COMPANY LAW REVIEW GROUP

REPORT ON A REVIEW OF DIRECTORS' COMPLIANCE STATEMENTS UNDER THE COMPANIES ACT 2014

DECEMBER 2023

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Chairperson's Letter to the Minister for Enterprise, Trade and Employment

Mr Simon Coveney T.D.,
Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2
D02 TD30

Mr Dara Calleary, T.D.
Minister of State for Trade Promotion, Digital and Company Regulation
23 Kildare Street
Dublin 2
D02 TD30

21 December 2023

Dear Ministers,

I am pleased to present to you a Report of the Company Law Review Group (**CLRG**) on Directors' Compliance Statements under the Companies Act 2014, being item 2 on the Review Group's Work Programme for 2022-2024.

I would like to extend my sincere thanks to the members of the CLRG's Corporate Governance Committee and in particular Committee Chairperson Salvador Nash for their engagement and input in examining these issues.

I would also like to thank the Department of Enterprise, Trade and Employment for their support, in particular, the Secretariat to the Review Group, Deirdre Morgan and Dan O'Neill.

Yours sincerely,

____

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction

1.1. The Company Law Review Group

The Company Law Review Group (**CLRG**) is an expert advisory body charged with advising the Minister for Enterprise, Trade and Employment (**the Minister**) on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two- year work programme which is determined by the Minister in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from Government Departments and Agencies including the Department of Enterprise, Trade and Employment (**the Department**) and the Revenue Commissioners. The Secretariat to the CLRG is provided by the Company Law Review Unit of the Department. Full lists of members of the Company Law Review Group and of the Corporate Governance Committee are set out in Section 2.

1.2. The Role of the CLRG

The CLRG is established to monitor, review and advise the Minister on matters pertaining to company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" as per section 959(2) of the Companies Act 2014.

1.3. Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4. Contact information

The CLRG maintains a website at www.clrg.org. In line with the requirements of the Regulation on Lobbying Act and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the CLRG and is happy to assist members of the public. Contact may be made either through the website or directly to:

Deirdre Morgan
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2
D02 PW01
Email: clrg@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1. Membership of the Company Law Review Group

The membership of the Company Law Review Group at the date of this Report is set out in this table.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Prof Deirdre Ahern	Ministerial Nominee (School of Law, Trinity College Dublin)
Alan Carey	The Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry LLP)
Dr Margaret Cullen	Institute of Directors in Ireland
Richard Curran	Ministerial Nominee (LK Shields LLP)
Emma Doherty	Ministerial Nominee (Matheson)
Ian Drennan	Corporate Enforcement Authority
Bernice Evoy	Banking and Payments Federation Ireland CLG
James Finn	The Courts Service
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Ministerial Nominee (DETE)
Neil Keenan	Law Society of Ireland (Beauchamps LLP)
Eamonn Kennedy	Irish Business and Employers' Confederation (IBEC)
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Prof Irene Lynch Fannon	Ministerial Nominee (Matheson)
Kathryn Maybury	Small Firms Association LTD (KomSec LTD)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Dr David McFadden	Ministerial Nominee (Companies Registration Office)
Salvador Nash	The Chartered Governance Institute (KPMG Law)
Fiona O'Dea	Ministerial Nominee (DETE)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Eadaoin Rock	Central Bank of Ireland

Niamh Ryan	Irish Funds Industry Association CLG (Dechert LLP)
Cathy Smith	Bar Council of Ireland
Doug Smith	Restructuring and Insolvency Ireland (Addleshaw Goddard (Ireland LLP)
Tracey Sullivan	Consultative Committee of Accountancy Bodies-Ireland (CCAB-I) (Grant Thornton Ireland)

2.2. Corporate Governance Committee

The membership of the Review Group's Corporate Governance Committee is set out in this table.

Salvador Nash	Chairperson
Deirdre Ahern	CLRG member
Barry Conway	CLRG member
Dr Margaret Cullen	CLRG Member
Richard Curran	CLRG member
Emma Doherty	CLRG member
Jane Dollard	DETE Nominee
Paul Egan SC	CLRG member
Michael Halpenny	CLRG member
David Hegarty	Corporate Enforcement Authority
Tanya Holly	CLRG member
Eamonn Kennedy	CLRG member
Dr David McFadden	CLRG member
John McGorry	Revenue
Kathryn Maybury	CLRG member
Susan Monaghan	IAASA
Gillian O'Shaughnessy	CLRG member
Niamh Ryan	CLRG member
Tracey Sullivan	CLRG Member

3. The Work Programme

3.1. Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The current work programme began in November 2022 and runs until mid-2024. The work programme is focused on continuing to refine and modernise Irish company law.

3.2. Company Law Review Group Work Programme 2022-2024

The Review Group's Work Programme during the currency of which this Report was prepared included the mandate to review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance." This Report is delivered in fulfilment of the Review Group's mandate under this heading.

3.3. Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

3.4. Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014, matters arising such as court judgements in relation to company law and developments at EU level. This Report is the product of work undertaken by the Corporate Governance Committee which is chaired by Mr Salvador Nash.

The Committee met three times (both in person and using video conferencing facilities) to consider these issues, as well as circulating draft text of its proposed conclusions several times between meetings.

4. Report on a review of Directors' Compliance Statements

4.1. Introduction

The Committee was asked to review the directors' compliance statements regime and how any improvements might be made in the interest of good corporate governance.

4.2. Defined terms

In this Report, the following defined terms and expressions are used:

1963 Act	Companies Act 1963
1990 Act	Companies Act 1990
2001 Act	Company Law Enforcement Act 2001
2003 Act	Companies (Auditing and Accounting) Act 2003
2014 Act	Companies Act 2014
CEA	Corporate Enforcement Authority
Committee	the Review Group's Corporate Governance Committee
Report	CLRG 2005 Report on Directors' Compliance Statement

In this Report, references to sections, Chapters, Parts and Schedules are to sections, Chapters and Parts of and Schedules to the 2014 Act unless otherwise stated.

4.3. Background to and scope of Directors' Compliance Statements

Pursuant to section 225 of the 2014 Act, directors of in-scope companies are required to complete a directors' compliance statement in which they acknowledge their responsibility for securing the company's compliance with relevant obligations listed in the Act and to set out their policies for securing such compliance.

The directors' compliance statement was first introduced by Section 45 of the 2003 Act, although the section was never commenced. Its introduction was set against the backdrop of the 1998 McDowell Working Group on Company Law Compliance and Enforcement which identified a "culture of non-compliance" in Irish Company law[1] and also the Review Group on Auditing's 2000 DIRT report[2], which recommended the introduction of the directors' compliance statement owing to its finding that non-compliance by Irish companies was more widespread than had been thought.

The objective of the directors' compliance statement was to foster a culture of compliance within Irish companies by ensuring appropriate procedures were in place and to emphasise to directors their responsibility in ensuring the company's compliance with its statutory obligations.

[1] *Parliamentary Inquiry into DIRT*, First Report by the Committee of Public Accounts (Stationery Office, Pn 7963, 1999)

[2] See *The Report of the Review Group on Auditing* (Stationery Office Pn 8683, 2000)

4.3.1. Section 45 Companies (Auditing and Accounting) Act, 2003

Under section 45 of the 2003 Act, directors of qualifying companies would have been required to prepare a compliance statement setting out the company's policies for ensuring compliance with its statutory obligations, its internal control procedures for securing compliance and the arrangements for implementing and reviewing the effectiveness of its policies. They would also have been required to include an annual compliance statement in their annual report to the shareholders in which they were to acknowledge that they were responsible for securing the company's compliance with its relevant obligations and confirm the necessary procedures were in place to ensure such compliance. If this was not done, they would be required to explain why not – "comply or explain".

Any failure to prepare a compliance statement under the Act was a criminal offence carrying up to a 12-month sentence on summary conviction or up to 5 years on indictment. Making a false statement was also an offence under the Act.

Section 45 was to apply to all public companies and to private limited companies with a turnover exceeding €15,236,853 and a balance sheet exceeding €7,618,428.

The relevant obligations under section 45 were to include any obligations under the Companies Acts, Tax Acts, and any other enactments that may materially affect the company's financial statements.

The Act also created a role for audit committees who would have been required to review the compliance statement and make a recommendation to the board prior to its approval. Auditors would have also been required to state in the auditor's report whether the assertions in the directors' compliance statement were fair and reasonable in their opinion and to report any deficiencies to the Director of Corporate Enforcement. It would also be a criminal offence under the Act if an auditor failed to comply with these obligations.

4.3.2. CLRG 2005 Report on Directors' Compliance Statements

Following opposition from the business community,[3] many of whom believed the requirement for a directors' compliance statement would create a significant burden for companies, the compliance statement was referred to the CLRG for consideration and to prepare a report.

Following a detailed review, in a special report published in 2005[4], a majority of the CLRG recommended against the commencement of section 45 of the 2003 Act, considering the benefits to be outweighed by the potential adverse effects which had been identified. The Irish Congress of Trade Unions (ICTU) the Office of the Director of Corporate Enforcement (ODCE, the precursor of the CEA), and the Revenue Commissioners each expressed reservations as to the majority recommendation, set out in Appendices A, B and C, respectively of the 2005 Report. The Report concluded that the commencement of this section would place a disproportionate and unnecessary burden on companies in return for what it considered to be 'intangible' benefits and considered it difficult to point to any 'particular mischief' that it would remedy.[5] It found that the additional procedures, policies, monitoring and ultimately expenditure that would be required of companies was excessive and could have a disproportionate effect on national competitiveness, reduce foreign direct investment and could lead to companies registering outside the state and the remit of the Irish authorities. It also considered that the burdens created by requiring the statement would have a greater impact on smaller companies.

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[3] Deirdre Ahern *Directors' Compliance Statements under the microscope,* Commercial Law Practitioner 2006, 13(5), 137-145

[4] *Company Law Review Group, Report on Directors' Compliance Statement (2005)*

[5] *Ibid* at Appendix 1

The Report also concluded that the objectives for the introduction of the directors' compliance statement had already been substantively met through the introduction of various other corporate governance initiatives, such as:

- The establishment of the Office of the Director of Corporate Enforcement, the Irish Financial Regulatory Authority and the Irish Auditing and Accounting Supervisory Authority
- Section 383(3) of the 1963 Act (inserted by section 100 of the 2001 Act), which stated that it was the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company
- Section 194(5) of the 1990 Act (inserted by section 74 of the 2001 Act), which required auditors to report the reasonable suspicion of indictable offences under the Companies Acts to the Director of Corporate Enforcement

The Review Group also thought section 45 represented a materially significant departure from international developments on corporate governance[6] in circumstances where no other common law jurisdiction had introduced a compliance statement regime of such reach. They noted that the prevailing global view was that corporate governance should be based on complying with a code of best practice principles rather than prescriptive legislation and indicated that a 'wait and see' approach would be preferable, especially given the fact that the European Commission had recognised the importance of global coherence and a light regulatory touch in corporate governance matters.[7] The Review Group further noted that listed companies in Ireland and the UK were already bound to the best practice code and that the directors' compliance statement regime would mark a considerable addition to this requirement.

The majority of the CLRG therefore favoured the repeal of section 45 entirely but were conscious of this being interpreted negatively as a win for 'business v regulators' as well as noting that it was the clear intention of the Oireachtas to put in place a form of directors' compliance statement requirement. Consequently, the Review Group opted to put forward an alternative proposal for consideration.

4.3.3. The CLRG Proposal

As a compromise, the CLRG drafted a revised proposal which sought to minimise the burden to businesses while achieving the same aims as the original section 45 of the 2003 Act. The CLRG's draft text was ultimately adopted, almost verbatim, as section 225 of the 2014 Act.

4.3.4. Section 225 Companies Act 2014

Directors' compliance statements were reintroduced under the 2014 Act in a more moderate form than had previously been provided for under the 2003 Act and were made a requirement for affected companies for the financial year ending in 2016.

In their statement, directors must still acknowledge their responsibility for securing compliance with the relevant obligations listed in the 2014 Act and must confirm that a compliance policy has been prepared which sets out the company's policies in relation to compliance with its obligations. If a policy had not been prepared, then the statement must explain why not. They must also confirm that, in their opinion, there are appropriate structures in place for securing material compliance and that they have undertaken a review of these structures within the financial year. These structures may include reliance

[6] *Ibid* at 94

[7] Ahern, *op. cit*, 137-145

on advice from external advisors or employees, but such persons must have the necessary experience to advise the company on compliance with the relevant obligation.

The 2014 Act, however, only requires directors' compliance statements from directors of larger scale companies than would have been the case under the 2003 Act. It applies to public limited companies (other than investment companies), limited companies, designated activity companies, and companies limited by guarantee with a balance sheet exceeding €12.5 million and a turnover of greater than €12.5 million, although the amounts may be altered by the Minister. It does not apply to unlimited companies.

The number of relevant obligations which must be covered by the compliance statement have also been reduced under the 2014 Act which now requires a statement of compliance with only the more serious obligations of which a breach would constitute a category 1 or 2 offence, tax obligations, and serious market abuse and prospectus and transparency offences.

4.4. Corporate Governance Reporting: Overview of other Jurisdictions

Comparative research was undertaken to ascertain how other common law jurisdictions and European countries addressed corporate governance. The full text of the memorandum can be found at Appendix 3.

The research considered a number of jurisdictions including the United Kingdom, Australia, Belgium, Singapore and investigated whether a comparator for the directors' compliance statement could be located. Corporate governance in other jurisdictions comprises a set of principles, usually legislation akin to the 2014 Act or in the form of a code. Generally, in-scope companies were large listed companies. Most jurisdictions had a similar "comply or explain" provision in their respective codes.

The research also addressed the position generally within the European Union in relation to corporate governance and the Corporate Sustainability Reporting Directive (CSRD)[8].

The conclusion reached was that there are no comparable provisions to section 225 of the 2014 Act. While other jurisdictions are of relevance and bear some similarity, the obligation imposed on directors, in for example Singapore and the United Kingdom, is not as onerous as the obligation imposed in this jurisdiction. Furthermore, in countries which have an applicable code (and which applies to listed companies), most contain the "comply or explain" provision similar to section 225.

4.5. CLRG Survey to assess views and experience of directors and practitioners

The Committee elected to conduct a survey on the effectiveness and usability of the directors' compliance statement to ascertain the views of those who interact with it. Two surveys were created, similar in nature, with one designed for practitioners and the second for directors. The directors' survey was included in the Institute of Directors' monthly ezine which issued to in excess of 3000 directors and 1700 stakeholders (which has an open rate of over 45%). In addition, both surveys were disseminated by members of the Committee and the CLRG to relevant contacts and were publicised on the websites of the Department and the Corporate Enforcement Authority and their respective social media platforms. The surveys were live for a period of 3 weeks from 7 February until 28 February 2023.

[8] Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards corporate sustainability reporting (the 'Corporate Sustainability Reporting Directive' or 'CSRD') L 322/15.

The surveys sought feedback from the participants on the following general areas: the value, relevancy and their overall impression of the directors' compliance statement as currently provided for; the perceived benefits and challenges; whether the directors' compliance statement is achieving its objectives; process and costs; the impact on a company's competitiveness; the scope, content and degree of prescription; verification; consequences of non-compliance; and suggestions for improvement.

4.5.1. Survey results

The response rate was disappointing for both surveys, with only 31 responses received for each survey. Although it is difficult to determine the number of companies in scope of the directors' compliance statements, limited research indicates that there is anywhere between 1,000 and 3,000 companies in scope of the directors' compliance statements. If one assumes that each had 2 directors, and each is likely to have more due to their size, the number of directors affected is in the region of 2,000 to 6,000. Consequently, the results cannot be regarded as being representative of the views of either directors or practitioners. The results and comments were therefore viewed by the Committee as providing a small sample of diverse opinions on the directors' compliance statement. From those responses received, the results varied significantly between both surveys and within each survey.

Overall, the results suggest the practitioners support the directors' compliance statement while there appears to be a lack of understanding on the part of the directors. 52% of practitioners and 45% of directors agreed that the directors' compliance statement should continue to apply to all companies to which it currently applies. Of all participants, 48% voted for the option to retain the DCS as it currently applies, which means 52% voted to reduce the scope in some way. A summary of the findings of the surveys is set out in a working paper at Appendix 4, but as referenced above, it is important to emphasise that given the very small number of responses received, the responses cannot be taken to be representative of the views of in-scope companies.

4.6. Committee Analysis

Noting that the findings of the surveys could not be used to reliably determine the views of directors or practitioners on the directors' compliance statement, the Committee considered several other factors in its review.

There have been no complaints or submissions received by the CLRG, the Department or the CEA concerning the directors' compliance statement. The request for the CLRG to review the directors' compliance statement was a general request in the interests of good corporate governance. The Committee considered that if there was a substantial issue with the directors' compliance statement, more practitioners and directors would have completed the survey. There appears to be no evidence to indicate that the directors' compliance statement, as is currently set out in section 225 of the 2014 Act, is causing concern.

The Committee considered that the low response rate could be interpreted as a general acceptance of the requirements of the directors' compliance statement. If this is the case, it would support the conclusion that there is no widespread issue with the directors' compliance statement.

Additionally, given the request to the various bodies to partake in the survey and ultimately only 62 people responding to the survey, it is reasonable to deduce that there is no evidence of any concern with the directors' compliance statement. In that regard, given its requirements and offences, if there was any issue and or if improvements could be made in the interests of good corporate governance, feedback could have been provided from:

- **Auditors:** relaying their experiences of directors' compliance statement not being made, procedures and policies not being in place and/or less than ideal explanations for not completing the directors' compliance statement

- **Directors:** commenting on additional costs to comply and or the obligations imposed on directors

- **CEA and its predecessor:** receiving complaints regarding the directors' compliance statement

The Committee noted that none of the foregoing bodies have expressed any concerns with the directors' compliance statement (although the CEA did suggest that consideration could perhaps be given to revisiting the role of the auditor from an assurance perspective) nor have the auditors or directors suggested any improvements to it. Indeed, no complaints have ever been received by the CEA or its predecessor in relation to the director's compliance statement.

Whether or not there is a public benefit to the directors' compliance statement was discussed by the Committee, with a number of members expressing their doubt over the value added as it is currently formulated. The Committee considered that a broad and imposing directors' compliance statement was originally proposed by the legislator in section 45 of the 2003 Act which received opposition from the business community. The 2005 Report recommended a version of the directors' compliance statement to assuage public concern at the time (and which was ultimately adopted in the 2014 Act). The rationale at that time for what is now the directors' compliance statement remains valid today.

4.6.1. Other Factors

The Committee gave consideration to the reporting requirements for in-scope companies in three different circumstances. First, in scope companies for the directors' compliance statement. Second, in scope companies for the CSRD and third, the companies in scope for the purposes of establishing an audit committee pursuant to section 167 of the 2014 Act. The thresholds of each are set out below:

In-scope companies for the **directors' compliance statement** are companies that have both:

- Balance Sheet Total – greater than €12.5 million; and
- Turnover – greater than €25 million

In-scope companies for the **CSRD** are companies with two or more of the following:

- Balance Sheet Total – greater than €20 million
- Turnover – greater than €40 million
- More than 250 employees

In-scope companies for establishing **an audit committee** are companies that have both:

- Balance Sheet Total – greater than €25,000,000; and
- Turnover – greater than €50,000,000

Other matters the Committee took account of during the course of deliberations were:

- Whether or not the directors' compliance statement imposed an unjustified burden on in-scope companies

- Whether there was a need to educate directors and practitioners about the directors' compliance statement

- Verification of the directors' compliance statement

- When the directors' compliance statement was first introduced there was a flurry of activity, but the Committee considered whether the directors' compliance statement has now become "boilerplate"

- The Committee took account of the "comply or explain" provision in section 225 of the 2014 Act

Additionally, it should be noted that both the CLRG recommendation in the Report and section 225 of the 2014 Act as enacted focus primarily on a director acknowledging his or her responsibility for securing the company's compliance with its relevant obligations and either confirming that certain measures have been complied with or explaining why they have not.

Understanding the foregoing is critical to comprehending the legal obligations imposed on directors pursuant to the directors' compliance statement. The introduction of the original directors' compliance statement was in the context of the 1998 McDowell Working Group on Company Law Compliance and Enforcement and a culture at that time of noncompliance. Its objective to foster a culture of compliance within Irish companies was identified in the Report as having been substantially met, resulting in the alternative and less onerous directors' compliance statement as enacted in section 225 of the 2014 Act. The foregoing and the overriding duty of directors under section 223(1) of the 2014 Act to ensure compliance with the Companies Act may provide some explanation as to why legislature enacted section 225 of the 2014 Act and designated non-compliance with section 225 of the 2014 Act as a category 3 offence.

The Committee concluded that, overall, the director's compliance statement appeared to fulfil the intention of the Oireachtas. The ICTU member suggested expanding the obligations to include both environmental law obligations as well as duties to employees. However, the prevailing view was that the CSRD will impose sufficient reporting obligations on companies in the area of environmental law, to include the involvement of auditors. It was noted by the Committee Chair that duties to employees already exist in legislation, and it would not be appropriate to single out this fiduciary duty for inclusion over all others. It was also noted that a similar proposal in 2017 did not find support[9]. The low response to the survey, the lack of any suggestions for improvements or amendments, the absence of any complaints in respect of the directors' compliance statement and no evidence being presented to the Committee that the directors' compliance statement should be enhanced in any way in the interests of corporate governance supported the Committee's conclusion that the directors' compliance statement was operating for its intended purpose.

However, the Committee proposed that consideration should be given to reviewing the thresholds for in-scope companies for the directors' compliance statement in the context of the thresholds applicable for in-scope companies for establishing an audit committee and the in-scope companies for the CSRD. The Committee believed that this would streamline the reporting requirements of companies in scope and be in the interest of good corporate governance. The Committee also considered that a proportionate, standardised approach would reduce the burden on companies, particularly small companies, and would provide greater consistency to businesses generally in relation to their statutory obligations.

[9] Company Law Review Group Report on the Protection of Employees and Unsecured Creditors, page 33.

4.7. Recommendation

The Committee's brief was to review the directors' compliance statement with a view to making recommendations for improvements in the interests of good corporate governance. Research was undertaken on equivalent obligations in other jurisdictions, a survey was conducted of stakeholders', views obtained from members of the Committee, and feedback and input provided by the CEA.

