false in any material particular, knowing it to be false, the person shall be guilty of a category 2 offence.

#### **Commentary**

Part 6 of the Companies Act 2014 addresses provisions relating to the financial statements, Annual Return and audit of companies. The documents required by this part include:

- The company's accounting records;
- Its statutory financial statements;
- Its directors' report;
- The statement to be included in the balance sheet if the audit exemption is availed of (if applicable);
- The company's annual return and documents annexed to it (as applicable);
- Abridged financial statements for filing (as applicable); and
- Revised financial statements (if applicable).

Additionally Part 6 addresses statutory auditor's reports, special auditor's reports on abridged financial statements and statutory auditor's reports on revised financial statements. It also contains the sections addressing statements by the statutory auditor where resigning or removed.

False statements made in the context of any of the above could constitute a category 2 offence under section 406. For example, in the course of and by virtue of the audit, the statutory auditor may become aware of an incorrect statement in a document or return required of the company by Part 6. While the statutory auditor is not obliged to review a company's annual return, the statutory auditor may be prompted to consider whether there is a possible breach of this section should it be ascertained, for example, that the annual return filed by a client company, which qualifying as a small company under the Act, has filed abridged financial statements, did not include the details of directors' interests that were included in the Directors' Report presented with the financial statements presented to the members in general meeting as required by section 352(3)(b). These details of directors' interests are required to be annexed to the annual return (s355(6)).

Section 355(9) provides that where the documents which are annexed to the Annual Return are not in compliance with the requirements set out in section 355(6), the company and any officer who is in default is guilty of a Category 2 offence. Thus, while there is no obligation on the statutory auditor to review the annual return, the statutory auditor may be prompted to consider if there is a reporting requirement to the ODCE in relation to section 355(9) if it is noted that information required to be annexed to the annual return was omitted.



#### **4.12    *Section 406: False statements in returns, financial statements etc. (contd.)***

Should the statutory auditor conclude that there is a reporting requirement in relation to section 355(9) as above, the statutory auditor may also be prompted to consider whether the incorrect statement/omitted information may give rise to a requirement to report to the ODCE in relation to the Category 2 offence in section 406. For an offence to be committed under this section, a statement must be made, which is false in a material particular, intentionally by a person who knew that it was false in a material particular. In the example circumstances outlined in the previous paragraphs, the statutory auditor may consider if, in the course of and by virtue of the audit, the statutory auditor forms the opinion that there are reasonable grounds to believe that a person intentionally filed the Annual Return, knowing it to be false in a material particular, giving rise to a requirement to report this opinion to the ODCE.

#### **4.13 Section 722: Fraudulent trading**

Any person, who knowingly is a party to the carrying on of a business of a company with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, shall be guilty of a category 1 offence.

##### **Commentary**

This is a serious offence and involves a very specific fraudulent intent.

Creditors in either context used in the section could, for instance, include the Revenue Commissioners.

The statutory auditor carries out procedures required by ISA 240 (UK and Ireland) "The Auditor's Responsibility to Consider Fraud in an Audit of Financial Statements" to assess the risk of material misstatement from fraud, defined as deliberate misstatements resulting either from fraudulent financial reporting or misappropriation of assets. The statutory auditor is concerned with fraud that causes material misstatement in the financial statements and not with the broader legal definition of fraud or the specific description of fraudulent trading as set out in section 722.

In carrying out procedures required by ISA 570 (UK and Ireland) "Going Concern", the statutory auditor may become aware of uncertainties that may affect the going concern status of a company. However, whilst the statutory auditor may become aware of information indicative of risks that third parties may suffer financial loss, this of itself does not indicate any fraudulent intent.

As this offence involves very specific fraudulent intent, the statutory auditor may wish to take legal advice when considering any reporting obligation under section 393 in relation to section 722 'Fraudulent Trading'.

