

ODCE Investigations

Managing the risks when your practice comes into investigators' focus

by Joe Kelly

This article sets out some tips for Certified Public Accountants faced with an investigation from the Office of the Director of Corporate Enforcement (ODCE) into the books and records of clients.

The ODCE and its remit

The ODCE was established in November 2001, charged with the responsibility for tackling offences under the Companies Acts, now the Companies Act 2014 (the Companies Act).

The ODCE's primary statutory mandate is to encourage compliance with the Companies Act.¹ The ODCE has responsibility for investigating instances of suspected non-compliance and/or offences under the Companies Act; with the power to prosecute in its own right, summary offences (generally taken to mean offences which attract sentences of less than one year) in the District Court or to refer more serious (indictable) offences to the DPP for prosecution.

In addition, and crucially for CPA Ireland members, the ODCE exercises a supervisory role over the activities of liquidators and receivers.

The investigative powers of the ODCE

The ODCE has extensive powers to investigate suspected breaches of the Companies Act, such as fraudulent trading or providing false statements

to auditors. For example, the ODCE may compel a liquidator or receiver appointed to a company, to produce books in relation to a liquidation or receivership, or indeed all of the liquidations or receiverships, they have carried out, within the last 6 years.

Most crucial amongst the ODCE's arsenal of investigative powers, are the powers to: (i) compel the production of books and documents relating to a company under investigation; and (ii) to enter and search premises and seize material information.

Production of books and documents

The ODCE may issue statutory production orders which require the production of the books of a company or documents relating to a company. "Books and documents" potentially covers a wide range of written, audio or visual documents in hardcopy or in electronic form: including but not limited to emails, recordings of phone-calls, text messages and video content.

The ODCE may require the production of books and records where:

- a. A liquidation or receivership of a company is being carried out (this request is made to the liquidator or receiver)²;
- b. It is necessary to determine whether inspectors should be appointed to investigate the company³;
- c. The affairs of the company are being conducted with the intent to defraud creditors/creditors of another person/the members or for another fraudulent/unlawful purpose⁴;
- d. The affairs of the company are being conducted in an unlawful manner⁵;
- e. The affairs of the company are being conducted in a manner, or the company has engaged in an act or omission, that is unfairly prejudicial to some of the creditors/members⁶;
- f. The acts or omissions of the company or an officer of the company are likely to be unlawful⁷;
- g. The company was formed for some unlawful/fraudulent purpose⁸;
- h. The company possesses books or documents relevant to another company coming within the terms listed at (c) to (g) above⁹.

1 S.949 Companies Act (1)(a)

2 Sections 446 and 653 of the Companies

3 Section 779(a) of the Companies Act

4 Section 779(b)(5)(c) of the Companies Act

5 Section 779(d) of the Companies Act

6 Section 779(e),(f), (g)(5)(h) of the Companies Act

7 Section 779(i) of the Companies Act

8 Section 779(j) of the Companies Act

9 Section 779(k) of the Companies Act

Of particular relevance to accountants is the ODCE's power to compel third parties to produce information and/or documents by way of a production order, where that third party has relevant information about a company which is under investigation by the ODCE¹⁰.

In such circumstances the third party, which may include the company's accountants or auditors, may be compelled to explain the documents and to provide reasonable assistance to the ODCE.

If a scenario arises where the party served with a production order claims that the documents requested contain legally privileged material, the documents must be provided to the ODCE. In practice, these documents will be provided in sealed envelopes until the issue of whether or not they are privileged has been resolved by the court or by an independent legal professional, as agreed between the ODCE and the party concerned.

Entry, search and seizure at a premise

The ODCE may apply to the District Court for a warrant to enter and search premises to gather material information or documents. In order to obtain a warrant, the ODCE must satisfy the court that it has reasonable grounds for suspecting that "material information"¹¹ will be found at the premises¹².

Material information means information or documents which may be relevant to the commission of an offence under the Companies Act, or documents which have been sought by way of a statutory order which have not been produced.

Such a warrant permits a designated officer of the ODCE to:

- a. enter the named premises, by force if necessary;
- b. search the premises;
- c. require any person found on the premises to give their name, home address and occupation, and produce any material information that is in their custody;
- d. seize and retain any material information found on the premises or in the custody or possession of any person found on the premises; and
- e. "take any other steps that appear to the officer to be necessary for preserving or preventing interference with material information."

Furthermore, the orders are valid for a period of 30 days, during which the ODCE officers may enter and search the premises multiple times.

The ODCE, in addition, has "extended powers of seizure" which permit it to seize non-material information where it is not immediately practical to establish whether the information is material, or where material information cannot be separated from non-material information.

In this scenario the ODCE is obliged to separate the information while maintaining confidentiality over the document and allowing the owner of the document access to it¹³. The separation of the information should take place within three months or such longer period as is permitted by the High Court¹⁴. This scenario in particular arises where a document may contain material information but may be subject to legal professional privilege or partly subject to legally privileged.