While some themes emerged from the surveys, no reliance can be placed on the results due to the small number of responses. Other than some members of the Committee querying the directors' compliance statement as it is currently formulated and suggesting potential sources of assurance, no member of the committee, director or auditor profession identified any area of concern or areas to improve or enhance the directors' compliance statement.

The Review Group therefore concludes that the directors' compliance statement is achieving the desired objective of the Oireachtas as enacted in section 225 of the Act 2014 and was provided with no evidence to warrant a recommendation for any substantive change.

clrg™

COMPANY LAW REVIEW GROUP

an grúpa athbhreithnithe dlí cuideachtaí

Report on Directors' Compliance Statement

2005

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clrg members and secretariat

Chair:

Dr. Thomas B. Courtney	Solicitor, Head of Legal and Compliance – Personal Lending, Bank of Ireland Group

Members:

Paul Appleby	Director of Corporate Enforcement
Marie Daly	IBEC
Conall O'Halloran	Consultative Committee of Accountancy Bodies – Ireland
Paul Egan	The Law Society of Ireland
Paul Farrell	Registrar of Companies
Michael Halpenny	ICTU
Muriel Hinch	Revenue Commissioners
William Johnston	Arthur Cox
Ian Drennan	Irish Auditing and Accounting Supervisory Authority
Deirdre Somers	Irish Stock Exchange
Mary Burke	Financial Regulator
Jonathan Buttimore	Office of the Attorney General
Ralph McDarby	Institute of Directors
Vincent Madigan	Department of Enterprise, Trade and Employment
Tanya Holly	Department of Enterprise, Trade and Employment
Maire O'Connor	McCann Fitzgerald
Lyndon MacCann	The Bar Council
Jon Rock	Institute of Chartered Secretaries and Administrators
Nora Rice	Companies Registration Office
Enda Twomey	Irish Bankers' Federation
Noel Rubotham	Courts Service

Alternate Members:

Brian Binchy
Kevin O'Connell
Adrian Brennan
Eamonn McHale
John Olden
Marie Hurley
Aidan Lambe
Ambrose Loughlin
Donncha Connolly
Des Fullam
Geraldine MacWeeney

Secretary to the Review Group:

Pat Nolan

Secretariat:

Conor Verdon
Brooke O'Rourke
Eileen Bolger
Pamela Rickard

Dear Minister,

I am pleased to attach the Report of the Company Law Review Group (CLRG) on the Directors' Compliance Statement contained in Section 45 of the Companies (Auditing and Accounting) Act, 2003 (45/2003) as requested by you pursuant to Section 68(1)(h) of the Company Law Enforcement Act, 2001.

The rationale for a Directors' Compliance Statement (DCS) is to encourage companies to be compliant, by fostering a culture of compliance. 45/2003 does not impose any new primary obligations on companies; rather it is a compliance-verification measure, intended to encourage companies to demonstrate their commitment to obeying the laws to which they are already subject. Its benefits are therefore intangible and it is difficult to point to any particular mischief that its introduction will remedy. As our Report shows, the direct and indirect costs of 45/2003 are, however, manifest and readily identifiable in nature if not completely in scale. The existence of these direct and indirect set-up and ongoing cost is accepted by almost all members of the CLRG.

A clear majority of the CLRG considered that it was simply not feasible to commence 45/2003 because of the additional unnecessary costs it causes for companies and the negative and disproportionate effect on national competitiveness and the likelihood of dysfunctional behaviour that would see companies registering outside of Ireland and so unaccountable to the Irish authorities.

I believe that this conclusion is supported by our Screening Regulatory Impact Analysis (RIA) which follows the template provided by the recently published *Report on the Introduction of Regulatory Impact Analysis* (July 2005). This template provided a very useful framework for analysis of 45/2003 and was used as a stepping stone for a further risk analysis of commencement of 45/2003.

Whilst not all members agree with the analysis or the conclusions to be drawn, a substantial majority of 16 out of 19 voting members consider that the risks of commencing 45/2003, as enacted, greatly out-weigh the risks of either repealing 45/2003 or introducing a modified version of a DCS. In my opinion, the risks of commencing 45/2003 are, quite simply, unacceptable.

A majority of members (11 out of 19 voting members) support the repeal of 45/2003 in circumstances where it should not be replaced. Most take comfort from the many recent changes to Irish compliance and enforcement law and think it appropriate to await international, and especially European Union, developments before enacting a uniquely prescriptive and stringent Irish compliance verification regime. Accordingly, the first recommendation by majority is that 45/2003 should be repealed and not replaced.

The CLRG was, however, mindful of the background to the introduction of the DCS and of the ensuing desire on the part of Government to encourage compliance by companies. Also, the recommendation for repeal without replacement could be interpreted as a 'business versus regulators" polarisation of views which would unfairly reflect the very real engagement with the issue and ignore the suspension of sectional interest which informed our deliberations. It was therefore decided that you should be given the alternative option of a compromise DCS which supports the policy behind having such a statement but which eschews the costs and adverse consequences of 45/2003 as enacted.

I am pleased to report that a compromise proposal, known as *Section X*, is supported by 16 of the 19 voting members, three members expressing the reservations which are included in the appendices to this Report. Each of the proposed features of *Section X* has been carefully weighted and considered so as to strike the optimum balance. I believe that *Section X* is a proportionate measure that will secure most, if not all, of the policy objectives that underpinned 45/2003 but which will avoid excessive and costly over-regulation. It is, I believe, significant that the substantial majority that support this proposal is comprised of both business interests and regulators.

Letter to the Minister

I would like to acknowledge the willingness to compromise and reasonableness that informed the substantial majority who support *Section X*. All members who were satisfied that 45/2003 was excessive and disproportionate but who still supported a form of DCS gave their support to *Section X*. The greatest shift came from those who were and remain totally opposed in principle to any form of DCS and who believe that the Screening RIA justifies the repeal, without replacement, of 45/2003. In working with me and supporting my compromise proposal in *Section X*, all of these members, in my opinion, displayed altruism and considered the national interest as opposed to solely seeking to further their own legitimate sectional interests.

I regret that three members were unable to support the compromise in *Section X* for the reasons set out in their reservations. The honesty and integrity of their positions and of their reasons for not supporting the compromise are unquestionable and I acknowledge their engagement with me in the search for compromise.

I do believe, however, that the compromise contained in *Section X* represents the only viable option for any form of DCS at this time in Ireland. The enactment of *Section X* will, I believe, allow for resolution of this thorny issue with which the political, administrative and business communities have now been grappling for five years.

The CLRG's second recommendation is, therefore, that if a decision is taken not to implement the first recommendation (to repeal and not replace 45/2003) and a decision is taken to have a DCS, the model in *Section X* is commended to you by the CLRG.

Finally, I would like to acknowledge the tremendous commitment of the Secretariat, headed up by Mr Pat Nolan, to working with all members of the CLRG in seeking compromise which went above and beyond normal service and, in particular, for their unfailing support to me as Chairman.

Yours sincerely,

Dr Thomas B Courtney
Chairman

1. On 21st April 2005, the Minister for Commerce and Trade, Mr Michael Ahern TD referred the issue of the Directors' Compliance Statement (DCS) required by Section 45 of the Companies (Auditing and Accounting) Act, 2003 **(45/2003)** to the Company Law Review Group (the **Review Group**) pursuant to Section 68(1)(h) of the Company Law Enforcement Act, 2001.

2. The Review Group was asked for its views on the proportionality, efficacy and appropriateness of the DCS as set out in 45/2003, having regard to the following factors:

* Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.[1]
* The scope of application and the requirements of the Director's Compliance Statement;
* Potential costs issues;
* Potential competitiveness issues; and
* Potential implementation issues.

The Review Group was requested to produce a report consistent with the goal of 'Making markets and regulation work better' and to conduct its analysis and structure its report consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis (RIA).

The Review Group has worked intensively over a three month period moving through the stages of initial exchange of views, risk analysis, regulatory impact analysis, impact assessment, conclusions and recommendations. In carrying out its examination of the DCS the plenary (full membership) of the CLRG met on 4 occasions to discuss the business of the review and progress its findings. The review was also progressed by the Review Group's Steering Committee (consisting of the Chairman and five other members) meeting a further 7 times on this matter to develop action points and prepare drafts for the consideration of the plenary.

3. The Review Group considered:

* the objectives of the DCS, in particular having regard to recent corporate governance initiatives with effect in Ireland, (Chapter 2);
* the application of 45/2003 and the guidance provided by the Office of the Director of Corporate Enforcement (ODCE) on the form of DCS envisaged by 45/2003, (Chapter 3);
* the scope, content, degree of prescription, verification and timing of the DCS as envisaged by 45/2003, (Chapter 4);
* the cost benefit impact of 45/2003. In this regard the Review Group received assistance from Goodbody Economic Consultants which independently evaluated the additional costs arising from the commencement of 45/2003 and the Review Group also availed of material on national competitiveness provided by the Industrial Development Authority (IDA) (Chapter 5);
* the public submissions received on foot of the Review Group's notice on its website, www.clrg.org, and placed in The Irish Times and Foinse which sought submissions before 28th June 2005 and the written submissions received from its own members' organisations or representative bodies, (Chapter 6);
* the approaches that have been taken to corporate governance in competitor-jurisdictions with particular regard to the European Union (EU), the United Kingdom, the United States, Australia, New Zealand, Singapore and Hong Kong. (Chapter 7);
* the options open to the Review Group to consider recommending in any reform of 45/2003, setting out the arguments both "for" and "against" each option canvassed. (Chapter 8).

The Review Group considered its analysis and findings regarding 45/2003 consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis and revisited this model to carry out a Screening Regulatory Impact Analysis (RIA) consistent with the template set out in the Report on the Introduction of Regulatory Impact Analysis (Department of the Taoiseach, July 2005).

1 Principles of Corporate Governance, Principle VI.D.7, OECD, Paris 2004.

4. The Review Group found evidence that attainment of the policy objective that underpinned the DCS in 45/2003 was supported and furthered by the following policy initiatives that had been enacted or otherwise developed since the original policy for a DCS was formulated:

* Making directors responsible for compliance with company law - section 100/2001 which amended 383/1963;
* Establishing Corporate Regulators and enhancing the power of sectoral regulators - the establishment of the ODCE and the Irish Auditing and Accounting Supervisory Authority (IAASA) was noted as were the establishment of the Irish Financial Services Regulatory Authority ("the Financial Regulator") and the bolstering of powers of the Competition Authority, the Health & Safety Authority and the Data Protection Commission;
* Requiring that auditors should report indictable offences to a Regulator and thefts to the Garda Síochána - section 74(e)/2001 which amended 195(5)/1990, and section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001;
* Strengthening the powers of the Revenue Commissioners - a significant range of new powers and additions to then existing powers are noted in the Report;
* Modelling best practice on EU and international developments;

It was also noted that an alternative option to 45/2003 would be to introduce a less prescriptive DCS. The Review Group found that the purpose behind 45/2003 can be achieved in a number of ways substantially different to the presently drafted DCS. At the time of recommending a DCS, in July 2000, some of the initiatives set out above would not even have been considered as being viable stand-alone alternatives for achieving the objectives in 45/2003 because of the significant costs associated with, for example, the establishment of the ODCE, for that purpose alone. It is reasonable to conclude that the set of initiatives in the first four bullet points above provide a substantive alternative approach to 45/2003. It is, of course, significant that all four initiatives have been implemented and that, in consequence, the policy objective for 45/2003 has been greatly advanced, if not entirely achieved, without its implementation. Given the costs associated with the implementation of 45/2003, it is considered that 45/2003 as currently framed now represents a disproportionate response to achieving the identified objectives. There is little that can be said in favour of commencing it in its present form.

The Review Group recognized, however, that there remains some merit in the concept of a compliance statement which involves directors acknowledging their responsibilities, having a compliance policy statement if appropriate and having appropriate arrangements in place for securing compliance, *provided that any such DCS does not add additional cost to companies, operate as a likely disincentive to Foreign Direct Investment (FDI) or reduce the competitiveness, including profitability, of Irish business.*

5. The Review Group worked with Goodbody Economic Consultants in seeking to obtain an indicative estimation of the costs involved in compliance with 45/2003. Twelve legal and accountancy firms were surveyed and were asked, on the basis of services already provided by them to their clients, to assess the costs of the new compliance regime as set out in Section 45. Eight firms furnished replies. The firms were asked to identify costs arising from compliance with: Company law; Tax law; and other material enactments. It was also recognised that there would be initial or set up costs in establishing systems as well as ongoing costs in operating such systems, and a breakdown along these lines was also obtained. Other data made available to Goodbody Economic Consultants, and on which they also drew, was a set of anonymised costs (some real, some estimated) provided by fifteen member companies of Irish Business and Employers Confederation (IBEC) of varying sizes and types of activity.

The Review Group found from its consideration of estimated impacts that:

* Compliance with 45/2003 would give rise to additional costs over and above existing expenditure on compliance issues. This was because 45/2003 was seen to require additional certification procedures, documentation of policies, and extensive and formal ongoing monitoring;

* The cost estimates exhibited a number of consistent features: Initial or set-up costs were some two to three times that of ongoing costs; External legal cost were identified as the largest cost element, with other third party costs being generally lowest; Costs generally increased with company size; and large companies in the financial sector indicated very high levels of cost in excess of €12m for set-up and €7m for ongoing costs;
* The minimum set-up costs and ongoing costs identified from the data supplied are €90,000 and €40,000 respectively. These estimates could be regarded as applying to smaller companies in less regulated sectors. The maximum set-up and ongoing costs are €1,000,000 and €600,000. These estimates would be relevant to large companies in regulated sectors.
* A consultancy study undertaken for the Department of Enterprise, Trade and Employment (DETE) in 2002 identified 2,490 companies to which Section 45 will apply. This includes 738 Section 17 companies that have a group structure, so that the above figure may be an underestimate. Taking the minimum cost estimates provided above, the 2,490 companies would incur €224m in set-up costs and just €100m in ongoing costs. However, a more realistic estimate would take account of the higher costs incurred by larger companies.
* A sensitivity analysis showed that a minimum estimate of aggregate cost to industry is €377m set-up and €202m ongoing costs. Depending on assumptions made regarding the number of affected companies, this could rise to €692m for set-up and to €343m for ongoing costs.
* The Review Group acknowledges that it has proven to be impossible to secure unanimous agreement on the extent of the additional costs that arise to companies by reason of 45/2003. This difficulty is due in a large measure to the fact that the wording of 45/2003 is open to different interpretations: a liberal, less prescriptive interpretation and a more conservative, more prescriptive and more costly interpretation. Ironically, it is the case that the more conscientious the company concerned, the more conservative the interpretation and the more costs that will arise in verifying compliant companies' compliance regimes.

6. The Review Group also identified and considered the following expected benefits and where they would fall from the enactment of 45/2003:

* An international recognition of positive action on the part of Ireland to promote good corporate governance and encourage compliance with relevant legislation would increase the probity of Irish companies;
* Lower enterprise risk for Irish companies on financial, reputational and other grounds in consequence of a reduced likelihood of legal or other external scrutiny;
* The shareholders, employees, investors and lenders to companies that are required to have a DCS will benefit to the extent that a DCS will provide a degree of assurance that the company in which they have an interest is being managed and its business conducted to a high standard of corporate governance;
* The DCS facilitates orderly succession in the compliance function of companies.
* The existence of a regime that requires certain companies to opine in a public and transparent manner on their compliance policies and regimes will be of considerable benefit to those charged with securing compliance with "relevant obligations" e.g. ODCE, Revenue Commissioners, the Companies Registration Office (CRO), IAASA.

The Review Group considered that the benefits identified are sufficiently tangible to be stated in a meaningful way but considered it to be significant that almost all of the benefits as identified could still be achieved through the adoption of a model of a DCS that is not entrammeled by the negative side-effects of the very prescriptive DCS required by 45/2003.

7. The Review Group also considered the impact on national competitiveness of 45/2003. It recognised the importance of Ireland being viewed internationally as a business friendly location and one where investors would be happy to establish deep roots. Moreover, the Review Group recognised that additional cost arising for indigenous companies that does not add appreciably to their probity or profitability could create unanticipated behaviour and result in an adverse outcome to a policy objective designed to promote compliance. This could result in companies moving from Ireland as their place of incorporation or choosing to incorporate elsewhere *ab initio*. The importance of the existence of an attractive and vibrant Irish Stock Exchange (ISE) is also considered paramount and the negative effects of a DCS must be weighted carefully against the benefits arising.

The Review Group identified and considered the following effects on national competitiveness:

* The DCS contained in 45/2003 will undoubtedly lead to an increased cost base for Irish companies in scope - Public Limited Companies (PLCs) whether listed or unlisted and large private companies which meet the monetary requirements for application of the provision. The cost of the DCS to the financial services sector is likely to be especially high (several millions for the large banks);
* 45/2003 will give rise to an increased cost base for companies that will reduce the money that is available for distribution to all stakeholders, be they shareholders or employees and such costs might have to be passed on to consumers;
* Indigenous companies might re-locate to another jurisdiction to avail of what would be a less onerous compliance verification regime;
* In the context of promoting FDI, it is the relative extent and costs of Ireland's compliance requirements that matter most. This is because multinational companies are continuously comparing locations in terms of their cost-quality proposition. Concerns that the directors' compliance statement will impact negatively on the competitiveness of Irish business vis à vis peers in other EU and third country jurisdictions were raised in a significant proportion of the submissions made to the Review Group;
* Serious concerns were raised by the ISE on the possible negative impact of a DCS on the ISE's international reputation and, indeed, viability;

The Review Group accepts that there are serious concerns that the DCS as constituted in 45/2003 will adversely impact on national competitiveness. Empirical data on the negative effects of the DCS will only be readily available *post factum*, at which time the damage would have been done. The Review Group accordingly considers that in moving forward with recommendations, the only realistic method of taking an objective position is by risk analysis.

8. In accordance with the template for a Screening RIA the Review Group also considered the impact of 45/2003 on socially excluded or vulnerable people, the environment, the extent to which it represented a significant policy change in an economic market and the extent to which it impinges disproportionately on the rights of citizens and third parties.

9. The Review Group concluded that it is not feasible to pursue the option of implementing the 45/2003 because of the additional costs it gives rise to and the negative and disproportionate effect on national competitiveness and possible encouragement of dysfunctional behaviour. Whilst a Screening RIA does not support the commencement of 45/2003 as enacted the Review Group considers that there still is some merit in the concept of a compliance statement which involves directors acknowledging their responsibilities, having a compliance policy statement, if appropriate, and having appropriate arrangements in place for securing compliance, provided that any such DCS does not add additional cost to companies, operate as a likely disincentive to FDI or reduce the competitiveness, including profitability, of Irish business.

10. The Review Group conducted a risk analysis of commencing 45/2003 as enacted and concluded by a majority decision of 16 out of 19 voting members (with three abstentions) that the risks associated with not repealing or modifying 45/2003 greatly outweighed in terms of seriousness the risks associated with not commencing 45/2003 for the following reasons:

* The existing company law compliance regime that is currently in force will not be reduced or lessened: companies and their directors will still have the same legal obligations to ensure compliance with legislative enactments;

* There is a clear and imminent risk that the commencement of 45/2003 will result in a substantial cost to those Irish companies within the scope of the DCS;
* There is a clear and imminent risk that investment in the Irish economy through Irish registered companies will be curtailed;
* There is a clear and imminent risk that companies that are currently the subject of Irish regulation could migrate to other EU or non-EU countries;
* Following on from the previous reason, there is a clear and imminent risk that fewer companies will be answerable to the Irish agencies of enforcement, registration and supervision;
* With the exception of additional embedding of a culture of compliance, there is no other material tangible benefit arising from the commencement of 45/2003;
* There is no evidence to suggest that a stance by Ireland on corporate compliance that is so far-reaching and above the recognised standards applying at EU and international level will be accepted by the international community and it is likely that such would operate to encourage foreign companies to incorporate in an alternative jurisdiction; and
* The Screening RIA in Chapter 9 supports the foregoing conclusions.

11. The Review Group recommends by a majority decision of 11 out of 19 voting members, (with three abstentions) that having regard to its analysis of the issues identified and considered in Chapters 1-7, the arguments for and against the options set out in Chapter 8 and the Screening RIA set out in Chapter 9, Section 45 should be repealed and should not be replaced with any alternative DCS.

12. The Review Group also considered the option of mitigating the adverse effects, whether direct or consequential, of the current requirements in Section 45. Although by a majority decision the Review Group recommends that 45/2003 should be repealed and not replaced pending any EU initiative on compliance verification by directors of companies, if the decision is taken not to accept that recommendation, the Review Group believes that it must recommend a revised form of DCS. The Review Group's thinking is also influenced by the fact that the Oireachtas enacted, just two years ago, 45/2003 and whilst the Review Group does not believe that the legislature intended such a costly and burdensome DCS, the clear intention of the Oireachtas was to put in place a form of DCS.

13. The Review Group believes that if a political decision is taken to enact a replacement form of DCS, the resulting form of DCS should be confined to an obligation on the directors of companies within the scope of the DCS to acknowledge their responsibilities, to have a compliance policy statement, if appropriate and, having appropriate arrangements in place for securing compliance, if appropriate, subject to a 'comply or explain' approach provided that such does not add unnecessary additional cost to companies, operate as a likely disincentive to FDI or reduce the competitiveness, including profitability, of Irish business.

14. The Review Group considered that the following aspects of 45/2003 were in whole or in part contributory to the adverse effects of the DCS:

* The scope of the DCS i.e. the number of companies to which 45/2003 is applicable;
* The extensive definition of "relevant obligations";
* The absence of a sufficiently prominent materiality requirement;
* The prescriptive requirements for a Compliance Policy Statement and an Annual Statement in companies' Directors' Reports;
* The involvement of companies' auditors; and
* The immediacy of the implementation of any form of a DCS.

15. The Review Group recommends by a majority decision of 16 out of 19 voting members[2] (with three abstentions)[3] that if Ireland is to have a DCS, it should be with the modifications as set out below, for the reasons stated, and as provided for in the redrafted *Section X*, at the end of this Chapter. The Review Group believes that this modified version of a DCS will continue to promote and encourage corporate compliance and achieve much of the purpose and intention underpinning 45/2003, without the adverse effects identified in this Report.