Fraudulent trading involves dishonesty and the intent to defraud the creditors of the company or of another entity or person. Case law demonstrating the types of circumstances in which the criteria of section 722 are met is limited. Examples of such circumstances may include:

- i. Where a person obtained a loan on behalf of a company where he knew that the company was not in a position to discharge the loan; and
- ii. Where a company obtains multiple bank loans over the same property without disclosing the existence of all such loans to the lenders or other interested persons.
- iii. Where a company takes on liabilities when it is aware that it will not be in a position to meet those liabilities due to solvency difficulties.

#### **4.14 Section 876: Providing false information**

A person shall be guilty of a category 2 offence where he/she:

- Gives an answer to a question; or
- Provides an explanation; or
- Makes a statement; or
- Completes, signs, produces, lodges or delivers any return, report, certificate, balance sheet or other document

that is false in a material particular and which the officer knows or is reckless as to whether it is false in a material particular; or

- Provides false information to an electronic filing agent or provides false information that is subsequently transmitted in a return made on that person's behalf to the Registrar.

In certain situations the person convicted of the category 2 offence may be held liable for the maximum term of imprisonment and the maximum amount of fine as provided for in a category 1 offence.

#### **Commentary**

This offence encompasses a broad range of acts or omissions.

The statutory auditor may become aware of information during the course of the audit that appears to contradict statements, explanations or documents made by the company. Another situation that may occur is that information comes to the statutory auditor's attention which reveals false invoices, suppression of sales or other false accounting. Circumstances such as those set out above may prompt the statutory auditor to consider whether an offence under section 876 was committed. Such information may come to the statutory auditor's attention, for example, on becoming aware of a Revenue settlement, settlement of a legal claim against the company or otherwise as a result of normal audit work.

For an offence to have been committed under this section, the false statement, explanation or document must have been made knowingly or recklessly as to whether it was false and must be false in a material particular.

**4.15     *Section 877: Destruction, mutilation or falsification of book or document***

**4.16     *Section 878: Fraudulently parting with, altering or making omission in book or document***

**877** - An officer who destroys, mutilates, or falsifies or is privy to the destruction, mutilation or falsification, of any document affecting or relating to the property or affairs of the company including if they make or are party to the making of a false entry in any such book or document shall be guilty of a category 2 offence.

**878** - An officer who fraudulently parts with, alters or makes an omission or is party to the fraudulent parting with, alteration or omission, of any book or document relating to the property or affairs of the company is guilty of a category 2 offence.

***Commentary***

Circumstances where the statutory auditor may be prompted to consider whether there is a possible breach of these sections include:

- Documents appear to provide inconsistent information in relation to material transactions or balances;
- Documents expected to be available in support of material transactions or balances are unavailable;
- Audit work reveals “ghost” customers or employees.

#### **4.17    Sections 1395 and 1396: Authorisation of Investment Companies by the Central Bank of Ireland**

An investment company as defined in the Companies Act shall not carry on business in the State unless it has been authorised by the Central Bank of Ireland. In addition a person shall not carry on business on behalf of an investment company relating to the purchase or sale of shares in the investment company unless that investment company has been authorised by the Central Bank of Ireland.

There are very specific rules as laid out in sections 1395 and 1396 which an investment company must satisfy to enable it to obtain authorisation as an investment company from the Central Bank of Ireland. Section 1396 gives the Central Bank the power to impose such conditions for the granting of an authorisation to an investment company as it considers appropriate and prudent for the orderly and proper regulation of investment companies.

Any company or person carrying on business on behalf of an investment company which contravenes any of the authorisation requirements outlined in the Act or imposed by the Central Bank of Ireland shall be guilty of a category 2 offence.

#### **Commentary**

Investment companies or individuals, carrying on business on behalf of an investment company, shall be guilty of a category 2 offence, if they have not met the authorisation requirements as laid out in section 1395 and as imposed by the Central Bank of Ireland as outlined in section 1396.

Where information comes to the statutory auditor's attention in the course of the normal audit procedures, for example during the course of audit work completed under ISA (UK and Ireland) 250, that leads the statutory auditor to form the opinion that the entity has not met all the prescribed authorisation requirements, the statutory auditor may be prompted to consider the reporting obligations in this regard.