An ODCE investigation on your premises

It is crucially important that all practices are alert to the "do's and don'ts" in the event that they have to deal with an unexpected visit from the ODCE and/or the Gardaí. Colloquially, this is often referred to as a "dawn raid" though invariably the raid or visit does not take place at dawn.

Imagine this scene:

You get a call from your office as you make your way into work one morning. Your receptionist says that a number of people from the ODCE and the Gardaí are in reception and that they have produced a District Court warrant.

When you arrive at work you find an ODCE digital forensic specialist in your office searching through your files, downloading your e-mails, asking for your mobile phone, reading your diary and asking you questions about client meetings from last year. An ODCE forensic accountant is busy at work reviewing and copying your clients' books and records.

If your practice is not adequately prepared and every member of your business is not properly briefed in advance, then dealing with such a regulatory intervention will be all the more challenging and damaging for your business.



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¹⁰ Sections 780 - 783 of the Companies Act

¹¹ Section 787(13) of the Companies Act defines material information to include information which is relevant to the commission of a Companies Act offence or documents which were sought by way of a production order and not produced.

¹² Section 787(1) of the Companies Act

¹³ Section 788(2) - (5) of the Companies Act

¹⁴ Section 788(7) of the Companies Act

What to do when the ODCE arrives

IMMEDIATE STEPS	THE RAID	
<p> Check Investigators' ID/Statutory Authorisations</p> <ul style="list-style-type: none"> • ODCE must obtain a warrant to search your premises • Ensure the warrant correctly identifies your business, location and the authority • Ensure it is a District Court warrant - not a Production Order • Take a copy for your lawyers <p> Call your legal advisors and tell them:</p> <ul style="list-style-type: none"> • WHERE you are • WHICH body has arrived (the ODCE / other regulator) • WHO is the lead investigator • WHAT is being investigated 	<p> Co-operate</p> <ul style="list-style-type: none"> • Don't obstruct, conceal or destroy documents • Don't fail (unreasonably) to comply with a request • Failing to co-operate may be a criminal offence • Keep it confidential - by telling others, you risk committing a "tipping off offence" <p> Be vigilant</p> <ul style="list-style-type: none"> • Object to investigators seeing legally-privileged materials • Object to investigators seeing irrelevant materials • If there's a disagreement, don't obstruct - ask for materials to be put in a sealed envelope for resolution later 	<p> Answer questions</p> <ul style="list-style-type: none"> • Investigators can ask questions • Answer routine questions - if appropriate, state that you are answering under compulsion • Be truthful and stay on point • If you don't know the answer, say so • Clarify if necessary • Take notes of questions and your answers <p> Observe what is happening</p> <ul style="list-style-type: none"> • Observe every investigator • Record what they are seeking e.g. names/dates/key terms • Take notes of any materials reviewed, copied or taken

The future for the ODCE - signs of a movement towards a more active investigative force?

Despite possessing strong investigative powers, the ODCE has not been overly active in using its powers to compel the production of books and records or to engage in search and seizure. That may be because it may be a better use of resources for the ODCE to serve statutory directions to produce specified books or documents.

While the ODCE has, for many years, been made up of civil servants, law enforcement officers and professionals having a range of interdisciplinary expertise, some recent changes in the make-up of the ODCE's staff have suggested an intention to make greater use of its significant investigative capabilities.

In particular, in 2017, the ODCE hired a digital forensic specialist and a forensic accountant.¹⁵ Two enforcement lawyers were also added to the staff over the course of 2017 and 2018.¹⁶

According to figures from the ODCE's latest Annual Report, as of 2018 the ODCE's professional staff include three lawyers, seven forensic accountants, a Digital Forensic Specialist, seven members of An Garda Síochána (seconded from the Garda National Economic Crime Bureau), assisted by a number of civil servants of various grades. It is also understood that the ODCE is procuring software and hardware to enable it to put in place its own e-discovery capability.

Conclusion

The ODCE has significant investigative powers including the power to compel CPA Ireland members to produce books and

records of clients and/or to provide information within their knowledge or custody concerning their practice and/or their clients. The ODCE, and the Gardaí who are seconded to the ODCE, can also make use of extensive powers of search and seizure.

While it is not legally possible to obstruct an ODCE officer who is legitimately exercising these powers under the Companies Act, it is always sensible to contact your legal advisor, to ensure that those powers are being used correctly and that your constitutional and statutory rights, and those of your client are being respected.

To best prepare for an unexpected visit from the ODCE or any other regulator, practices should make sure to have a plan in place for dealing with such visits and ensure that each member of the practice is fully briefed on their role in the event of such a visit occurring.

¹⁵ ODCE, Annual Report 2017, (Dublin: ODCE, 2018), p.10

¹⁶ ODCE, Annual Report 2018, (Dublin: ODCE, 2019), p.10