2. ODCE, ICTU and the Revenue Commissioners voted against this recommendation. The reservations of these three members are reproduced in the appendices to this Report. Both Revenue Commissioners and ICTU support the ODCE's proposal in its reservation.
3. The Courts Service, the Office of the Attorney General and IAASA.

16. The model for a revised DCS, supported by 16 of the 19 voting members of the Review Group is as follows:

* The types of company within the scope of the DCS should remain as is, with the qualification that the two monetary requirements for the test for the inclusion of large private companies should be increased in line with the Review Group's recommended limits for a company to be a large private company for accounting purposes i.e. a balance sheet of over €12,500,000 and a turnover of €25,000,000. In addition, the provision should be made expressly conjunctive so that for a large private company to be "in scope" it must satisfy both monetary requirements.

* The definition of "relevant obligations" should be amended by the removal of the "third limb" and by introducing a degree of materiality by defining company law obligations as those relating to indictable offences.

* The removal of the prescription surrounding companies' "Compliance Policy Statements" and the mitigation of the representations that must be made in the Annual Statement on Compliance in Directors' Reports and the requirement that appropriate averments by directors are expressed to be made in the "directors' opinion", coupled with a materiality requirement, and all on a comply or explain basis.

* The removal of the requirement that a company's auditors must specifically opine on the reasonableness or otherwise of the proposed revised Annual Statement on Compliance in Directors' Reports.

* The non-commencement of 45/2003 and the enactment of the Review Group's proposed alternative Annual Statement on Compliance as part of the Companies Bill, 2006, the heads of which the Review Group is in the process of finalising for submission to the Minister.

17. For the avoidance of any doubt as to the interpretation of the Review Group's majority recommendation, the Review Group has drafted Section X which reflects its recommendations and which the majority commends to the Minister as the only form that any new DCS provision should take.

Section X

(1) In this section -

'amount of turnover' and 'balance sheet total' have the same meanings as in section 8 of Companies (Amendment) Act 1986;

'relevant obligations', in relation to a company, means the company's obligations under-
(a) the Companies Acts, where the failure to comply with any such obligation is an indictable offence under the Companies Acts, and
(b) tax law,

'tax law' means-
(a) the Customs Acts,
(b) the statutes relating to the duties of excise and to the management of those duties,
(c) the Tax Acts,
(d) the Capital Gains Tax Acts,
(e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,
(f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,
(g) the statutes relating to stamp duty and to the management of that duty, and
(h) any instruments made under an enactment referred to in any of paragraphs(a) to (g) or made under any other enactment and relating to tax.

(2) This section applies to -
(a) a public limited company (whether listed or unlisted), and
(b) a private company limited by shares, but it does not apply to a company referred to in paragraph (a) or (b) that is of a class exempted under section 48(1)(j) of the Act of 2003 from this section or to a company referred to in paragraph (b) while that company qualifies for an exemption under subsection (6).

(3) The directors of a company to which this section applies shall also include in their report under [section 158 of the Principal Act] a statement-
(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations, and
(b) confirming that the company has in place a compliance policy statement that is, in the opinion of the directors, appropriate for the company; and, if this is not the case, specifying the reasons, and
(c) confirming that the company has in place, appropriate arrangements or structures that are, in the opinion of the directors, designed to secure material compliance with its relevant obligations, which arrangements or structures may (at the discretion of the directors) include the company's reliance upon internal and or external advisors who appear to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations; and, if this is not the case, specifying the reasons, and
(d) confirming that the company's arrangements or structures referred to in paragraph (c), have been reviewed during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

(4) For the purposes of this section, a company's arrangements or structures are considered to be designed to secure material compliance with its relevant obligations if they provide a reasonable assurance of compliance in all material respects with those obligations.

(5) Where the directors of a company to which this section applies fail to comply with subsection (3), each director to whom the failure is attributable is guilty of an offence.

(6) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if, either-
(a) its balance sheet total for the year does not exceed-
(i) €12,500,000, or
(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount,

or, in the alternative to the provisions in (a),

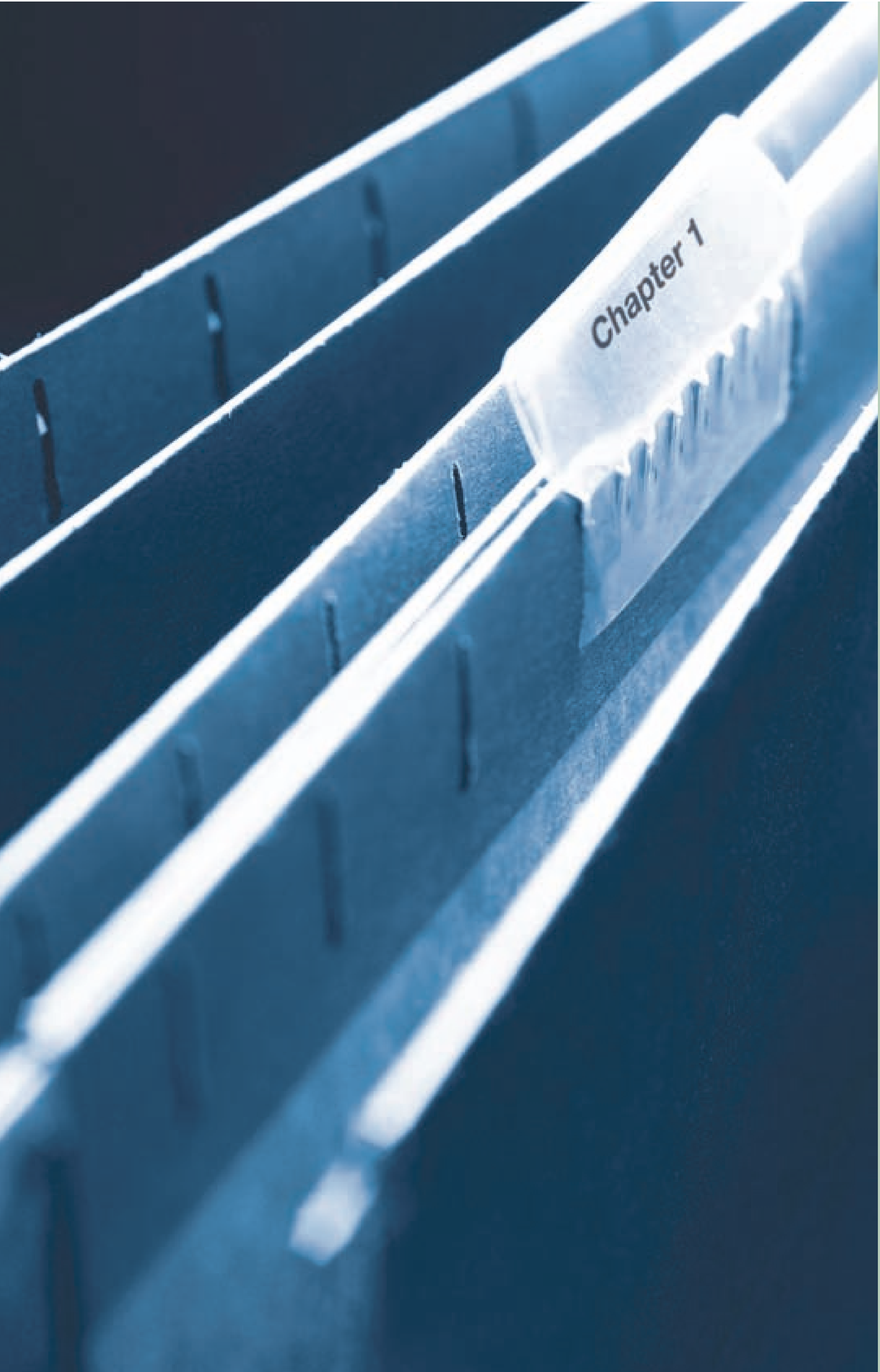
(b) the amount of its turnover for the year does not exceed-
(i) €25,000,000, or
(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount.

Glossary

Glossary of Abbreviations

45/2003 - Section 45 of the Companies (Auditing and Accounting) Act 2003

APB - Auditing Practices Board
ASX - Australian Stock Exchange
C&AG - Comptroller & Auditor General
CCAB-I - Consultative Committee of Accountancy Bodies - Ireland
CLRG - Company Law Review Group
CEO - Chief Executive Officer
CFO - Chief Financial Officer
CRO - Companies Registration Office
DCS - Directors' Compliance Statement
DETE - Department of Enterprise, Trade and Employment
DIRT - Deposit Interest Retention Tax
DWT - Dividend Withholding Tax
EU - European Union
FDI - Foreign Direct Investment
FEE - European Federation of Accountants
FRC - Financial Reporting Council (UK)
FSA - Financial Services Authority (UK)
FSF - Financial Stability Forum
IAASA - Irish Auditing and Accounting Supervisory Authority
IBEC - Irish Business and Employers Confederation
ICAEW - Institute of Chartered Accountants in England and Wales
ICAI - Institute of Chartered Accountants in Ireland
ICTU - Irish Congress of Trade Unions
IDA - Industrial Development Authority
IEE - Integrated Enforcement Environment (Companies Registration Office)
IFSRA - Irish Financial Services Regulatory Authority (now known as the Financial Regulator)
IOD - Institute of Directors
IQ - Individual Questionnaire
ISA - International Standard of Accounting
ISE - Irish Stock Exchange
MOU - Memorandum of Understanding
NCC - National Competitiveness Council
NED - Non-Executive Director
NZX - New Zealand Exchange
ODCE - Office of the Director of Corporate Enforcement
OECD - Organisation for Economic Cooperation and Development
PAC - Public Accounts Committee of Dail Eireann
PAYE - Pay As You Earn (Tax)
PLC - Public Limited Company
PSWT - Professional Services Withholding Tax
RIA - Regulatory Impact Assessment
RCT - Relevant Contracts Tax
RGA - Review Group on Auditing
SCNZ - Securities Commission New Zealand
SEC - Securities and Exchange Commission (US)
SME - Small or Medium Sized Enterprise
SOX - Sarbanes-Oxley Act 2002 (US)
SSIA - Special Savings Incentive Account
TRS - Tax Relief at Source
VAT - Value Added Tax



Chapter 1

Directors' Compliance Statement - Background and Context

1

Terms of Reference of referral of Directors' Compliance Statement to Company Law Review Group for consideration

On 21 April 2005 the Minister for Commerce and Trade, Michael Ahern, T.D., asked the Company Law Review Group to examine and report to him by 31 July, 2005 its views on the proportionality, efficacy and appropriateness of the Directors' Compliance Statement ("DCS") as set out in section 45 of the Companies (Auditing and Accounting) Act 2003 ("45/2003"), having regard to the following factors:

* Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.[4]
* The scope of application and the requirements of the Directors' Compliance Statement;
* Potential costs issues;
* Potential competitiveness issues; and
* Potential implementation issues.

The Review Group was requested to produce a report consistent with the goal on 'Making markets and regulation work better' set out in the Strategy Statement of the Department of Enterprise, Trade and Employment, i.e. to ensure that regulation is fair, balanced and effectively implemented in order to encourage commerce, ensure competitiveness, secure confidence in business and secure the welfare of citizens.

Section 45/2003 is attached as Appendix D.

When assigning the Directors' Compliance Statement to the Company Law Review Group for review Minister Ahern made the following comments:

> *"From the outset, I have regarded the Directors' Compliance Statement as a very effective mechanism for achieving corporate compliance. However, as the Companies Acts are the primary means of regulating business activity in the State it is very important that the legal provisions in these Acts are appropriate and proportionate. There has been a significant amount of concern expressed about the potential cost and competitiveness issues which the Directors' Compliance Statement may give rise to. I feel it is an appropriate response to look at these concerns thoroughly so that we get the balance right between the encouragement of business activity and the deterrence of sharp practice and downright illegality."*
>
> *"I have accordingly asked the Company Law Review Group under the esteemed chairmanship of Dr. Tom Courtney to consider the optimal framework for and content of the Directors' Compliance Statement and I wish to thank the CLRG for agreeing to take on this task. The Review Group, which is composed of business, regulatory and professional interests, is I believe, the most suitable body to conduct such a review in the light of its expertise, its representative composition and its statutory advisory role on the reform and modernisation of company law," Minister Ahern added.*
>
> *"I also asked the Director of Corporate Enforcement to produce guidance to assist operators to comply with the requirements. It was essentially during this further process, that parties for which this had a relevance voiced concerns", Minister Ahern concluded.*

4. *Principles of Corporate Governance, Principle VI.D.7, OECD, Paris 2004.*

The Minister's press release of 21 April 2005 is attached at Appendix E.

In addressing this issue the Review Group was asked to conduct its analysis and structure its report consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis,[5] see Appendix 3. In the event the Review Group not only did this but undertook a Screening Regulatory Impact Analysis (RIA), consistent with the template adopted by the Government on 21 June 2005 (see Appendix F), two months after the Review Group began its task of reviewing the Directors' Compliance Statement, as envisaged by 45/2003. Screening RIA is set out in full at Chapter 9 of this Report.

The Government White Paper *Regulating Better* defines 'Regulatory Impact Analysis (RIA)' as:

> ** an assessment of the likely effects of a proposed new regulation or regulatory change. It involves a detailed analysis to ascertain whether or not the new regulation would have the desired impact. It also helps to identify the side effects and any hidden costs associated with regulation. RIA clarifies the desired outcomes of the proposed regulatory change.*
>
> ** RIA promotes evidence-based policy-making by giving detailed consideration to the likely impacts of decisions, along with structured consultation with stakeholders and citizens.*
>
> ** RIA is not a substitute for decision-making. It is an approach which improves the quality of political and administrative decision-making, while providing openness, public involvement and accountability.*[6]

Clearly, it is impossible to conduct an ex ante RIA on a legislative provision enacted before the publication of the White Paper. And neither is it possible to conduct an ex post RIA where the administrative and legal decision has been taken but the relevant section has not been commenced and has not been in operation. Nonetheless, it is possible to apply the evaluation and evidence-based principles underlying the RIA to such quantitative and qualitative data as it is possible for the Review Group to source and to produce within the very tight timescale specified for review of 45/2003. Throughout the report those principles have informed our analysis and pointed the Review Group in the direction of appropriate recommendations.

Moreover, in the Screening RIA at Chapter 9, the Review Group goes beyond the requirements of a true RIA on the DCS, to comprehend in its consideration the range of policy options and alternatives available at the time of recommendation by the Review Group on Auditing (RGA) in July 2000 that there should be a requirement in law for a DCS.

This Chapter of the report looks at the background and context to 45/2003. Since 1998, in the area of company law in Ireland there has been a move away from self-regulation to a greater and more active government role in regulation, both in the form of dedicated regulators and in the form of primary law. This has been accompanied by a review of professional standards of governance within the accountancy bodies.

In this report the term "regulation" is used in the generic sense defined in May, Peter J., 2002, p. 157,[7] i.e. "it consists of rules that identify permissible and impermissible activity on the part of individuals, firms, or government agencies, along with accompanying sanctions or rewards, or both."

5. Principles of Corporate Governance, Principle VI.D.7, OECD, Paris 2004.
6. p 5, Regulating Better, January 2004, www.betterregulation.ie/attached_files/upload/static/1166.pdf
7 May, Peter J. 'Social Regulation', 'The Tools of Government', eds. Salamon, Lester M. and Elliott, Odus V., Oxford University Press, 2002.

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The rationale for the regulation of market activity is intended to produce behaviourally or ethically desirable outcomes. The law defines a suitable basis for the engagement by various market participants and is intended to deliver results which define acceptable relationships not only among the participants themselves but also in terms of delivering a positive result for the public interest.[8] In the area of company and financial services law for instance, the commodity of shared public interest which is being protected is trust in capital markets and financial accounting and resulting confidence in the commercial system and structures of the country.

Worldwide, the last quarter century has seen a remarkable rise in the ascendancy of the doctrine of competition and its attendant structure, regulation, on the basis that good regulatory practice allied to effective competition can "substantially improve market performance, public sector effectiveness, and citizen satisfaction."[9]

Within the Organisation for Economic Co-operation and Development (OECD), and countries that aspire to membership of the OECD, regulatory policy, i.e. "an explicit policy that aims to continuously improve the quality of the regulatory environment"[10] has become an important strategic policy area and objective itself, with regular in-depth country reviews of regulatory reform being undertaken based on self assessment and peer evaluation by relevant OECD Committees, such as the OECD report on Ireland published in May, 2001.

That being said, the overhaul of regulatory oversight of the marketplace in Ireland has been empirically driven by successive revelations of systemic bad practice. In 1998 a Working Group on Company Law Compliance and Enforcement (the "McDowell Group") set up by Tanaiste and then Minister for Enterprise, Trade and Employment, Mary Harney T.D. identified the scale of the problem, to wit:

> *Irish company law has been characterised by a culture of non-compliance and a failure by companies and their officers to meet their obligations in respect of the filing of annual returns on time. For example, in 1997 only 13% of companies complied with their obligations to file annual returns on time.*[11]

The McDowell Group's Report led in due course to the Company Law Enforcement Act 2001 which created an independent statutory officer, the Director of Corporate Enforcement, to head up a dedicated agency. The principal functions of the Director and Office of Corporate Enforcement are: to take over the function of initiating summary prosecutions under the Companies Acts from the Minister for Enterprise, Trade and Employment, to exercise a limited supervisory role over the conduct of liquidators or receivers of a company, to apply to the High Court for the restriction and disqualification of certain persons from serving as a director or other officer of a company[12] and to encourage compliance and probity.

Meanwhile, the July 1999 report of the Comptroller and Auditor General (C & AG) into the administration of DIRT (Deposit Interest Retention Tax)[13], undertaken at the behest of the Public Accounts Committee of Dail Eireann (PAC), came to the following conclusion based on an audit of twenty two of the most significant financial institutions in the State:

> *From site visits performed and discussions held with the institutions, it would appear there has been a widespread lack of understanding regarding the full compliance requirements for DIRT exemptions. In particular there is a belief that the eligibility as advised by the customer matters more than the holding of a written declaration evidencing that eligibility.*

8 The public interest is considered to be that which supports and promotes the good of society as a whole (as opposed to what serves the interests of individual members of society or of sectional interest groups). In this sense the term "public interest" broadly equates with the term "the common good" as used (but not defined) in the Constitution of Ireland.
9 Source: OECD document PUMA(2002)3 'Note on draft report: Regulatory Policies in OECD countries: from Intervention to Regulatory Governance'.
10 Source: PUMA(2002)3, ibid.
11 Source: p. (ii), Report of the Working Group on Company Law Compliance and Enforcement, November 1998.
12 P. 42 of the WG Report.
13 DIRT was introduced in 1986. Banks and other financial institutions were obliged to collect and remit to the Revenue Commissioners the appropriate amount of tax, taking account of the prevailing rate of tax applicable to the interest earned on the individual savings accounts of Irish residents. DIRT was not payable on accounts operated by non-Irish residents who had completed a statutory declaration.

In short, the C&AG report found that "evasion of DIRT was pervasive and that the relevant State authorities were well aware of the problem."[14]

The PAC's own report on DIRT evasion (December 1999)[15] which was based on the information in the C&AG's report but which also took account of oral evidence given to the PAC in Autumn 1999 by witnesses from the principal financial institutions, State agencies and other main parties was just as critical. In particular the PAC noted that:

* *The problem of DIRT evasion was an industry-wide phenomenon (i.e. financial services industry);*[16] *and*
* *There were a number of serious defects and weaknesses in relation to the statutory external audit function, which contributed to the continuance of the bogus non-resident problem.*[17]

The PAC was critical not only of financial institutions and auditors, but also of the inaction of the Department of Finance, the Revenue Commissioners and the Central Bank. The PAC report concluded that the Department of Enterprise, Trade and Employment (DETE) should establish a review group to review identified key issues with regard to the regulation and practice of auditing. In response, the Tanaiste and Minister for Enterprise, Trade and Employment, Mary Harney TD, established a Review Group on Auditing (RGA) which met from February-June 2000 and whose report was published in July 2000.[18]

The Report of the Review Group on Auditing, July 2000, set out at pp. 17-28 eighty recommendations dealing with issues of self-regulation of the accountancy bodies, auditor independence, the auditing of financial institutions and the compliance of auditors and company directors with statutory provisions. Recommendation 14.1 advocated the introduction of a directors' compliance statement on the following basis:

> *Directors of a company should be required to report on an annual basis to the shareholders on the company's compliance with its obligations under company law, taxation law or other relevant statutory or regulatory requirements. The report should confirm that any instances of non-compliance have been reported to the relevant regulatory authority and that in all other respects the company has complied with its obligations under company law, taxation law and other relevant statutory or regulatory requirements. The report should be appended to the annual financial statements (Recommendation 14.1, RGA)*
>
> *The RGA were also careful to note that "detailed guidance on the application of this Recommendation will be required. All relevant parties should be consulted to identify regulations and administrative provisions considered to be relevant in advance of enactment of legislation."*

14 Report of Review Group on Auditing, p. 15, July 2000.
15 Technically, the evidence was given to the sub-Committee of the PAC constituted to deal with "Certain Revenue Matters".16 PAC DIRT Report, Vol. 1, p. 78.
17 PAC DIRT Report, Vol. 1, p. 79.
18 Op. cit.

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Companies (Auditing and Accounting) Act 2003
The recommendations of the RGA were given effect in the Companies (Auditing and Accounting) Bill, enacted December 2003. The main focus of the Act was on establishing the Irish Auditing and Accounting Supervisory Authority (IAASA). Section 8(1) of the Act sets out the principal objects of IAASA, which are:

(a) To supervise how the prescribed accountancy bodies regulate and monitor their members;
(b) To promote adherence to high professional standards in the auditing and accounting professions;
(c) To monitor whether the accounts of certain classes of companies and other undertakings comply with the Companies Acts; and
(d) To act as a specialist source of advice to the Minister (for Enterprise, Trade and Employment) on auditing and accounting matters.

45/2003 gives effect to the RGA recommendation on the DCS as it applies to companies[19]. However, that Section has yet to be commenced.

45/2003 establishes the requirement for a form of DCS that requires the directors of each public company and each private company with a balance sheet total above €7,618,428 or turnover in excess of €15,236,856[20] to have a compliance policy statement (in a very prescribed format) and to produce an annual statement of compliance with

(a) The Companies Acts;
(b) Tax law, and
(c) Any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements.

45/2003 further imposes an obligation on the auditor of the company to review the annual directors' compliance statement:

> To determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

It seems clear from the above that the objective of the DCS was to foster a culture of compliance by developing a greater sense of accountability and responsibility among company directors and by developing good systems of internal controls within companies so that conscientious directors could commit themselves to compliance statements in good faith.

19 There is an enabling provision in Section 25 of the Central Bank Act 1997 (as substituted by Section 26 of the Central Bank and Financial Services Act 2004) whereby the Financial Regulator may require regulated financial service providers to prepare compliance statements.
20 A private company falling below these limits, which are set at national level subject to overall maxima determined by the EU Commission, qualifies as a medium-sized company and on that basis is allowed to file abridged annual accounts with the Companies Registration Office.

Chapter 2

Enhancing Compliance

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Enhancing Compliance: The Objectives of the Directors' Compliance Statement and Other Recent Corporate Governance Initiatives

Chapter 1 of this Report outlines the provenance of the Directors' Compliance Statement, as envisaged by 45/2003 i.e. its emergence as recommendation 14.1 in the Report of the Review Group on Auditing, 2000 (RGA).

It is clear that, as a matter of law, the directors' compliance statement has the sole legislative purpose of fostering a culture of compliance by requiring directors to publicly affirm their responsibilities and their companies' compliance verification procedures. It does not compel compliance with relevant obligations, nor does it sanction non-compliance; it merely exists to encourage compliance.

As the RGA Report notes at p217:

> *Imposing a requirement on Boards of Directors to make a positive statement regarding compliance will emphasise to members of Boards the importance of their role and responsibilities in this regard.*

More specifically, the directors' compliance statement and the provision for its review by the external auditor would seem to have been envisaged as something of a multiple lock for raising the standard of compliance and, more especially, companies' compliance verification, to wit:

* *The compliance statement would require directors to be more active, vigilant and thorough in establishing that there was indeed compliance;*
* *Review of the compliance statement would require external auditors to be more active, vigilant and thorough in reviewing compliance; and*
* *The intensity of focus brought about by the compliance statement would lead to expectations on the part of external auditors of higher standards being adhered to by company directors, and vice versa.*

Review Group on Auditing

Contextualising the directors' compliance statement we find that it arose from the analysis and discussion in Chapter 14 of the RGA. The actual focus of Chapter 14 is *"Compliance with statutory provisions: the role of the external auditor"*. To that end the chapter notes the obligations on external auditors with regard to compliance with the law on:

* *Company law provisions, relating to the form and content of company financial statements,*
* *Taxation law provisions, where auditors become aware that non-compliance has occurred and no corrective action has been taken, and*
* *Central Bank (now the Financial Regulator) legislation, where auditors become aware of matters of significance to the Financial Regulator.*

The Report notes at p209 that

> *obligations imposed on companies by legislation directly influence the financial accounts as compliance, or otherwise, with such legislation can impose costs on a company*

and further makes the point on that page that

> *failure by the directors to provide for the financial consequences of non-compliance, or to disclose appropriate information concerning any potential liability should lead to auditors qualifying their opinion on the financial statements concerned.*

The report further reflects on the relevant Auditing Practice Board[21] standards which require auditors to obtain audit evidence about compliance with those laws and regulations which relate directly to the preparation of, or the inclusion or disclosure of specific items in, the financial statements.

21 The APB establishes Auditing Standards which set out the basic principles and essential procedures with which external auditors in the United Kingdom and Ireland are required to comply.

The RGA analysis of legal and professional requirements applying to the audit of accounts concludes, *inter alia,* that

> *neither the Directors of non compliant companies nor their external auditors take their obligations under various statutory provisions or the professional standards that deal with these issues with sufficient seriousness. (p216).*

At this stage the Report shifts its focus somewhat from the external auditor to the company directors, noting that:

> *compliance with statutory provisions is the responsibility of a company's management and ultimately the Board of Directors. (p217).*

The key section of analysis then follows;

> *The auditor's role cannot take the place of that played by Directors of entities, who have prime responsibility in law for direction of the entity's activities and their compliance with the law, or of the Revenue Commissioners who have the powers to enforce collection of taxes or other State authorities. It is not the intention of the (RGA) to dilute the responsibilities of Directors.*
>
> *In addition, given that the primary purpose of an audit is to express an opinion on the financial statements, its focus in relation to compliance would generally be on non-compliance with law and regulations where the financial impact is material to the company's financial statements.*
>
> *To expect that an audit could uncover all instances of non compliance would require a significant extension of the scope of the audit and consequently involve considerable extra cost. Therefore the (RGA) accepts that without a fundamental shift in the scope and nature of the audit, it cannot, in itself, ensure full compliance with all statutory provisions.*
>
> *While the (RGA) was anxious to strengthen the role of auditors in relation to compliance with statutory obligations, it felt that this should be achieved in a balanced manner that would not impose significant additional costs on companies. Imposing a requirement on Boards of Directors to make a positive statement regarding compliance will emphasise to members of Boards the importance of their role and responsibilities in this regard. Boards may also be more reluctant to unquestioningly accept management's views on compliance where they are aware that their statement will be the subject of a report from external auditors. This Recommendation should therefore ensure that Directors take additional steps to ensure that the company conducts its affairs in a responsible manner in particular in relation to its compliance with law and regulations...*
>
> *(The imposition of) a requirement on Directors to report in the event of noncompliance to the Revenue Commissioners in the case of tax issues and to the proposed Director of Corporate Enforcement in the case of company law matters gives Directors a clear understanding of what is expected of them when they become aware of non-compliance with statutory requirements.*

To the extent that Chapter 14 of the RGA deals with the need for compliance with legislation other than company or tax law every piece of legislation referred to relates to areas of activity now regulated by the Irish Financial Services Regulatory Authority ("the Financial Regulator"). It might then be reasonably inferred that the RGA had only Financial Regulator-related legislation in mind with regard to the compliance requirements sought under the 'third limb' of the DCS, i.e. compliance with "other relevant statutes". However, this is not the case. It is our understanding that other laws were discussed and intended to be covered by the recommendation, including compliance with employment, health and safety and environmental legislation. It has been represented to this Review Group that it was the belief of at least some of the RGA members that the recommendation implicitly covers these, even if the text does not explicitly say so.

Companies (Auditing and Accounting) Act 2003
The section of the Explanatory Memorandum accompanying the Companies Bill as initiated in Seanad Eireann on 12 February 2003,[22] deals more with the 'how' of the requirement for the directors' compliance statement than with the 'why' basis for its introduction, as follows:

Section 43 (enacted as Section 45)
This section amends the Companies Act of 1990 by the insertion of new provisions. Under this, directors are required to prepare a compliance statement, containing the following information regarding the company:

* its policies in relation to compliance with its relevant obligations (which are defined as the Companies Acts, tax law and enactments within a legal framework in which the company operates and which could materially affect the company's financial statements);
* the procedures which it has put in place within the company in order to ensure compliance with these obligations; and
* the arrangements for implementing and reviewing the effectiveness of these policies and procedures.

The directors are also required to include in the report required under section 158 of the Companies Act 1963 a statement acknowledging their responsibility for securing compliance by the company with its relevant obligations, confirming that the company has in place internal financial and any other necessary procedures designed to achieve compliance with its relevant obligations and confirming that the directors have reviewed the effectiveness of these procedures during the financial year to which the report relates. If the company either does not have the financial and other necessary procedures for compliance with its relevant obligations, or has not conducted the required review of their effectiveness in the financial year in question, the directors are required to give the reasons for this.

The section is not applicable to certain classes of companies. There is also a requirement for the company auditor to conduct an annual review of the directors' compliance statement and of the statement required under the section in relation to the report under section 158 of the Companies Act 1963. This is to establish whether, in the judgment of the auditor, each of these statements is fair and reasonable, having regard to the information available to the auditor from its work for the company.

It will be noted from this Memorandum that the Bill as published contained DCS provisions which were more limited in scope and more flexible in application than recommended by the RGA. During the passage of the Bill through the Oireachtas a number of criticisms were expressed about the costs of the directors' compliance statement, the scope of legislation covered and potential difficulties which might arise with regard to the recruitment of effective and responsible non-executive directors. These issues are addressed specifically in Chapter 5, Impact Analysis, and Chapter 9, Screening RIA.

Reform of corporate governance in Ireland
It is important to put the DCS into context, as one aspect of one legal instrument intended to improve the corporate governance of a subset of Irish companies.

Since the 1999 Report of the Comptroller and Auditor General there have been a number of very significant and far reaching reforms which have sought to improve corporate governance in Ireland. These reforms have been both regulatory and non-regulatory in nature. Overall, corporate governance is the set of rules under which a company is managed and under which the company and its officers report to its shareholders and creditors and to regulators. For most companies, its most important component is company law, as set out in the Companies Acts 1963-2003. It is otherwise composed of:

* The company's own constitution as set out in its memorandum and articles;
* The standards of self-regulating professions (principally accountants as regards company accounts and the audit functions);

22 Seanad Debates 12 February 2003.

* Voluntary codes of best practice such as those adopted by the OECD or applied by regulatory bodies such as the Irish Stock Exchange (ISE);[23] and
* The fiduciary duties of company directors to members, which are often common law principles rather than being set out in company statutes.

The listing rules and the Combined Code on Corporate Governance are perhaps even more important than company law in making up the corporate governance universe of a listed public limited company.

The establishment of the three new dedicated statutory bodies, the Financial Regulator, the Office of the Director of Corporate Enforcement (ODCE) and IAASA,[24] has already been referred to. In addition, the Company Law Review Group was established by the 2001 Act as a statutory advisory body to the Minister for Enterprise, Trade and Employment on the modernisation, reform and simplification of company law. The substantive recommendations set out in the First Report of the Review Group[25] and as amplified in the Second Report[26] are currently being translated into the General Scheme of a Bill to consolidate, reform and simplify company law. It is anticipated that the Minister for Enterprise, Trade and Employment will take these proposals to Government for approval for the drafting of a Bill in early 2006.

The fiduciary duties of directors are considered later in this chapter, where they arise in the context of the proposed Company Law Consolidation and Reform Bill.

Legal provisions related to the obligations of directors and auditors

Notable among the specific legal provisions related to company directors which have been introduced since publication of the RGA Report in 2000 are the following:

Section 74(e) of 2001 Act, and Section 37 of the 2003 Act: Both amendments of Section 194 of 1990 Act - Duty of auditors if proper books of account not being kept or other offences suspected.

A number of amendments were made to Section 194 of the 1990 Act. For the purposes of this Review the salient amendment is the insertion of a new subsection dealing with reporting by auditors of suspected breaches of the Companies Acts on the part of client companies. Subsection (5) requires auditors to notify the Director of Corporate Enforcement where the auditors form the opinion that there are reasonable grounds for believing that a company or its officers or agents may have committed an indictable offence under the Companies Acts. In addition, the auditors must provide the Director with details of the grounds on which they have formed the opinion that an offence may have been committed. This is to facilitate the Director in the performance of his function of investigating offences under the Companies Acts.

It has been said that an auditor is a watchdog but not a bloodhound. In this regard, this new subsection requires auditors to notify the Director only where they have grounds for believing that an offence may have been committed. It does not require that auditors go outside their brief or remit to search for such offences. The subsection is based on the premise that auditors may be alerted to possible breaches of the Companies Acts in the performance of the audit and, where this occurs, it imposes a reporting obligation.

To date, the ODCE has not brought any prosecutions under Section 194 of the 1990 Act. The ODCE has tended to encourage auditors to report where they (auditors) have been deficient in doing so.

Section 100(3) of the 2001 Act - Repeal and substitution of section 383 of the 1963 Act

This subsection provides that each director and the secretary[27] of a company is responsible for ensuring that the requirements of the Companies Acts are complied with by the company. This provision is intended to address situations where directors claim in court that they were either unaware of the requirements of the Companies Acts or did not realise that they had a responsibility to ensure that the company complied with those requirements. This

23 Typically, Stock Exchange codes are non-binding but there is a requirement on each listed company to indicate in its annual report where it has not applied the code. This is basically regulation by disclosure.

24 The Irish Auditing and Accounting Supervisory Authority is currently in the process of being established on a statutory footing, and is at present operating on an interim basis.

25 February 2002.

26 March 2004.

27 The CLRG does not believe that it is appropriate to impose this duty on company secretaries, whose responsibilities are determined in each company by the Board of Directors and recommends that this section is confined to directors: see First Report, 11.7.11.

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subsection establishes a clear statutory responsibility in respect of directors and secretaries of companies and should remove any doubt as to whether company directors, or a particular director in a given case, may be regarded as responsible for ensuring that the company complies with the law.

This subsection explicitly addresses concerns expressed in the Oireachtas and elsewhere that it should not be permissible for company directors to claim ignorance of the company and its operations as a defence against negligence or criminality.

The ODCE has not yet relied on Section 383 as amended in prosecuting offences under the Companies Acts. One significant reason for this is that a considerable number of ODCE prosecutions to date relate to offences committed before the commencement date of Section 100 of the 2001 Act (Section 100 is the provision which amended Section 383 of the 1963 Act).

The Criminal Justice (Theft and Fraud Offences) Act 2001 [28]

The Criminal Justice (Theft and Fraud Offences) Act 2001 introduced a number of specific offences relating to fraudulent activity into Irish statute law for the first time. Section 59 of the Act places a reporting duty on the auditors of a firm[29] and other parties who provide assistance or advice to a firm in connection with matters that are likely to be used in the course of maintaining or auditing the firm's accounts.
The reporting duty arises where the accounts, or other information or documents specified in the section, indicate that an offence under the Act may have been committed by the firm itself, a director (or equivalent for non-corporated firms) or employee. The section also specifies that the duty overrides any obligation of confidentiality due to the firm and that the auditor or other service provider is protected from liability for reports made in good faith.

First Report of Company Law Review Group

Chapter 11 of the First Report of the Company Law Review Group[30] makes a number of recommendations directed towards clarification of the obligations and liabilities of company directors and of company secretaries. The following duties have been extrapolated from that set of recommendations as being most salient in terms of the responsibility and accountability of company directors (and secretaries):

First Report of Company Law Review Group Summary of recommendations in Chapter 11 - Directors and other Officers

The fiduciary duties of a director to his company primarily as identified by the Irish courts should be stated in statute law. This statement should be in general rather than specific terms, derived from principles established by the courts and on the basis that the statement of duties is not exhaustive. Ultimately, in the consolidated Companies Act, the statement of the director's fiduciary duties should introduce other provisions of the Companies Acts touching on directors' fiduciary responsibilities, such as the provisions at present found in ss 186 to189 of the 1963 Act and Part III of the 1990 Act. (11.3.6 and 11.3.7)

Upon notification of appointment as a director (on the Form B10 or Form A1) and, in due course, on registration as a director, a would-be director's signature should appear below a statement: "I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Acts, other statutes and at common law" (11.3.8)

Where a director is appointed by reason of an entitlement of a shareholder so to appoint the director under the articles or by a shareholders' agreement, the director's fiduciary duties to the company should be varied to the extent that they may have co-existing duties to third parties e.g. in the case of a nominee director, their appointors. This clarification of the law is best effected by insertion of an appropriate paragraph in the statement of directors' duties set out in this Report at 11.3.7. (11.4.6)

28 Section 59 was commenced on 1 August 2002 by the Criminal Justice (Theft and Fraud Offences) Act 2001 (Commencement) Order 2002, S.I. No. 252 of 2002.
29 'Firm' is defined in that Act as meaning a partnership, a corporate or unincorporated body or a self-employed individual.
30 February 2002.

No distinction should be made between the duties of executive and non-executive directors. (11.5.2)

The Companies Acts should provide that:

(i) The duties of the secretary of the company will, without derogating from their own responsibility, be such duties as are delegated by the board of directors acting as a whole.
(ii) The directors will in their appointment of a secretary have a duty to ensure that the person appointed as secretary has the necessary skills to maintain (or to procure the maintenance of) the records (other than accounting records) required to be kept under the Companies Acts.
(iii) Upon notification of appointment as a director (on the Form B10 or Form A1) the secretary-designate's signature should appear below a statement stating "I acknowledge that, as a secretary, I have legal duties and obligations under the Companies Acts and other enactments". (11.7.11)

The office of company secretary should be retained. (11.8.9)

The existing prohibition on corporate directors should be retained. (11.8.10)

It should be possible for private companies limited by shares (i.e. the proposed CLS) to have one director only with a requirement that there be a separate company secretary. Sole directors should not also be the company secretary. The existing requirement for two directors should remain for all other companies. (11.8.11)

No individual should be capable of becoming a director or secretary of a company unless such individual has attained the age of 18 years. (11.9.13(i))

Of the recommendations set out in boxed text, probably the most significant are that the fiduciary duties of directors will be set out in the Companies Acts and that, on appointment, a director is required to acknowledge to the Registrar of Companies over his/her signature that "as director I have legal duties and obligations imposed by the Companies Acts, other enactments and common law". [31] The recommendation regarding fiduciary duties will be given effect in the Company Law Consolidation and Reform Bill, along with the other recommendations above. The recommendation regarding the acknowledgement of a director on appointment of his duties has already been given effect on foot of a Forms Order. A copy of the relevant Companies Registration Office (CRO) form (B10) is attached to this Report for information, see Appendix G.

Setting out the following (non-exhaustive) list of directors' duties in the Company Law Consolidation and Reform Bill should also make the obligations placed on all company directors considerably more accessible than they are at present.

Context of directors' duties
Without prejudice to the provisions of any enactment (including this Act) directors shall owe the following duties to companies of which they are directors, and which shall be enforced in the same way as any other fiduciary duty owed to a company by its directors.[32]

Duty of loyalty
A director must act in good faith in what he considers to be the interests of the company.[33]

Duty of obedience to company constitution
A director must act in accordance with the company's memorandum and articles of association and must exercise his powers only for the purposes allowed by law.[34]

31 Although the Review Group considered the benefit or otherwise of requiring directors to make a more detailed acknowledgment of his/her duties, it would not recommend anything further than requiring directors to make a "simple acknowledgment of the existence of directors' duties" upon notification of their appointment. See CLRG First Report p 241 at 11.3.8
32 See s 52(2) of the Companies Act 1990.
33 Clark v. Workman. [1902] 1 IR 107; Percival v. Wright (1902) 2 Ch 421.
34 Punt v. Symons & Co [1903] 2 Ch 506; Piercy v. S Mills & Co [1920] 1 Ch 77.
35 Re Regal Hastings v. Gulliver [1942] 1 All ER 378.

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Duty of avoidance of secret profits
A director must not use the company's property, information or opportunities for his own or anyone else's benefit unless he is allowed to by the company's memorandum or articles of association or the use has been disclosed to the members and an ordinary resolution passed consenting to it.[35]

Duty of independence of judgment
A director must not agree to restrict his power to exercise an independent judgment.[36] However, if he considers in good faith that it is in the interests of the company for a transaction to be entered into and carried into effect, he may restrict his power to exercise an independent judgment in the future by agreeing to act in a particular way to achieve this.[37]

Duty to avoid conflicts of interest
If there is a conflict between an interest or duty of a director and an interest of the company in any transaction, he must account to the company for any benefit he receives from the transaction. This applies whether or not the company sets aside the transaction.[38]

However, a director need not account for the benefit if he is allowed to have the interest or duty by the company's memorandum and articles of association or the interest or duty has been disclosed to the members and approved by ordinary resolution.

Duties of care, skill and diligence
A director owes the company a duty to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both (i) the knowledge and experience that may reasonably be expected of a person in the same position as the director, and (ii) the knowledge and experience which the director has.[39]

Duty to consider interests of third parties
A director must have regard to the interests of the company's employees in general and [to those of] its members[40]
A director appointed or nominated for appointment by a member with an entitlement so to appoint or nominate under the articles of association or a shareholders' agreement may have regard to the interests of that member.

Duty of fairness
A director must act fairly as between different members.[41]

The inclusion of the fiduciary responsibilities of directors in the new Act is a positive initiative which will make it much clearer to all stakeholders what company directors may, and may not, do. At the moment many such responsibilities are principles of common law rather than provisions of the Companies Acts.

Office of Director of Corporate Enforcement
The most tangible indicator of how the compliance and enforcement of corporate governance in Ireland has been improved can be found in the annual reports of the ODCE. The Report for 2004[42], published on 3 June 2005, contains the following relevant information, inter alia:

36 Clark v. Workman, [1902] 1 IR 107.
37 This principle has been accepted in a number of other common law jurisdictions in cases such as: Fulham Football Club Ltd et al v. Cabra Estates PLC [1994] 1 BCLC 363 (England and Wales); and in Thorby v. Goldberg [1965] 112 CLR 597 (Australia).
38 Gabbett v. Lawder (1883) 11 LR Ir 295.
39 Re City Equitable Fire Insurance Limited [1925] Ch 407.
40 This is a restatement of s 52(1) of the 1990 Act.
41 Nash v. Lancegaye (Ireland) Ltd (1958) 92 ILTR 11.
42 http://www.odce.ie/new/preview.asp?NID=392
43 Section 194(5) of the Companies Act 1990 (as amended by section 74 of the Company Law Enforcement Act 2001).
44 Section 299 of the Companies Act 1963 (as amended by section 143 of the Companies Act 1990 and section 51 of the Company Law Enforcement Act 2001).
45 Section 58 of the Company Law Enforcement Act 2001 and sections 192(6) and (7) of the Companies Act 1990 (as inserted by section 73 of the Company Law Enforcement Act 2001).

Number/Sources of Suspected Breaches
The detection and reporting of suspected company law offences to the ODCE arises principally as a result of:

* mandatory obligations imposed in the Companies Acts on certain parties, such as auditors[43], liquidators[44], professional bodies [45]and the Registrar of Companies[46] and;
* voluntary reports made to the Office by the public, the State or other authorities.

The ODCE also follows up information in the public domain suggesting company law offences, whether from the media or other public sources, such as the corporate information filed in the Companies Registration Office.

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The two tables below and the table on the next page give the type of suspected offence and the source of the report.

Breakdown of New Cases in 2004 by Source

Source of New Cases	**Total 2003**	**Total 2004**
Mandatory Reports		
- Indictable Reports from Auditors	1488	1568
- Reports from the CRO	9	15
- Report from Liquidator	1	2
- Indictable Reports from Professional Bodies	8	9
Total Mandatory Reports	**1506**	**1594**
Voluntary Reports		
- Public Complaints	307	341
- Reports from State Authorities	118	2
- Reports from non-State Authorities	1	18
- Other Reports and Detections	18	1
Total Voluntary Reports	**444**	**362**
TOTAL REPORTS	**1950**	**1956**

Source: Appendix 2.1.1, ODCE Annual Report 2004.

Mandatory Reports - Character of Possible Company Law Defaults

Types of Indicated Default	**Total 2003**	**Total 2004**
Non-filing of Annual Returns on a timely basis	1519	1560
Excessive Directors' Loans	271	303
Failure to Keep Proper Books of Account	48	59
Non-holding of Extraordinary General Meetings	92	30
Directors' Interests/Shares Registration Infringements	0	15
No Director Resident in the State	24	12
Non-holding of Annual General Meetings	3	6
Non-Qualification for Appointment as Auditor	5	4
Fraudulent Trading	1	2
Failure of Liquidator to call Meetings of Company/Creditors	1	2
Falsification of Documents	1	2
Failure to Comply with Accounting Principles	0	2
Other	1	10
Total Defaults in Mandatory Reports	**1966**	**2007**

Source: Appendix 2.2.1, ODCE Annual Report 2004.

46 Section 194(1)(b) of the Companies Act 1990 (as amended by section 74(b) of the Company Law Enforcement Act 2001).

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Voluntary and Other Reports - Character of Issues Involved

Types of Indicated Issues	Total 2003	Total 2004
External company filing defaults	117	Nil
Debt Issues	68	63
Irish Registered Company Filing Issues	44	11
Shareholder Issues	17	24
Information alleging Misconduct	17	18
Director Issues	17	16
Civil Issues	12	13
Reckless/Fraudulent/Insolvent Trading	11	53
Liquidated Companies	10	3
Failure to effect service of documents on Registered Addresses	8	2
Trading while struck off the Companies Register	8	13
Annual/Extraordinary General Meetings	8	27
Companies ceasing trading (but not placed in liquidation)	6	2
Forgery/False information	3	13
Unclear/Other Issues	98	104
Total	**444**	**362**

Source: Appendix 2.2.2, ODCE Annual Report 2004.

Cooperation between Regulatory Authorities
Cooperation between regulatory authorities has been instrumental in increasing compliance and ensuring the detection and prosecution of non-compliance. During 2004, the Director of Corporate Enforcement signed two Memoranda of Understanding (MOU) on the sharing of confidential regulatory information, the first with the ISE in February and the second with the Revenue Commissioners in December. In addition, discussions took place with two Government Departments in relation to formalising exchanges of information.

The MOU with the ISE yielded 18 reports to the ODCE in 2004, 15 of which related to the failure to notify the market on a timely basis of possible price sensitive information. The 18 reports concerned transactions in 16 listed companies.

The MOU with the Revenue Commissioners formalised the assistance which currently exists between both organisations, but the Director hopes that it will also deepen mutual co-operation over time and widen the incidence of detected non-compliance in the public interest.

The ODCE continued to have regular consultations with the Garda Bureau of Fraud Investigations and other Garda authorities on matters of mutual interest in relation to companies. The Garda Unit within the ODCE recorded some 126 such contacts during the year.

Arising from the signing of a Memorandum of Understanding with the Irish Financial Services Regulatory Authority in 2003, the ODCE continued to have regular contacts in 2004 on issues of concern in the financial sector. During the year, the Office also provided material to professional accountancy bodies and a non-European Union authority in accordance with its legal powers permitting assistance to fellow regulators.

The Director of Corporate Enforcement acknowledged in particular the continuing assistance of the Registrar of Companies and his staff during 2004 in the registration and certification of filed documentation and in the attendance of CRO staff at Court proceedings initiated by the ODCE. This cooperation continues to be essential in supporting the compliance and enforcement work of the ODCE.

In the context of fostering a compliance culture it is also highly relevant to comment on user perceptions of the ODCE, as indicated in the Table below. The following table represents a summary of quantitative research results from market research in 2003/2004 in respect of a sample of 300 company directors, 100 accountants and 30 liquidators.

Issue	Outturn
Perception of Improved Compliance Environment	95% of accountants/liquidators believe that company law compliance has improved. While a comparable result for directors was not measured, 97% of directors regard such compliance as important
Awareness of the ODCE	Overall, 67% are familiar with the ODCE - 54% of directors, 97% of accountants, 100% of liquidators
Knowledge of ODCE Information Materials	Overall, 47% are aware of ODCE publications - 30% of directors, 83% of accountants, 97% of liquidators
Perception of ODCE Effectiveness	Overall, 44% rate the ODCE as effective - 35% of directors, 67% of accountants and 60% of liquidators

Source: ODCE Annual Report 2004, p 7.

While the ODCE market research has indicated a positive improvement in the compliance environment, the ODCE's results for 2004 nevertheless indicate both -

* A continuing rise in the number of reports by auditors of suspected indictable offences under the Companies Acts, and
* A continuing increase in the number of public complaints received by ODCE.

However, it is as valid to assume that these increases are due to increased legal obligations and the developing public awareness of the ODCE and its functions as to actual increases in offences.[47]

It is noteworthy that the vast majority of auditor reports are filed in respect of just four indictable offences. Compared with the more than one hundred indictable offences in the Companies Acts, this suggests that only particular types of offences are coming to the attention of auditors during the audit process. While ODCE has obviously sought to widen its information sources in respect of possible company law offences through information-sharing arrangements with other regulatory authorities, the Director has expressed his view that only a small proportion of company law offences are actually coming to notice and that further measures are required to encourage compliance with obligations the breach of which he feels currently go undetected.

Reference was made earlier to the auditor reporting obligation under Section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001. According to the Garda Bureau of Fraud Investigation, the number of auditor reports under Section 59 increased from 40 in 2003 to 115 last year.

The recent RSM Robson Rhodes' Report on Economic Crime in Ireland[48] suggested that Irish companies suffer losses of about €2 billion annually from fraud, embezzlement, cheque and credit card fraud and corruption. The ODCE suggests that a number of the conclusions from the report are interesting in that a number of them would be addressed in part by implementing directors' compliance statements. The conclusions of the report were as follows:

* Economic crime is low on board agendas - only 51% discuss it more than once a year;
* 28% of boards are unaware of the financial costs;
* the largest companies are affected the most;
* 44% of companies expect economic crime to increase in the next three years;
* only 44% have adequate prevention systems;
* 54% of companies need further advice and training in prevention and detection.

47 It is the view of the ODCE that the assumptions made in this paragraph are very dubious. Firstly, there has been no increase in legal obligations which could explain the continuing increases in reporting. Secondly, while it may be possible to attribute the continuing increase in public complaints to a public awareness of the ODCE, this cannot explain the continuing increase in reporting by auditors who, as an informed professional community, have been well aware of their reporting obligations since at least 2002.

48 Source: www.rsmi.co.uk.

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The Review Group believes that increasing directors' awareness of compliance with their companies' obligations will be of very limited utility in reducing fraud, embezzlement, cheque and credit card fraud and corruption, since all of these mischiefs derive from non-compliance with directors', employees' creditors' and other third-parties' obligations to companies: not the 'relevant obligations' of companies set out in 45/2003.[49]

Companies Registration Office - compliance with the filing of returns at the CRO

Companies are required to file annual returns and accounts at the CRO each year. As was stated above, in 1997 only 13% of companies filed their returns on time.

Since 1997 an additional 40 staff have been assigned to the CRO and that Office has strengthened its enforcement regime. The principal mechanism used for enforcement since 1997 has been the striking from the register of companies that have failed to file returns. The number of companies struck off in each year since 1997 is as follows:

Year	Companies Struck Off
1998	4,834
1999	35,072
2000	43,680
2001	7,460
2002	6,251
2003	21,977
2004	6,416
2005	5,343

The CRO is now operating a new system of enforcement called the Integrated Enforcement Environment (IEE). The IEE operates through the selection each week of companies for enforcement where the severity of the action taken is based on the companies filing history. We understand from the CRO that during 2005 the IEE is being expanded to take account of individual filing agents that have a poor filing record and directors that have a poor filing record over a number of companies.

The effect of these enhanced measures by the CRO is reflected in the compliance figures. In 2004 70% of companies filed on time; as at 7 June 2005, 85% of companies are up to date.

The proper filing of annual returns and accounts is a major contributor to a transparent business environment and a deterrent to wrongdoing.

Strengthening the Powers of the Revenue Commissioners

Since 1999 the powers available to the Revenue Commissioners to police taxpayers' compliance their obligations have been significantly enhanced. Revenue now has specific powers of audit in relation to-

* the operation of PAYE, VAT and RCT;
* the records of all businesses;
* the operation of deposit interest retention tax (DIRT) by financial institutions;
* the exit tax regimes in respect of payments made by life assurance companies and collective funds;
* repayment claims made, under the tax relief at source (TRS) arrangements, by medical insurers, mortgagors and long term care insurers;
* the operation of the Special Saving Incentive Account (SSIA) regime by SSIA managers;
* the operation of the dividend withholding tax (DWT) regime by companies and their agents; and
* the operation of the professional services withholding tax (PSWT) regime

In addition, Revenue now has specific powers to require a taxpayer or a third party to supply information and documentation where the taxpayer's tax liability is under enquiry.

The addition of these powers have in themselves strengthened the compliance regime applicable to companies in that directors are more likely to be forthcoming in making returns and causing their companies to pay their taxes in circumstances where the Revenue Commissioners may exercise or apply to exercise such far-reaching powers of investigation, entry and demand for assistance.

49 The Revenue Commissioners consider that the DCS will have an effect in reducing the poor compliance environment in which economic crime thrives. This is important from a tax perspective, as there are implications for tax compliance in any unlawful activity.

Auditing and accounting practice

Alongside the changes in government supervision and regulation outlined above there has also been change in the professional governance of accounting and auditing. The accounting and auditing profession in Ireland has close links with the profession in the United Kingdom. The main bodies establishing professional standards are the Accounting Standards Board and the Auditing Practices Board. These bodies can issue a bulletin to members setting out the compliance procedure for a new statutory obligation (arising in whichever jurisdiction). For example, following consultation with ODCE[50], see Decision Notice 2002/2, a bulletin was issued on compliance with Section 74 of the Company Law Enforcement Act 2001 dealing with the new reporting obligation on auditors. In drawing up this agreed approach regard was had to a number of existing Auditing Practices Board Statements of Auditing Standards.

Similarly, following the DIRT revelations a special bulletin was issued on guidance for the auditors of financial institutions. The DIRT revelations also gave rise to a review by the accountancy bodies of their bye laws which led to the introduction of greater sanctions and more openness and publicity about investigations and the imposition of sanctions.

Entities Regulated by the Financial Regulator (IFSRA)

The Financial Regulator is currently carrying out a review with the intention of establishing a comprehensive framework of standards for testing the probity and competence of directors and managers of financial services firms.[51] The closing date for receipt of submissions was the 30th June 2005.

The context to the Review is set out at Chapter 3 of the Financial Regulator Consultation Paper, i.e.

> *The Financial Regulator currently applies a "fit and proper" test to the directors and managers of most financial services firms for which it is responsible. While the standards applied for the purposes of the fit and proper test are broadly similar, each sector is looked at slightly differently in practice. This reflects the separate development of national and EU law in the various financial service sectors and to the separate evolution of standards in these sectors. The process of checking the fitness and probity of the directors and managers of banks, insurance companies, securities firms, investment firms, collective investment schemes and the managers of same is based on the completion of individual questionnaires (IQ's) by newly proposed directors or managers. The form of the IQ varies from one sector to another. The completed forms are then scrutinised and validated by the relevant Department of the Financial Regulator. The fit and proper test applies not just to new applicants but also to existing directors and managers.*
>
> *Where there is reason to believe that an existing director or manager has acted in such a way as to cast doubt on his/her fitness or probity, there are procedures in the existing arrangements to take appropriate action, including removal of the person from his or her position.*
>
> *Reason for Review*
>
> *While the standards and processes applied at present within the Financial Regulator for the purposes of the fit and proper test are broadly similar, there are differences in emphasis and procedure. These differences derive from the separate development of the relevant provisions in national and EU law, rather than from any perceived need for differentiation. In light of the establishment of a single regulatory authority in 2003 and in the context of the setting up of a single authorisation unit in 2004 (the Financial Institutions and Funds Authorisations Department) the Financial Regulator considers it timely to review "fit and proper" standards and procedures throughout the organization with a view to establishing a common test. A common test has the advantage of ensuring that all firms, directors and managers regulated by the Financial Regulator would be subject to consistent standards.*

50 See Decision Notice 2002/2, "The Duty of Auditors to Report to the Director of Corporate Enforcement", at http://www.odce.ie/publications/decision.asp

51 IFSRA Consultation Paper CP11, February 2005.

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Regardless of the propriety or appropriateness of the tests described above, which may (or may not) be applied by the Financial Regulator to the directors of the undertakings it regulates are additional to any reporting obligations arising under the Companies Acts for financial institutions incorporated as companies.

Irish / UK corporate governance initiatives

Another strand in the development of a climate and tone of good corporate governance is to inform and educate company directors about their responsibilities. The ODCE published a series of Information Books in 2002, which are available on www.odce.ie. Of particular relevance is Book 2 on the 'Principal Duties and Powers of Company Directors' and Book 5 on the 'Principal Duties and Powers of Auditors'. These books were, however, published before enactment of the Companies (Auditing and Accounting) Act 2003 and thus do not cover Section 45 of that Act.

The Financial Reporting Council (FRC) in the UK published the Revised Combined Code in July 2003, available on www.frc.org.uk. This updated the Combined Code on Corporate Governance and incorporated the recommendations of the Smith Report on Audit Committees and the Higgs Report on Non-Executive Directors. This is applied only to PLCs (and not to private companies although they can apply the Code as 'best practice' if they so choose) via the Listing Rules of the Irish Stock Exchange in Ireland and the FSA in the UK.

The FRC issued a Consultation Document on 2 December 2004 on the Turnbull guidance on internal control.[52] The Turnbull guidance, available on www.frc.org.uk/corporate.cfm, was published in 1999 by the Institute of Chartered Accountants in England and Wales (ICAEW) and sets out best practice for directors of listed companies to demonstrate compliance with the internal control requirements of the Combined Code on Corporate Governance. It should be noted that this is a much narrower part of corporate governance (internal control) than that covered by 45/2003. At the same time, it must be acknowledged that the ODCE Revised Guidance on Directors' Compliance Statements relies heavily on the Turnbull Guidance on internal control, in order to minimize the burden on directors in implementing the compliance statements provision.

The FRC issued a Guide on 16 December 2004 on the use of Turnbull guidance when complying with the US regulatory requirements (Sarbanes Oxley Act 2002 - see also below)[53]. The most recent relevant conclusions from the review of Turnbull guidance are set out in Chapter 10 of this Report.

International corporate governance initiatives

The Sarbanes-Oxley Act became law in the USA in 2002 following the Enron affair. Section 404 of this Act (and the related Securities and Exchange Commission (SEC) rules), are of particular importance regarding DCS. A summary of the requirements in this regard is contained in the FRC Guide referred to above. Some of the similarities between Sarbanes Oxley and 45/2003 are:

(a) Requirements regarding documentation of processes and evaluating the effectiveness of controls;
(b) External Auditor's reports/attestations are required.

However it should be borne in mind that there are also significant differences:

(a) It is the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) who must sign off on the Sarbanes Oxley reports rather than the Board of Directors;
(b) Sarbanes Oxley Section 404 reports relate to the narrow area of corporate governance relating to 'internal controls over financial reporting' rather than to the wider area of compliance with laws and relevant obligations.
(c) Sarbanes Oxley relates to a narrower category of companies and does not encompass private companies.

52 Press Notice FRC PN 98.
53 Details on the FRC website, Press Notice FRC PN 98.

The European Federation of Accountants published a Consultation Document in March 2005 on 'Risk Management and Internal Control in the EU'.[54]

The Audit Committee Institute Ireland, supported by KPMG, has been established in Ireland.[55]

OECD Principles of Corporate Governance

In May 2004 the OECD Ministerial Council adopted a revised set of Principles on Corporate Governance. Originally agreed in 1999, the principles have formed the basis for corporate governance initiatives in both OECD and non-OECD countries alike. Moreover, they have been adopted as one of the Twelve Key Standards for Sound Financial Systems by the Financial Stability Forum.[56] Accordingly, they form the basis of the corporate governance component of the World Bank/IMF Reports on the Observance of Standards and Codes (ROSC).

Review of the Principles took place in the context of significant corporate failures, e.g. Enron, WorldCom and Parmalat and some faults identified in such large-scale collapses were addressed in the revised version of the Principles.

Part VI of those Principles deals with the Company Board or Board of Directors. As compared with the 1999 Principles responsibilities in this section have been more clearly specified to cover corporate ethics, compliance with laws and standards and oversight of internal control systems covering financial reporting. Noteworthy among the principles is Principle VI.D.7 which assigns the Board responsibility for:

> *Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.*

An annotation to this Principle clarifies the Board responsibilities further:

> *Ensuring the integrity of the essential reporting and monitoring systems will require the board to set and enforce clear lines of responsibility and accountability throughout the organisation. The board will also need to ensure that there is appropriate oversight by senior management. One way of doing this is through an internal audit system directly reporting to the board. In some jurisdictions it is considered good practice for the internal auditors to report to an independent audit committee of the board or an equivalent body which is also responsible for managing the relationship with the external auditor, thereby allowing a coordinated response by the board. It should also be regarded as good practice for this committee, or equivalent body, to review and report to the board the most critical accounting policies which are the basis for financial reports. However, the board should retain final responsibility for ensuring the integrity of the reporting systems. Some countries have provided for the chair of the board to report on the internal control process.*
>
> *Companies are also well advised to set up internal programmes and procedures to promote compliance with applicable laws, regulations and standards, including statutes to criminalise bribery of foreign officials that are required to be enacted by the OECD Anti-bribery Convention and measures designed to control other forms of bribery and corruption. Moreover, compliance must also relate to other laws and regulations such as those covering securities, competition and work and safety conditions. Such compliance programmes will also underpin the company's ethical code. To be effective, the incentive structure of the business needs to be aligned with its ethical and professional standards so that adherence to these values is rewarded and breaches of law are met with dissuasive consequences or penalties. Compliance programmes should also extend where possible to subsidiaries.*

54 See the Federation's website at www.fee.be.

55 See www.auditcommitteeinstitute.ie.

56 The Financial Stability Forum (FSF) was convened in April 1999 to promote international financial stability through information exchange and international co-operation in financial supervision and surveillance. The Forum brings together on a regular basis national authorities responsible for financial stability in significant international financial centres, international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of Central Bank experts. The FSF seeks to co-ordinate the efforts of these various bodies in order to promote international financial stability, improve the functioning of markets, and reduce systemic risk.

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EU Commission Initiatives

On 27 October 2004 the EU Commission launched a Communication on Preventing and Combating Corporate Malpractice.[57] The aim of the Communication was "to provide a holistic approach on how to reduce the risk of financial and corporate malpractice covering also taxation and law enforcement." (p2)

The Communication identified the "first (innermost) line of 'defence' against corporate malpractice as the internal control in a company, in particular by the board members."

The Communication summarised at para 4.1 the EU initiatives being taken to reinforce this defence as follows:

First line of defence - Internal controls in the company and corporate governance

Boards of companies have fiduciary obligations towards the company itself, its shareholders as well as obligations to stakeholders at large.

EU-level

As announced in the Action Plan for Company Law and Corporate Governance the Commission will:

* *In the short term[58], clarify the collective responsibility of the board members for financial statements and key non-financial information, enhance transparency for intragroup transactions as well as transactions with related parties (including SPVs) and oblige all listed companies annually to make public a corporate governance statement;*

* *In the longer term, the Commission will look into criteria for disqualification of directors and wrongful trading;*

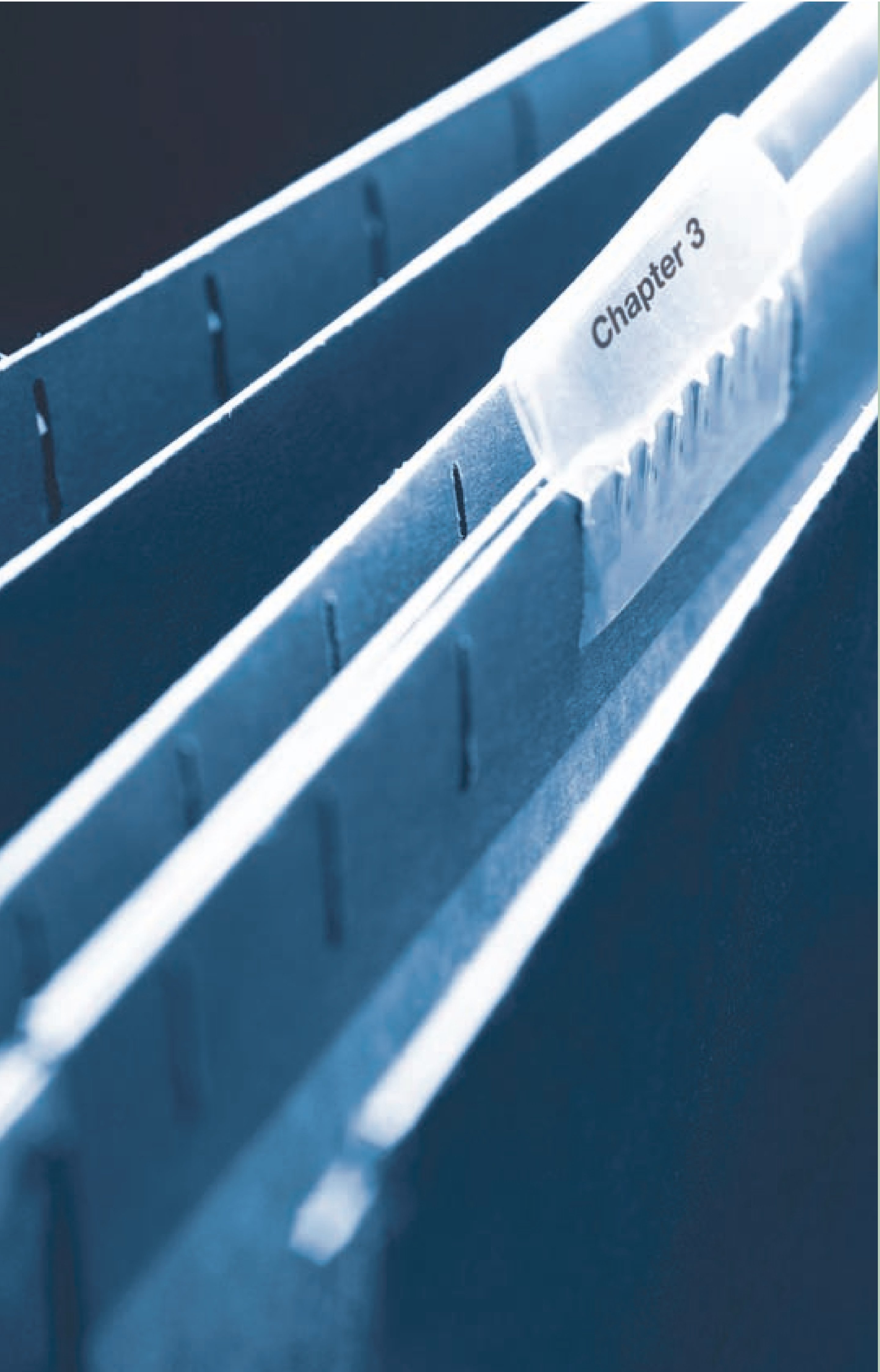
* *Bearer shares and bonds can be used to blur the ultimate beneficial owners and financial flows. The Commission will look more closely at the use of such instruments and make proposals to alleviate any problems.*

* *Following the Directive on Markets in Financial Instruments the Commission will analyse bond market transparency, including risk transfer to the retail sector. Depending on the outcome, further initiatives may follow.*

The fact that EU Member States have yet to decide on a common approach to and rules for the responsibility of company boards and directors, let alone compliance verification, featured strongly in the Review Group's discussions, notably with regard to timing, scope and competitiveness, see Chapters 9 and 10.

The above analysis makes it clear that the directors' compliance statement is not the only initiative taken in recent years intended to enhance the compliance of directors and other company officers. It is, in fact, one section of one legislative instrument, located among a number of legislative, regulatory, organisational and resourcing initiatives, all directed towards the improvement of compliance by companies and their officers with their legal obligations. The issue, developed in subsequent chapters, is not what the purpose of the compliance statement is, but whether it is an efficient, cost-effective, proportionate and competitive way to achieve that purpose of enhancing compliance.

57 COM (2004)611 final, Brussels, 27 September 2004 http://europa.eu.int/comm/internal_market/company/financial-crime/index_en.htm
58 Short term means before the end of 2004; medium term means before December 2005; and longer term initiatives means after 2006.



Chapter 3

3

Directors' Compliance Statement: Application ODCE Guidance on Directors' Compliance Statements

Considerable debate on the Directors' Compliance Statement has centred on how it would be applied by companies. While, generally speaking, the regulatory side has taken the view that there would be little or no extra costs, and possibly economic dividends to the company in the long term from the implementation of internal control systems this has been strongly contested by companies, their representative organisations and by the relevant legal and accountancy professional bodies. There is no question that the extra costs arising are driven by the search for legal certainty on the part of a company that it is complying with 45/2003. The analysis of costs, including costs already incurred as well as those likely to arise, and opportunity costs, undertaken for this report corroborates the view that in practice the DCS as it stands will give rise to substantial additional costs. The relevant analysis is set out in Chapter 5 and also addressed in Chapter 9.

Draft Guidance - July 2004

As a key element of the concern to establish clarity regarding the DCS, the Office of the Director of Corporate Enforcement undertook the preparation of guidance on the provision. On 22 July 2004, the ODCE published a Consultation Paper[59] on "Guidance on the Obligation of Company Directors to Prepare Compliance Policy and Annual Compliance Statements under the Companies (Auditing and Accounting) Act 2003".

In explaining the purpose of the guidance, the ODCE paper stated that "Given that the requirements of section 45 are entirely new, it is reasonable that directors and others affected should be provided with guidance material in advance of the commencement of the relevant provisions". At the invitation of the ODCE, the draft guidance had been prepared in consultation with the following bodies:

* the Consultative Committee of Accountancy Bodies - Ireland (CCAB-I);
* the Institute of Directors in Ireland (IoD);
* the Irish Business and Employers' Confederation (IBEC); and
* the Revenue Commissioners.

The consultation paper invited comments from interested parties on the draft guidance by 30 September 2004, and stated that any submissions received would be considered in detail and taken into account before the publication by the ODCE of its final guidance.

The following responded to the consultation paper with comments, queries and suggestions:

ACCA - Ireland
Arthur Cox
Audit Committee Institute Ireland
Business Software Alliance
Clery's Department Store
Deloitte.
Dillon Eustace Solicitors
Enterprise Ireland
Ernst & Young
Fashion and Footwear Federation
Financial Services Ireland
Friel Stafford Chartered Accountants
Grant, J.E.C.
Holohan, Simon
IBEC
Institute of Certified Public Accountants in Ireland
Institute of Chartered Accountants in Ireland
Irish Association of Investment Managers
Irish Bankers' Federation
Irish Congress of Trade Unions
Irish Financial Services Regulatory Authority
Irish Insurance Federation
Irish Stock Exchange
Irish Taxation Institute
Irish Venture Capital Association
John M. Molloy Engineering Ltd.
Kane, Mary
Kidney, R. J. & Co., Chartered Accountants
KPMG
Lavery Kirby, John
Law Society of Ireland
Mater Misericordiae & The Children's University Hospitals Ltd.
Matheson Ormsby Prentice Solicitors
McCann Fitzgerald Solicitors
Phelan, Mervin
PWC
Rehab Group

59 ODCE Consultation Paper C/2004/1

Auditing Practices Board Draft Guidance

In parallel with the preparation by the ODCE of their Draft Guidance, the Auditing Practices Board (APB) was engaged in a similar exercise of developing guidance for auditors on their duties with respect to directors' compliance statements. A draft bulletin was published in August 2004 and is not being finalised pending the current review of the compliance statement.[60]

Revised Guidance - December 2004

On 16 December 2004, the ODCE published its "Revised Guidance on the Directors' Compliance Statements to be prepared under the Companies Acts".

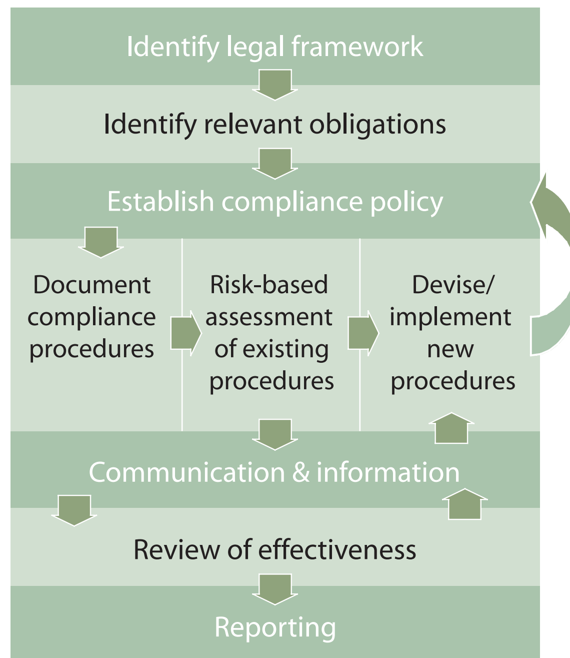
In this document, the intention was stated that "The Revised Guidance will be finalised and formally published in English and Irish after Ministerial decisions have been made on the date of commencement of the Directors' Compliance Statement obligations and on any exemptions for classes of companies otherwise covered by Sections 205E(2) and (9). The Director has decided to issue the Revised Guidance at this time to enable directors to continue with their preparations to comply with Section 205E".

The full text of the Revised Guidance can be accessed on the ODCE website at: http://www.odce.ie/_fileupload/publications/Revised_Guidance_on_Directors_Compliance_Statements_Final.doc

Main features of ODCE Revised Guidance

Key steps

The guidance recommended a structure involving the following key steps in preparing the compliance statement:



The third limb

The guidance deals in turn with each of the three terms used in paragraph (c) of the definition of "relevant obligations" in section 45 (the 'third limb') which may be open to interpretation. These three terms are *any other enactments* that provide a *legal framework* within which the company operates and that *may materially affect the company's financial statements.*

60 A copy of the Draft Guidance is available on the APB's website at www.frc.org.uk/apb

"Any other enactments"

In relation to any other enactments, the guidance states:

"The term 'any other enactments' in Section 205E(1) refers only to:

** primary legislation;*
** secondary legislation; and*
** EU Regulations having direct application in the State (e.g., the Cross-Border Insolvency Regulation officially known as Council Regulation (EC) No 1346/2000 of 29 May 2000).*

Specifically, the term does not extend beyond pronouncements having the force of law to, for example, non-legal rules or voluntary codes of practice. Nor does the term cover foreign enactments. Therefore, there is no obligation on the directors of an affected Irish company trading in the State and in other jurisdictions to report on the company's compliance with the legal obligations of any external jurisdiction.

"Legal framework"

The guidance advises that:

"The legal framework within which a company operates may include inter alia:

** legislation relating to employment (e.g., the law relating to employees' rights, Pay Related Social Insurance (PRSI) and pensions);*

** legislation affecting the company's stakeholders in general (e.g., the law relating to competition, consumer protection, data protection, equality and health and safety);*

** legislation with which, by virtue of its activities, the company is required to comply (e.g., copyright, environmental, planning and other sectoral legislation); and*

** those laws which govern any activities undertaken by the company which are subject to licensing by the State or those laws in relation to which non-compliance may affect the company's ability to continue trading (e.g., financial services, liquor licensing, telecommunications and transport)."*

"May materially affect the company's financial statements"

The following advice is offered by the guidance note on this point:

"Section 205E requires the relevant directors to identify enactments (other than company or tax law) that may materially affect the company's financial statements. Any legislation where compliance is important for the current or future financial standing of the company is relevant in this context.

There is no precise mathematical formulation of what financial sum or proportion of company turnover, profit or balance sheet total may constitute a material effect. However, the judgement as to what is material is likely to comprise both quantitative and qualitative elements.

Quantitative materiality indicators that are generally accepted in determining the impact of an item on financial statements include the impact on profit before taxation. An item with a five per cent or greater impact is generally deemed by auditors to be material; items lower than this threshold are generally deemed not to be material. However, absolute measures such as this threshold should be applied having due regard to the impact on other metrics such as turnover, total assets or key footnote disclosures and qualitative factors.

Qualitative indicators used in determining materiality include whether the potential impact of non-compliance:

** could result in enforced discontinuance or curtailment of operations;*

** masks a change in earnings or other trends in key financial indicators, such as earnings per share;*

** hides a failure to meet market expectations for the entity (e.g., whether the misstatement changes a loss into profit, if profits were forecast);*

** concerns a segment or other portion of the company's business that has been identified as playing a significant role in the company's operations or profitability;*

* *has the effect of protecting management's job(s) or reputation and/or increasing management's compensation (e.g., by satisfying requirements for the award of bonuses or other forms of incentive compensation, including share option schemes);*

* *could give rise to uncertain collateral damage for the marketability of a company's other products or services and/or its general reputation; or*

* *conceals technical insolvency or going concern problems or could affect the entity's distributable profits and hence the ability to pay dividends."*

Internal Procedures

The guidance contains detailed advice on suggested internal financial and other procedures for securing compliance with the relevant obligations, and for reviewing the effectiveness of these control procedures.

"All reasonable endeavours"

Moving on to the content of the compliance statement, and in particular the requirement in section 205E(6)(a) for the directors to specify therein that they are of the opinion that they used "all reasonable endeavours" to secure compliance, the guidance states:

"Interpretation of the term 'all reasonable endeavours' is ultimately a matter of judgement by a prudent board operating with due care in the particular circumstances of an individual company. The term does however impose a high level of expectation on directors. It requires a stronger commitment and effort than merely 'reasonable endeavours', a term that suggests the taking of reasonable steps while taking into account time and financial constraints, but is not as demanding as 'best endeavours', a term that suggests that directors should undertake all steps in their power to ensure compliance.

In forming their opinion as to whether they have used 'all reasonable endeavours' to secure the company's compliance with its relevant obligations, a company's directors will have to exercise their judgement having regard to the extent to which they have inter alia:

* *identified all of the company's obligations under the Companies Acts and tax law (irrespective of whether non-compliance may materially affect the company's financial statements);*

* *identified the company's legal framework (i.e., other than company and tax law) and determined those elements in respect of which non-compliance may materially affect the company's financial statements;*

* *documented the company's 'relevant obligations';*

* *developed policies respecting the company's compliance with its 'relevant obligations';*

* *communicated those company's policies to staff and management;*

* *designed financial and other procedures for the purposes of securing compliance with those obligations;*

* *implemented financial and other procedures for the purposes of securing compliance with those obligations;*

* *monitored and examined on an ongoing basis the effectiveness of those procedures in achieving their objective of providing reasonable assurance of compliance in all material respects with the company's relevant obligations,*

* *assessed the impact of any actual instances of non-compliance that have occurred or come to light during the course of the period in respect of which they are reporting;*

* *in instances of non-compliance or control weakness or failure, taken appropriate corrective and/or remedial action in an expeditious manner, and*

conducted an annual review of control effectiveness based on inter alia reports received during the year."

61 See section 42 of the Companies (Auditing and Accounting) Act 2003, which inserts a new section

3

Standard of directors' reporting, role of audit committees, and role of auditors

The ODCE document also provides guidance on the required standard of directors' reporting, and on the role of both the company's audit committee (where applicable[61]) and the company's auditors in reviewing the directors' compliance statement.

Framework for the directors' compliance policy statement

Appendix 3 of the Revised Guidance contains a suggested framework for the directors' compliance policy statement, as follows:

Framework for the Directors' Compliance Policy Statement
The policy of [insert name of company] (hereinafter called "the Company") is to comply with the Company's relevant obligations (hereinafter called the "relevant obligations") [save and to the extent indicated].

(Delete the text in the latter set of square brackets if it is inappropriate.)
(Directors may wish to identify by name the enactments which comprise the Company's relevant obligations.)
(Amend the paragraph as necessary.)

The Company's internal financial and other procedures for securing compliance with the Company's relevant obligations are as follows:

(Outline the Company's internal financial and other procedures for securing compliance with the Company's relevant obligations by reference, for instance, to the following:

* *communication of its compliance policy and procedures to business partners and existing and newly recruited staff;*
* *description of its relevant controls (e.g., supervision, authorisation and approval, personnel, computer processing, compliance calendar controls, etc.);*
* *key staff members in critical compliance areas are subject to regular training;*
* *advice is taken on a regular basis from external professional advisers on changes in compliance requirements;*
* *etc.)*

(Delete/add additional text on procedures based on Section 4.2 of the Revised Guidance.)

The Company's arrangements for implementing and reviewing the effectiveness of the Company's policies and procedures are as follows:

(Outline the Company's arrangements for implementing and reviewing the effectiveness of the Company's policies and procedures by reference, for instance, to the following:

* *line management confirm the operation of key procedures and actual compliance within their specific areas of responsibility throughout the year;*
* *internal audit and the compliance department review their operation of compliance procedures;*
* *management review changes in the Company's operations and the regulatory environment to ensure that procedures are amended and put in place where necessary. In the current year, this included...*
* *the board considers the impact of reported instances of non-compliance;*
* *etc.)*

(Delete/add additional text on arrangements based on Section 5 of the Revised Guidance.)

(Add further comment, if any, at the Directors' discretion.)

Approved by the Board of the Company on the day of 20[ ].

Framework for the directors' annual compliance statement

Appendix 4 of the Revised Guidance contains a suggested framework for the directors' annual compliance statement, as follows:

Framework for the Directors' Annual Compliance Statement
The Directors acknowledge that they are responsible for securing compliance by [insert name of company] (hereinafter called "the Company") with its relevant obligations (hereinafter called the "relevant obligations") as indicated in the Compliance Policy Statement.

205B, dealing with audit committees, into the Companies Act 1990. Section 42 has not yet been commenced.

(The Directors should state whether the Company has internal financial and other procedures in place that are designed to secure compliance with its relevant obligations. If not, they should specify the deficiencies and indicate the reasons for those deficiencies.)

(The Directors should state whether they have reviewed the effectiveness of these procedures during the financial year to which this Report relates. If not, they should specify the reasons.)

(The Directors, based upon the procedures in place and their review of the effectiveness of those procedures, should state whether they are of the opinion that they used all reasonable endeavours to secure compliance with the Company's relevant obligations in the financial year to which this Annual Report relates. If not, they should specify the reasons.)

(Add further comment, if any, at the directors' discretion.)

Relevant obligations: a user's viewpoint

Notwithstanding the enormous amount of time, effort and expertise which went into developing the ODCE guidance, difficulties in implementing 45/2003 remain. If the purpose was to make interpretation of 45/2003 straightforward, it is generally agreed that this did not happen.

This is illustrated by the following example:

A large financial services institution provided the CLRG with detailed material identifying what its legal advisers believe are its relevant obligations for the purposes 45/2003. This review was undertaken on foot of the draft ODCE Guidance.

In identifying what would constitute a 'relevant obligation' that derives from an enactment that provides a legal framework within which the particular institution operates and may materially affect the institution's financial statements, the institution made the following points:

"To set a meaningful starting point the concept of legal framework has been interpreted to mean all laws that are central to the business of the particular company, rather than being merely incidental to that business."

"The Oireachtas could not have intended that each company to which the obligations apply should be required to undertake the intensive process that stems from the 2003 Act in respect of all legislation that applies to that company, rather than merely in respect of legislation that is central or core to its business."

** The ODCE Draft Guidance suggests that the legal framework within which a company operates may include:*

- *legislation regulating employment;*
- *legislation affecting the company's stakeholders in general (eg competition law, consumer protection, data protection);*
- *legislation with which, by virtue of its activities a company is required to comply; and*
- *those laws that govern any activities undertaken by the company which are subject to licensing by the State or laws in relation to which non-compliance may affect the company's ability to continue trading*

** The Draft Guidance is also helpful regarding the application of the concept of materiality, as it suggests that an obligation is material if compliance with it is important for the current or future financial standing of the company. In this sense, materiality has quantitative and qualitative elements, which categories of potential considerations are to be accorded equal significance by directors. Relevant quantitative and qualitative considerations include the following:*

3

QUANTITATIVE	QUALITATIVE
If a breach of an obligation would be likely to:	*If breach of an obligation:*
Have an impact on a company's profit before tax of five percent or greater	Might result in enforced discontinuance or curtailment of operations
Have an impact on other key financial indicia of a company, such as turnover or total assets, of fiver percent or greater	Might entail a failure to meet market expectations
Require a disclosure in the company's accounts	Could entail collateral harm to a company's other products or services or its general reputation
	Could entail a change in earnings or other trend in financial indicators

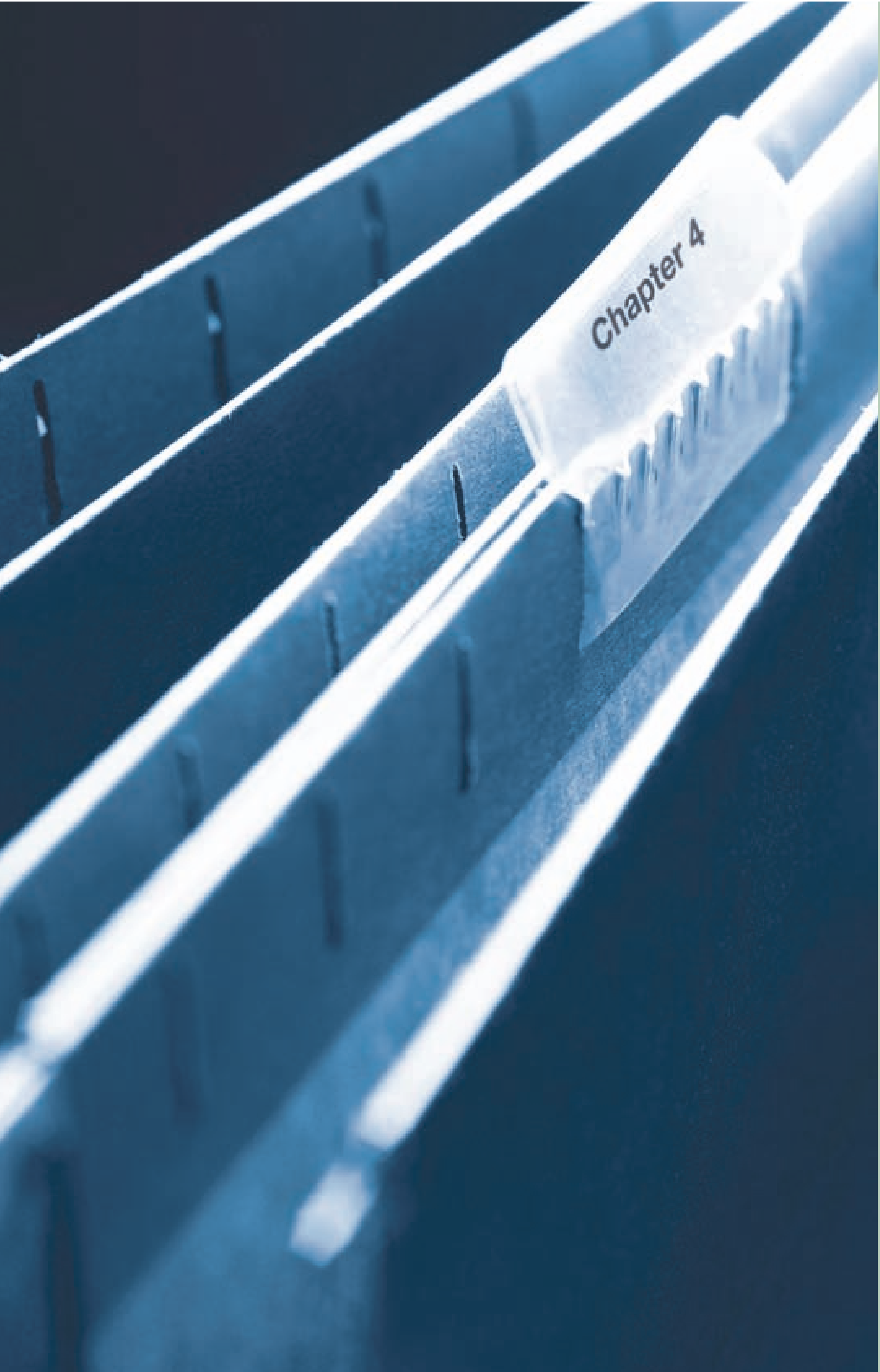
Applying the above criteria to identify relevant enactments other than those under the Companies Act and tax law, the company identified a 'Register of Relevant Enactments and Relevant Obligations' with 877 relevant obligation (there are a total of 156 relevant enactments and 1266 relevant obligations if the Companies Acts and tax law are included).

The above is not meant to be a representative sample in that large financial institutions are a small and specialised subset of companies. Nonetheless, they are precisely the type of companies likely to have good planning and well-developed risk analyses in place. The example is accepted as being a true representation of the risk assessment done by that particular company and a real indicator of the type and nature of costs likely to be borne by companies in search of establishing to their own satisfaction their compliance obligations under the DCS.[62] [63]

An important point to emerge from the discussions on the meaning of Section 45 and on the obligations arising from the provision was that in the event of the Review Group deciding on an amended version of Section 45, the wording of the amended or new section should be as clear and as unambiguous as possible. That objective has informed the wording of Section X, the proposed redraft of the DCS, which is appended to Chapter 10.

62 Without conducting any analysis of this work the ODCE cannot accept the example as a 'true representation' of the likely impact of 45/2003 on the institution in question. Firstly, it notes that the evaluation was conducted on the basis of its Draft Guidance and not the Revised Guidance which was developed following a public consultation process and further reflection. The institution also comprises many companies, not all of which would qualify under 45/2003. Moreover, the ODCE considers that a reasonable board of directors would never decide that a company had 1,266 'relevant obligations' for the purpose of 45/2003.

63 The Revenue Commissioners agree with the comments of the ODCE.



Chapter 4

Scope, Content, Degree of Prescription, Verification and Timing

4

The Directors' Compliance Statement: Scope, Content, Degree of Prescription, Verification and Timing

Since the enactment of the DCS in December 2003 many of the calls and representations, and much of the interest group lobbying, has called for its repeal. However, in many more interfaces the call has been for mitigation rather than repeal. In these instances the focus of complaint or discussion has centred on issues of scope, content, degree of prescription, verification and timing of the DCS.

Scope

The statutory provisions

Section 205E(2) of the Companies Act 1990 (as inserted by section 45 of the Companies (Auditing and Accounting) Act 2003) applies the requirements of the section to:

(a) a public limited company (whether listed or unlisted), and
(b) a private company limited by shares, but it does not apply to a company referred to in paragraph (a) or (b) that is of a class exempted under section 48(1)(j) of the Act of 2003 from this section or to a company referred to in paragraph (b) while that company qualifies for an exemption under subsection (9).

Section 48(1)(j) of the 2003 Act contains a power for the Minister to make regulations exempting from section 205E of the Act of 1990:

(i) qualifying companies within the meaning of section 110 of the Taxes Consolidation Act 1997[64] (as inserted by section 48 of the Finance Act 2003), and
(ii) classes of other companies and other undertakings, if the extent to which or the manner in which they are or may be regulated under any enactment makes it, in the Minister's opinion, unnecessary or inappropriate to apply those provisions to them.

No such regulations have been made to date.

Subsection (9) of section 205E of the Act of 1990 (as inserted by section 45 of the Companies (Auditing and Accounting) Act 2003) states that a private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if:

(a) its balance sheet total for the year does not exceed -
i. €7,618,428, or
ii. if an amount is prescribed under section 48(1)(1) of the Act of 2003 for the purpose of this provision, the prescribed amount, and
(b) the amount of its turnover for the year does not exceed -
i. €15,236,856, or
ii. if an amount is prescribed under section 48(1)(1) of the Act of 2003 for the purpose of this provision, the prescribed amount.

Issues to be considered
The issues which might be considered in the context of a review of the scope of section 205E include:

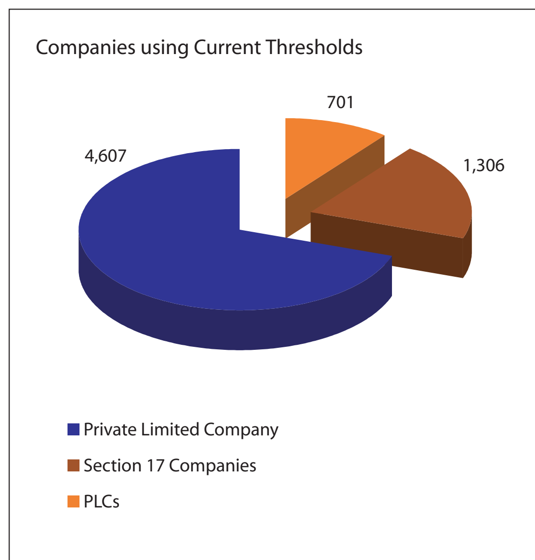
* Continue to apply it to all companies as it currently applies to; or
* Limit application to Listed PLCs; or
* Limit application to PLCs - Listed and unlisted; or
* Increase thresholds for affected Private Companies.

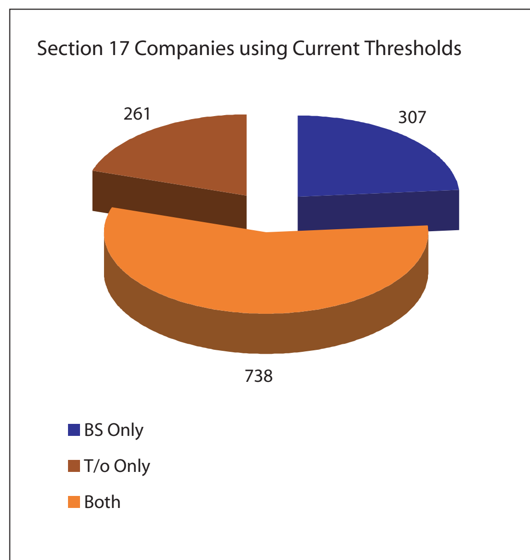
The following page contains data sourced by the ODCE in late 2004 indicating the number of companies falling into each relevant category.

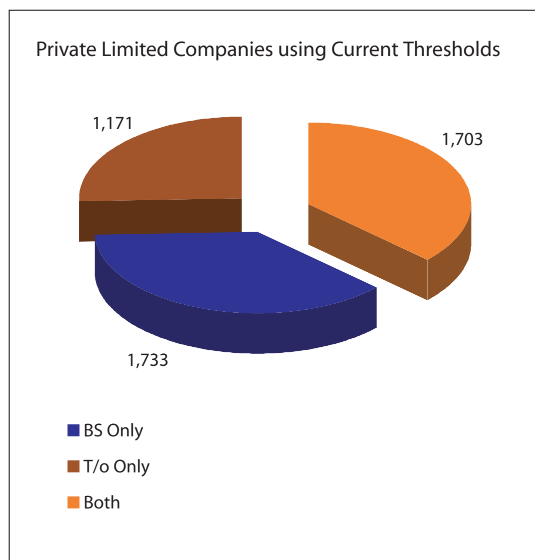
64 Section 110 of the Taxes Consolidation Act 1997 (as inserted by section 48 of the Finance Act 2003) is a provision dealing with securitisation and the tax treatment of profits made by a 'qualifying company' as defined in the section.

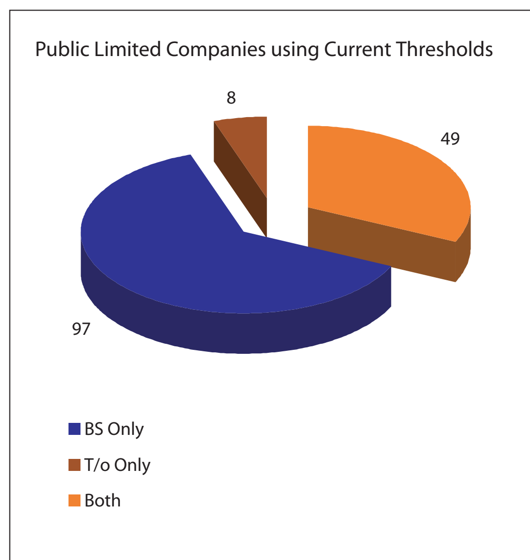
Companies using Current Thresholds

	Total	Balance Sheet (BS) Only	Turnover (T/o) Only	Both
Private Limited Companies	4,607	1,733	1,171	1,703
Section 17 Companies	1,306	307	261	738
PLCs (see * below)	701	97	8	49
Total	6,614			









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Content

The statutory provisions

Section 205E(3) states:

The directors of a company to which this section applies shall, as soon as possible after the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:

(a) its policies respecting compliance with its relevant obligations;

(b) its internal financial and other procedures for securing compliance with its relevant obligations;

(c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs (a) and (b).

Section 205E(1) defines "relevant obligations" as the company's obligations under:

(a) the Companies Acts,

(b) tax law, and

(c) any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements.

The "first limb"

Section 3 of the 2003 Act defines "Companies Acts" as "the Companies Act 1963 and every enactment, including this Act, that is to be construed as one with that Act".

The "second limb"

Section 205E(1) defines "tax law" as:

(a) the Customs Acts,

(b) the statutes relating to the duties of excise and to the management of those duties,

(c) the Tax Acts,

(d) the Capital Gains Tax Acts,

(e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,

(f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,

(g) the statutes relating to stamp duty and to the management of that duty, and

(h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.

The "third limb"

The "other enactments" referred to in paragraph (c) of the definition of "relevant obligations" are not defined nor are they further elaborated on. The ODCE Revised Guidance indicates that "what is material is ultimately a matter of reasonable judgement for the directors".

Anomalies

While the third limb is not defined and has therefore been the subject of much conjecture in the debate as to its possible contents, it is also noticeable that enactments, whatever they may be, falling into this category are subject to the test that they must be such as may "materially affect the company's financial statements". However, this test is not present in either the first or second limb.

The definition of tax *law* in the second limb is wide enough to include, at paragraph (h) of the definition, any instruments made under the listed tax enactments or under any other enactment relating to tax. The reference to "Companies Acts" in section 45 as defined in section 3 of the 2003 Act as "the Companies Act 1963 and every enactment, including this Act, that is to be construed as one with that Act" will include all the primary legislation which has the same collective citation. It is understood that it will also include all

statutory instruments made under the European Communities Act 1972 which amended the 1963 - 2003 Acts and which are to be construed collectively as part of the Companies Acts 1963 - 2005, and any other statutory instruments made under the 1963 - 2003 Acts themselves, which are generally limited, such as forms and fees orders for the CRO. The scope of the definition, therefore, depends on whether an individual instrument is to be construed as one with the 1963 - 2003 Acts in its own citation.

Further, while the term "Companies Acts" is defined very clearly, albeit in the definitions for the 2003 Act as a whole and not just for this Part, by giving the dates of the 1963 and 2003 Acts as starting and finishing points, the second limb uses terms such as "Customs Acts" and "Tax Acts" without defining these terms with similar precision.

Issues to be considered

The options which might be considered in reviewing the content of the directors' compliance statement include:

* Continue existing definition of "relevant obligations"; or
* Remove the "third limb" of the definition of relevant obligations; and/or
* Introduce a materiality requirement for the first limb - Companies Acts:
  - by providing that the provisions in question must materially affect the company's financial statements; or
  - by specifying a monetary amount/ percentage; or
  - by specifying certain provisions of the Companies Acts (e.g. loans to directors/ financial assistance/ dividend from distributable profits etc) and/ or
* Introduce a materiality requirement for the second limb - tax law
  - by providing that the provisions in question must materially affect the company's financial statements; or
  - by specifying a monetary amount/ percentage.

Degree of Prescription of the Directors' Compliance Statement

The Compliance Policy Statement

Section 205E(3) states:

The directors of a company to which this section applies shall, as soon as possible after the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:

(a) its policies respecting compliance with its relevant obligations;

(b) its internal financial and other procedures for securing compliance with its relevant obligations;

(c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs (a) and (b).

Section 205E(4) continues:

The directors' compliance statement (including any revisions) must -

(a) be in writing,

(b) be submitted for approval by the board of directors,

(c) at least once in every 3 year period following its approval by the board, be reviewed and, if necessary, revised by the directors, and

(d) be included in the directors' report under section 158 of the Principal Act.

Issues to be considered

Options regarding the extent of prescription of the compliance policy statement include:

* Continue to require the directors to make a Compliance Policy Statement; or
* Make the Compliance Policy Statement less prescriptive; or
* Drop the requirement for a Compliance Policy Statement.

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Annual Compliance Statement

Section 205E(5) is as follows:

The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement -

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations,

(b) confirming that the company has internal financial and other procedures in place that are designed to secure compliance with its relevant obligations and, if this is not the case, specifying the reasons, and

(c) confirming that the directors have reviewed the effectiveness of the procedures referred to in paragraph (b) during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

Section 205E(6) stipulates:

In addition, the directors of a company to which this section applies shall in the statement required under subsection (5) -

(a) specify whether, based on the procedures referred to in that subsection and their review of those procedures, they are of the opinion that they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year to which the annual report relates, and

(b) if they are not of that opinion, specify the reasons.

Issues to be considered

The options in respect of the extent of prescription regarding the annual compliance statement include:

* Continue to require the directors to make an Annual Compliance Statement; or
* Make the Annual Compliance Statement less prescriptive; or
* Drop the requirement for an Annual Compliance Statement.

Options in relation to the persons required to make the statement include:

* Continue to apply the law to all of a company's directors; or
* Confine the obligation to the Managing Director and/ or Chairman; or
* Confine the obligation to the Finance Director; or
* Confine the obligation to the Managing Director and/ or Chairman and Finance Director.

Verification

Section 205F, as inserted by section 45 of the 2003 Act, states:

(1) The auditor of a company to which section 205E applies shall undertake an annual review of-

(a) the directors' compliance statement under subsections (3) and (4) of that section, and

(b) the directors' statement under subsections (5) and (6) of that section, to determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor, or by an affiliate of the auditor within the meaning of section 205D, in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

(2) The auditor shall-

(a) include in the auditor's report appended to the company's annual accounts a report on, and the conclusions of, the review undertaken under subsection (1), and

(b) where any statement reviewed under subsection (1) is not, in the auditor's opinion, fair and reasonable-

(i) make a report to that effect to the directors, and

(ii) include that report in the auditor's report appended to the annual accounts.

(3) Where, in the auditor's opinion, the directors have failed-

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by section 205E(3) and (4)(a) to (c),

(b) to include a directors' compliance statement in the directors' report as required by section 205E(4)(d), or

(c) to comply with section 205E(5) and (6), the auditor shall report that opinion and the reasons for forming that opinion to the Director of Corporate Enforcement.

(4) Section 194(6) applies, with the necessary modifications, in relation to an auditor's compliance with an obligation imposed on him by or under this section as it applies in relation to an obligation imposed by or under section 194.

(5) A person who contravenes this section is guilty of an offence.

Issues to be considered

Options concerning the verification of the directors' compliance statement include:

* Continue to require auditors to undertake an annual review of the directors' compliance statement and opine upon whether it is fair and reasonable
* Postpone the commencement of the auditors' reporting requirement for two years. This would permit directors a period of time to bed the process down.
* Change the requirement to that of requiring the auditors to say whether the Directors' compliance statements are "inconsistent" with matters that have come to the auditor's attention in the audit of the company.
* Remove the involvement of auditors entirely.

Timing

The statutory provisions

Unlike the scope and content of the directors' compliance statement, the timing of its commencement is not determined in the 2003 Act itself. Section 2 of the Act enables the Minister to make an order, or orders, to commence different provisions of the Act. An order has not yet been made to determine the commencement date of section 45, although the date of 1 July 2005, and, subsequently, 1 January 2006, had been mooted in discussions on the issue.

The obvious point must be made that an order under section 2 could only be made to commence section 45 as it currently stands. If the provisions of section 45 are to be amended or varied, this would require primary legislation, presumably to amend the text of section 45, and then the amended section could be commenced.

This leads to the issue of time running towards the enactment of the new Companies Act (the "CLRG Act"). Given that the new Act will introduce a new company law regime, one consequence will be that the definition of the "Companies Acts" for the purpose of the 2003 Act, and in particular in the context of section 205E, will change significantly, and consequently so will the procedures and systems which a company would need to have in place to ensure that it is complying with the prevailing company legislation. The question therefore arises as to whether it would be overly burdensome to expect companies to go through the necessary procedures of ensuring that they can produce a satisfactory directors' compliance statement in respect of the existing Companies Acts, when this body of legislation would shortly afterwards be replaced by the new Companies Act, and companies who fall within section 205E would then be required to go through an extensive process *ab initio* to ensure that they can satisfy the requirements of the directors' compliance statement in respect of the new legislation.

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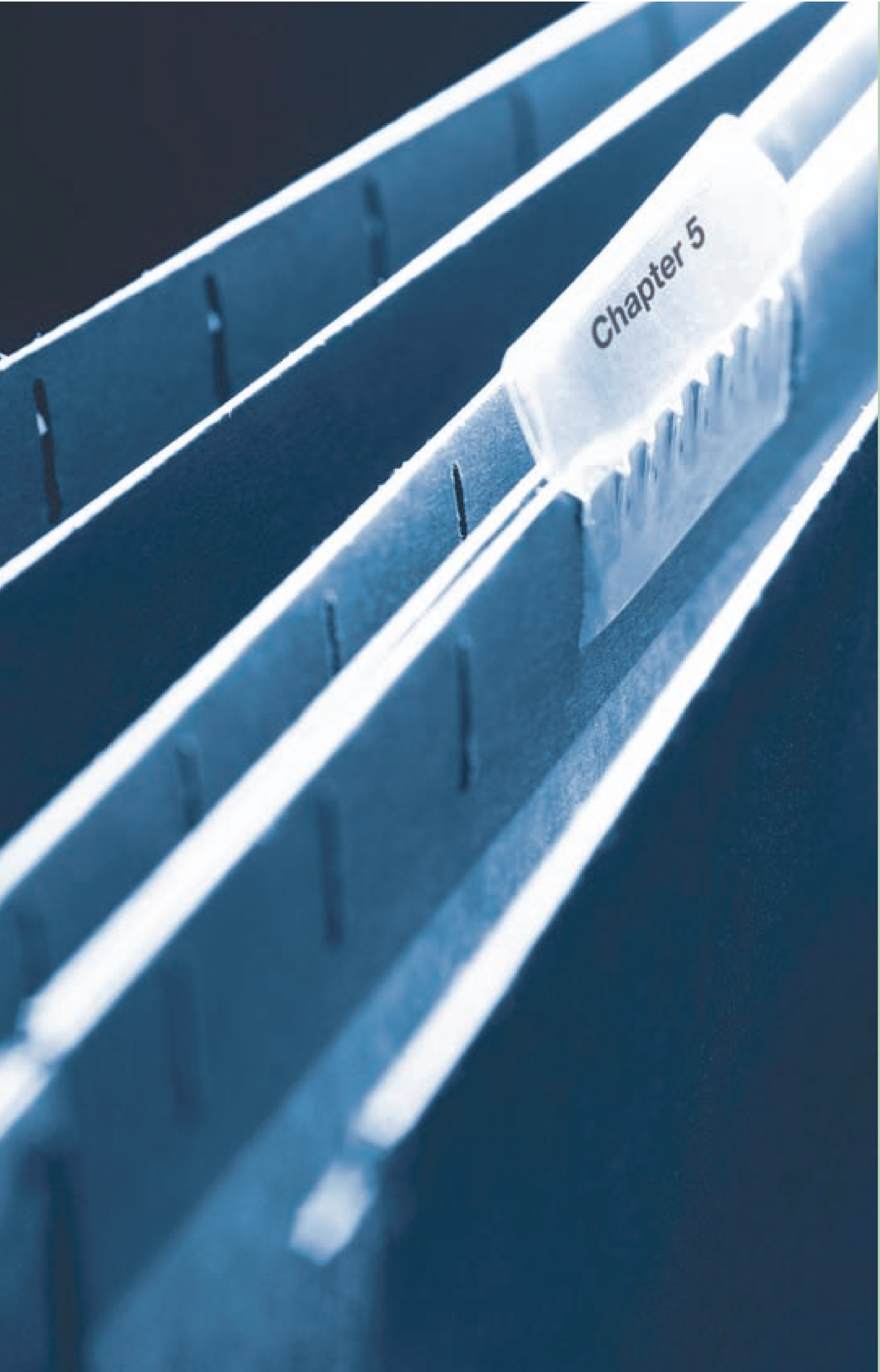
Issues to be considered

The options which might be considered in respect of the timing of the introduction of the directors' compliance statement include:

* Commence provisions as soon as possible; or
* Defer commencement until the commencement of the new Companies Bill, 2006; and/or
* Commence provisions (whether modified or unmodified) for listed PLCs immediately on a comply or explain basis, policed by the ISE.

The options for mitigating the Directors' Compliance Statement having regard to issues of Scope, Content, Degree of Prescription, Verification and Timing are appropriately developed and determined in Chapter 10 on the basis of the Screening RIA undertaken in Chapter 9.



Chapter 5

Cost Benefit Impact Analysis

5

Cost Benefit Impact Analysis

The Review Group has been asked to conduct its analysis and structure its report consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis. Chapter 9 of this Report concentrates in fuller detail on the individual elements of the regulatory impact analysis model, while this Chapter aims to examine the likely costs and benefits of the directors' compliance statement. While the anticipated benefits of the Directors' Compliance Statement in terms of improved business practices have been set out, for example, in the Report of Review Group on Auditing 2000, before the Review Group began its work there was very little quantitative data in the public domain on the likely costs of the provision.

However, it could reasonably be stated that the overwhelming impact of the Directors' Compliance Statement is economic in nature, a point verified by this Chapter and by Chapter 9. For a consideration of the social and environmental impacts of the DCS also see Chapter 9.

What is undeniable is that the requirement to focus on "other relevant obligations" can also have a significant material impact on a company's financial statements. Some real life examples are noted below:

Smurfit News Press Ltd. of Kells Industrial Estate, Kells, Co. Meath were fined a total of €1 million at Trim Circuit Criminal Court on the 29th October 2004 having pleaded guilty to the following charges:

Section 6(2)(c) of the Safety, Health & Welfare at Work Act, 1989;
Regulation 10 (a) of the Safety, Health & Welfare at Work (General Application) Regulations 1993;
Regulation 20 (1) of the Fifth Schedule Paragraph 8 (a) of the Safety, Health & Welfare at Work (General Application) Regulations 1993.
Health and Safety Authority website, Outcomes of Prosecutions 2004
www.hsa.ie/publisher/index.jsp?aID=1137&nID=166&pID=104

In 2004 the EPA brought 17 cases before the District Courts. Convictions were handed down in 16 of these cases.
Legal action led to significant investment (ranging from €250,000 to €900,000) in on-site infrastructure and abatement measures such as improved wastewater treatment plants and the installation of bioscrubbers.
Environmental Protection Agency, Annual Report 2004.

Gama Construction workers have called on the Government to intervene to secure the information relating to the bank accounts held in their names in Holland.

The workers, who staged a protest outside the Dail today, claim millions of euros in unpaid wages has been hidden by the Turkish construction company at a branch of Finansbank in Amsterdam.

The Taoiseach Mr Ahern said officials were seeking access to the bank records "to ensure that the rights and monies of these workers is secured".

He also said the money involved was substantially more than previous estimates of €30 million, Irish Times, 12 April 2005.
Source: ODCE

These examples of breaches or suspected breaches of health and safety, environmental, and employment law, involve significant sums, and where for example licensing is required by the EPA, breaches could result in the cessation of business. One of the impacts of DCS could be a refocusing of business on the importance, financially as well as socially and environmentally, of these "non-financial" obligations.

The issue arising with regard to the 'third limb' of the DCS is if the 'culture of compliance' anticipated is worth the very significant additional costs deriving from the vagueness of that third limb and the competitiveness costs to Irish companies (and foreign companies planning to locate in Ireland) which would single Ireland out as a jurisdiction which imposes a much more prescriptive and administrative compliance verification regime than its peers.

Moreover, the range of applicable legislation depends to some extent on the nature of business the company is engaged in. For example, data provided to the Review Group of a compliance management project undertaken for a large financial services company suggests the following breakdown:

Register of relevant enactments: 156 relevant enactments		
Type of enactment	*Number of obligations*	
Companies Acts	212	relevant obligations
Tax enactments	177	relevant obligations
Employment enactments	237	relevant obligations
General enactments	222	relevant obligations
Banking and Financial services enactments	418	relevant obligations
Total	**1,266**	**relevant obligations**

Clearly, a company not regulated by the Financial Regulator will not have the same requirement for compliance with banking or financial services enactments. A company engaged in manufacturing is likely to have more relevant obligations related to environmental law, health and safety, manufacturing standards, product liability etc. One submission received by the secretariat reports that "a brief review suggests that relevant obligations contained in generic enactments within the framework of most companies would amount to approximately 850".

It is also relevant to note that a review of relevant obligations in the context of the directors' compliance statement may not add to the review of practices and enforcement powers already applying under specific enactments.

In considering the compliance obligations of persons charged with the governance and management of a company it is helpful to consider the International Standard on Auditing (UK and Ireland) ISA 250 which deals with "Consideration of Laws and Regulations in an Audit of Financial Statements" (Section A) and "The Auditor's Right and Duty to Report to Regulators in the Financial Sector" (Section B). The purpose of the ISA is to establish standards and provide guidance on the auditor's responsibility to consider laws and regulations in an audit of financial statements.

The following paragraphs are particularly relevant for the purposes of this Review.

1-1. This (ISA) UK and Ireland uses the terms "those charged with governance" and "management". The term "governance" describes the role of persons entrusted with the supervision, control and direction of an entity. Ordinarily, those charged with governance are accountable for ensuring that the entity achieves its objectives, and for the quality of its financial reporting and reporting to interested parties. Those charged with governance include management only when they perform such functions.

1-2. In the UK and Ireland, those charged with governance include the directors (executive and non-executive) of a company or other body, the members of an audit committee where one exists, the partners, proprietors, committee of management or trustees of other form of entity, or equivalent persons responsible for directing the entity's affairs and preparing its financial statements.

1-3. "Management" comprises those persons who perform senior management functions.

1-4. In the UK and Ireland, depending on the nature and circumstances of the entity, management may include some or all of those charged with governance (e.g. executive directors). Management will not normally include non-executive directors.

10-1 In the UK and Ireland, in certain sectors or activities (for example financial services), there are detailed laws and regulations that specifically require directors to have systems to ensure compliance. These laws and regulations, could, if breached, have a material effect on the financial statements. In addition, the directors are required to report certain instances of non-compliance to the proper authorities on a timely basis.

10-2 In the UK and Ireland, it is the directors' responsibility to prepare financial statements that give a true and fair view of the state of affairs of a company or group and of its profit or loss for the financial year. Accordingly, it is necessary, where possible non-compliance with law or regulations has occurred which may result in a material

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misstatement in the financial statements, for them to ensure that the matter is appropriately reflected and/or disclosed in the financial statements.

10-3 In the UK and Ireland, in addition, directors and officers of companies have responsibility to provide information required by the auditor, to which the auditor has a legal right of access.[65] *Such legislation also provides that it is a criminal offence to give to the auditor information or explanations which are misleading, false or deceptive.*

The above illustrates in general terms the obligations of directors to the good governance of the company.

There are economic benefits to be derived from implementation of the compliance measures. For example, having incurred the short-term costs, certain benefits can be envisaged as accruing to the company over time.

Non-compliance with the laws covered by the statement can cost a company money or even threaten its existence. A catalogue of a company's "relevant obligations" would assist in the management of that risk.

Between positive compliance and non-compliance there is likely to be an area where a business is not actually conscious of its legal obligations but happens not to be deviating from them. That position enhances risk because it is easier to shift to a position of non-compliance. That becomes less likely when the business has gone through the exercise of positively identifying its compliance obligations.

Furthermore, once a company has a comprehensive catalogue of those obligations it would ease the task of ensuring management continuity when one person hands over to another; it would be easier for one person to succeed to the role previously occupied by another when they have express guidance as to what that role involves.

Conscious of the dearth of quantitative data, the Review Group sought assistance from its own membership network on the likely economic costs arising from compliance with the Directors' Compliance Statement.

IBEC provided data drawn from fifteen of its members, of varying size and engaged in various types of economic activity. The Review Group also sought, via Goodbody Economic Consultants, details from a number of legal and audit firms on estimated costs arising from the new compliance regime, as the Review Group felt that would add to the robustness of any costing analysis, and indeed draw on actual expenditure in some instances in preparation for the anticipated commencement of Section 45. The companies in question were asked to use their experience, judgment and billing-policies as well as any existing data which they had to provide an estimate of the costs involved in compliance:

In sourcing data the Review Group specified that:

1. All costs should be additional, arising specifically because of Section 45 i.e. relative to proving compliance as opposed to securing compliance.
2. Internal Costs are a matter for each company; however, it is possible that the legal or audit firms might have views or estimates of the costs companies are likely to incur, if they were to follow advice in putting in place additional procedures.
3. Other third party costs would cover items such as software and training.

It was required that data should clearly distinguish between the set-up cost of implementing the Directors' Compliance Statement and ongoing costs. It seems clear that the major costs will be in the first year as directors ensure that proper systems are in place. Thereafter those systems will be less costly to maintain.

The potential categories of costs arising were as follows:

* External resources
* Internal staff time
* Legal costs
* Audit/advisory fees
* Design and build of appropriate IT systems

By way of illustrating the type of scoping work that a legal firm might undertake in preparation for directors to determine their relevant obligations. The following sample [66] [67] gives a fuller picture of the procedure and process involved :

65 In Ireland under Sections 193(3) and 197 of the Companies Act 1990.

Sample: Content of review of compliance procedure and process carried out by external firm

1. **Gaining an in-depth understanding with the client of the business carried out.**

2. **Preparing a tailored schedule of obligations in relevant areas, Company and Tax are mandatory and thereafter a wide range of other relevant legislation may be relevant include Employee/Health and Safety, Data Protection/E-commerce, Regulatory, Pension and EU/Competition etc. This takes a large amount of time.**

3. **Carrying out a due diligence to ascertain existing procedures within all areas of the business to secure compliance. Reviewing these procedures and advising of any gaps. Advising in relation to the effectiveness of procedures. Preparing a gap analysis for the client and assisting on legal issues in relation to any new procedures.**

4. **Advising on a range of other ancillary issues which necessarily arise in the context of such a project, including education and training of employees, development of a breach notification policy and procedure etc.**

5. **Providing ongoing legal assistance e.g. advising on any new or amended relevant legislation which needs to be considered, assisting in the putting in place of new or amended procedures and revising relevant Schedules and Procedures documents etc.**

The above all involves detailed interfacing with the client and its employees together with, when necessary, the company's Board, Board Audit Committee and external auditors.

As specified above, the Review Group asked Goodbody Economic Consultants to carry out an evaluation of the additional costs arising from the commencement of 45/2003 as currently drafted. Their analysis is set out in the following pages.

66 The ODCE does not believe that the type of forensic legal audit indicated here is always required to comply with 45/2003. Many directors and managers will be sufficiently well informed to make their own judgements in relation to the main areas of significant legal exposure. They may accordingly be in a position to avoid a need for external professional advice or at least to limit their requests to discrete areas of work, thus saving on the substantial costs which would be associated with the type of comprehensive engagement suggested in this Table.

67 The Revenue Commissioners agree with the ODCE analysis. The Revenue Commissioners have not seen the analytic data that would give an insight as to why additional costly procedures are necessary or whether the additional costs relate to a particular category of obligation. It would be surprising if substantial additional costs would arise in relation to taxation given that compliance with tax law is inextricably linked to taxation.

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Evaluation of the Cost of Complying with Section 45 of the Companies (Auditing and Accounting) Act 2003 prepared by Goodbody Economic Consultants, June 2005 [68]

1 Introduction

This note provides an estimate of the costs of complying with Section 45. The cost estimates provided are based on a survey of legal and accountancy firms and data provided by IBEC.

2. Data Collection

2.1 Survey of Legal and Accountancy Firms

Twelve legal and accountancy firms were surveyed and asked to assess the costs of the new compliance regime as set out in Section 45. Eight firms furnished replies. The firms were asked to identify costs arising from compliance with:

** Company law;*
** Tax law; and*
** Other material enactments.*

Information was also sought on how these costs broke down as between:

** External legal costs;*
** External audit costs;*
** Internal company costs; and*
** Other third party costs.*

It was also recognised that initial or set up costs would differ from ongoing costs, and a breakdown along these lines was also obtained.

2.2 IBEC Survey

IBEC sought identical information from a number of its members. At the time of writing, fifteen companies had furnished data.

3. Source and Determinants of Additional Costs

3.1 Source of Additional Costs

From the data and the commentaries provided by survey respondents, it is clear that compliance with Section 45 would give rise to additional costs over and above existing expenditure on compliance issues. This was because the Section was seen to require additional certification procedures, documentation of policies, and extensive and formal ongoing monitoring.

3.2 Determinants of the Costs

Respondents identified two major factors influencing the costs that would arise for any particular company, viz.

** Scale (and complexity) of the company; and*
** Complexity of the regulatory environment facing the company.*

Other factors, such as whether the company was listed or not, were seen to contribute to the scale of the costs. The need to rely on external experts as opposed to own resources was also identified as a factor influencing initial or set-up costs especially.

It was noted that there would be high costs even for smaller companies operating in a less complex regulatory environments, because generic enactments would have to encompassed. This would require a minimum level of resources, irrespective of company size.

4. Synthesis of the Cost Estimates

The cost estimates exhibited a number of consistent features:

** Initial or set-up costs were some two to three times that of ongoing costs;*
** External legal cost were identified as the largest cost element, with other third party costs being generally lowest;*
** Costs generally increased with company size; and*
** Large companies in the financial sector indicated very high levels of cost in excess of €12m for set-up and €7m for ongoing costs.*

Excluding the large financial companies, it is possible to provide a synthesis of the cost estimates as per Table 1. This sets out the range of costs provided by the two data sources. The cost estimates provided by IBEC tend to be larger. This probably reflects the fact that the IBEC survey related to relatively large companies, whereas the information from legal and accountancy firms covered a wider range

68 The ODCE has serious reservations about the value of this analysis. See the ODCE reservation at end of this Report.

of company sizes. The minimum set-up costs and ongoing costs are €90,000 and €40,000 respectively. These estimates could be regarded as applying to smaller companies in less regulated sectors. The maximum set-up and ongoing costs are €1,000,000 and €600,000. These estimates would be relevant to large companies in regulated sectors. Of course, as indicated above, the costs for very large financial companies lie well above these estimates.

Table 1: Synthesis of Cost Estimates

	Source			
Cost Element	Legal and Accountancy Firms		IBEC Companies	
	Set-up	Ongoing	Set-up	Ongoing
Minimum cost	€90,000	€40,000	€140,000	€50,000
Maximum cost	€750,000	€210,000	€1,000,000	€600,000

5. Aggregate Cost Estimates

The OCDE has identified 2,490 companies to which Section 45 will apply. [69] ***This includes 738 Section 17 companies that have a group structure, so that the above figure may be an underestimate.***

Taking the minimum cost estimates provided above, the 2,490 companies would incur €224m in set-up costs and just €100m in ongoing costs. However, a more realistic estimate would take account of the higher costs incurred by larger companies.

This estimate was made by:

**** Assuming that private limited companies (1,703) would incur the minimum costs of €90,000 set-up and €40,000 ongoing;***
**** Assuming that the remaining 787 companies would incur costs one-quarter of the maximum costs identified viz. €250,000 set-up and €150,000 ongoing; and***
**** Adjusting the estimates for the special case of large financial companies.***

This process yields set-up costs of €377m set-up and €202m ongoing.

6. Sensitivity Analysis of Costs

The estimate of costs outlined above is sensitive to a number of factors:

**** The assumption that the 787 companies would incur costs one-quarter of the maximum costs identified is somewhat arbitrary and may prove conservative; and***

**** There is uncertainty as to the numbers of firms to which the Section might apply, with estimates in excess of 6,000 companies being mentioned.***

A test of the sensitivity of the cost estimates to both of these factors was carried out.

With regard to the first factor, it was assumed that the larger companies would incur costs of one-third rather than one quarter of the maximum costs identified by the data collection exercise. This increases the set-up and ongoing costs to €442m and €242m respectively.

69 The figure of 2,490 companies attributed to the ODCE assumes that qualifying companies meet both the turnover and balance sheet thresholds specified in 45/2003. According to the ODCE, the figure of 738 is an actual figure, so no qualification is appropriate.

With regard to the second factor, if 6,000 companies are affected, then the set-up costs rise to €692m and to €343m for ongoing.

A minimum estimate of aggregate cost to industry is €377m set-up and €202m ongoing costs. Depending on assumptions made regarding the number of affected companies, this could rise to €692m for set-up and to €343m for ongoing costs.

7. ***Conclusions***
   Costs of compliance with Section 45 are likely to arise as a result of additional certification procedures, documentation of policies, and extensive and formal ongoing monitoring. The two major factors influencing the costs that would arise for any particular company are the scale (and complexity) of the company and the complexity of the regulatory environment within which it operates. The minimum set-up costs and ongoing costs are estimated at between €90,000 and €40,000 respectively. These estimates could be regarded as applying to smaller companies in less regulated sectors. The maximum set-up and ongoing costs are estimated to be €1,000,000 and €600,000. Large companies in the financial sector indicated very high levels of cost in excess of €12m for set-up and €7m for ongoing costs.

A minimum estimate of aggregate cost to industry is €224m in set-up costs and just €100m in ongoing costs. A more realistic estimate taking account of the higher costs incurred by larger companies results in an estimate of €377m set-up and €202m ongoing.

Competitiveness

The above analysis by Goodbody Economic Consultants sets out anticipated absolute economic costs. What is equally important from the perspective of the national economy is relative costs or competitiveness. In addressing the issue of the DCS the Review Group recognised that it is important that Ireland should be viewed internationally as a business friendly location and one where investors would be happy to establish deep roots.

When multinational companies contemplate investing in Ireland, they are sensitive to changes in the respective regulatory and compliance environments between their home country, Ireland and other competing locations. The issue here is to achieve standards of corporate governance that are at least equivalent to, if not better, than those experienced by multinationals in their home countries, but in a manner that does not lend itself to perceptions of over-regulation and the imposition of excessive costs.

In the context of promoting Foreign Direct Investment (FDI), it is the relative extent and costs of Ireland's compliance requirements that matters most. This is because multinational companies are continuously comparing locations in terms of their cost-quality proposition.

Concerns that the directors' compliance statement will impact negatively on the competitiveness of Irish business vis à vis peers in other EU and third country jurisdictions were raised in a significant proportion of the submissions made to the Review Group. The main specific issues cited were:

1. The approach being taken (under Section 45) would put Ireland out of line with the 24 other jurisdictions of the EU. On the one hand, measures being enacted on foot of the Financial Services Action Plan means that current emphasis is on the harmonisation of company law. On the other hand, under Section 45 time and effort is, in effect, being expended to make the laws of Ireland diverge from other EU jurisdictions in the absence of any apparent need for such divergence. Meanwhile, a further proposal as to corporate governance has been issued by the EU Commission following the 2003 Company Law Action Plan and it would make more sense strategically and economically to participate in developing a common corporate governance regime than to 'go it alone'.[70] [71]

70 The ODCE has reservations that the analysis of EU corporate governance developments is overstating its potential relevance for Ireland or other Member States. See the ODCE reservation at end of this Report.
71 The Revenue Commissioners agree with the ODCE view.

2. Much effort has been incurred and resources expended by various bodies in the State to promote Ireland as an attractive location for foreign investment, including the recent change in tax law facilitating the operation of holding companies in the State. Requiring directors of Irish incorporated companies to sign compliance statements along the lines of Section 45 will ensure that some persons, particularly non-nationals unfamiliar with Ireland, intending to take positions on the boards of Irish companies will think again in view of the unusually onerous obligations being imposed. In addition, a key goal of enterprise policy is to forge stronger links between Irish and overseas firms within Ireland, including situations where experienced managers from the overseas sector assume non-executive director posts with Irish companies to help them strengthen their management capability. The DCS may discourage this valuable behaviour.

3. The ODCE Guidance makes it clear that the Directors' Compliance Statement does not apply to foreign (overseas) companies. If the Statement is implemented, it is likely that in, say, five years time, a significant number of companies operating in Ireland would be incorporated outside the jurisdiction, thereby diminishing the regulatory control of these companies by ODCE, CRO and IAASA.

The Industrial Development Authority provided the following model of the potential effects of implementing the Directors' Compliance Statement as currently drafted, assuming that its commencement would reduce the inflow of FDI by 10%.[72] [73] This is a reasonable assumption to make on the basis of the preceding analysis in this Chapter and in Chapter 9 and on the basis of the disproportionately negative effect of the DCS on competitiveness.[74] [75]

Table 2: IDA Model of Effects on Competitiveness

1. A loss of circa 1,000 new jobs p.a. given the average of circa 10,000 p.a. new jobs we have been achieving over the last few years.

2. Assuming that the IDA would, in the absence of this effect, be achieving broad stability in FDI job numbers (with a growing proportion of high quality jobs etc), this would become a net loss of 1,000 p.a, and result in a 10% shrinkage of the overall base in circa 13 years.

3. Current FDI sourced Corporation Tax take is about €2.7bn p.a. Therefore on average a 1,000 job loss would represent about 0.7 to 0.8% p.a. of this overall tax take. If we assume the lost FDI would be new high quality and hence high value added and profitable, the loss in corporation tax take could be circa 1% of the total p.a. cumulative, i.e. it would fall as our overall employment base fell as outlined in 2) above.

   1% p.a. of the annual Corporation tax take would on current figures be circa €27m. p.a. In addition, to maintain government finances in their current state would require raising that €27m somewhere else, thus subduing economic activity in some other part of the economy.

4. Other tax yields would also be hit to some degree, e.g income tax, various indirect taxes etc. Even with virtually full employment in the economy this would not be insubstantial, but very hard to estimate accurately.

5. Annual Irish Economic Expenditures (IEEs) from IDA clients is circa €15.5bn p.a. so a loss of 1,000 high quality jobs p.a. could be expected to impact on total Irish Economic Expenditures in a similar manner to corporation tax (which is included in IEEs), i.e. an annual loss of circa 1% p.a. or about €155m IEEs p.a

72 The ODCE has seen no analysis which would satisfactorily justify the indicated assumption that the present Directors' Compliance Statement would reduce the flow of FDI by 10%. See the ODCE reservation at end of this Report.
73 See the reservation of the Revenue Commissioners at end of this Report.
74 The ODCE does not agree that there is a sound basis for the conclusion that the Directors' Compliance Statement will cause 'very significant additional costs' and 'a disproportionately negative effect on national competitiveness'. See the ODCE reservation at end of this Report.
75 See the reservation of the Revenue Commissioners at end of this Report.

6. The impact on trade would also be significant, we could expect export growth from FDI clients to be reduced by circa 1% p.a , about €700m based on current figures.

7. The indirect down stream effects would be significant as well, studies show that for every direct job we lose we probably lose at least 1 indirect job in services companies etc somewhere else in the economy.

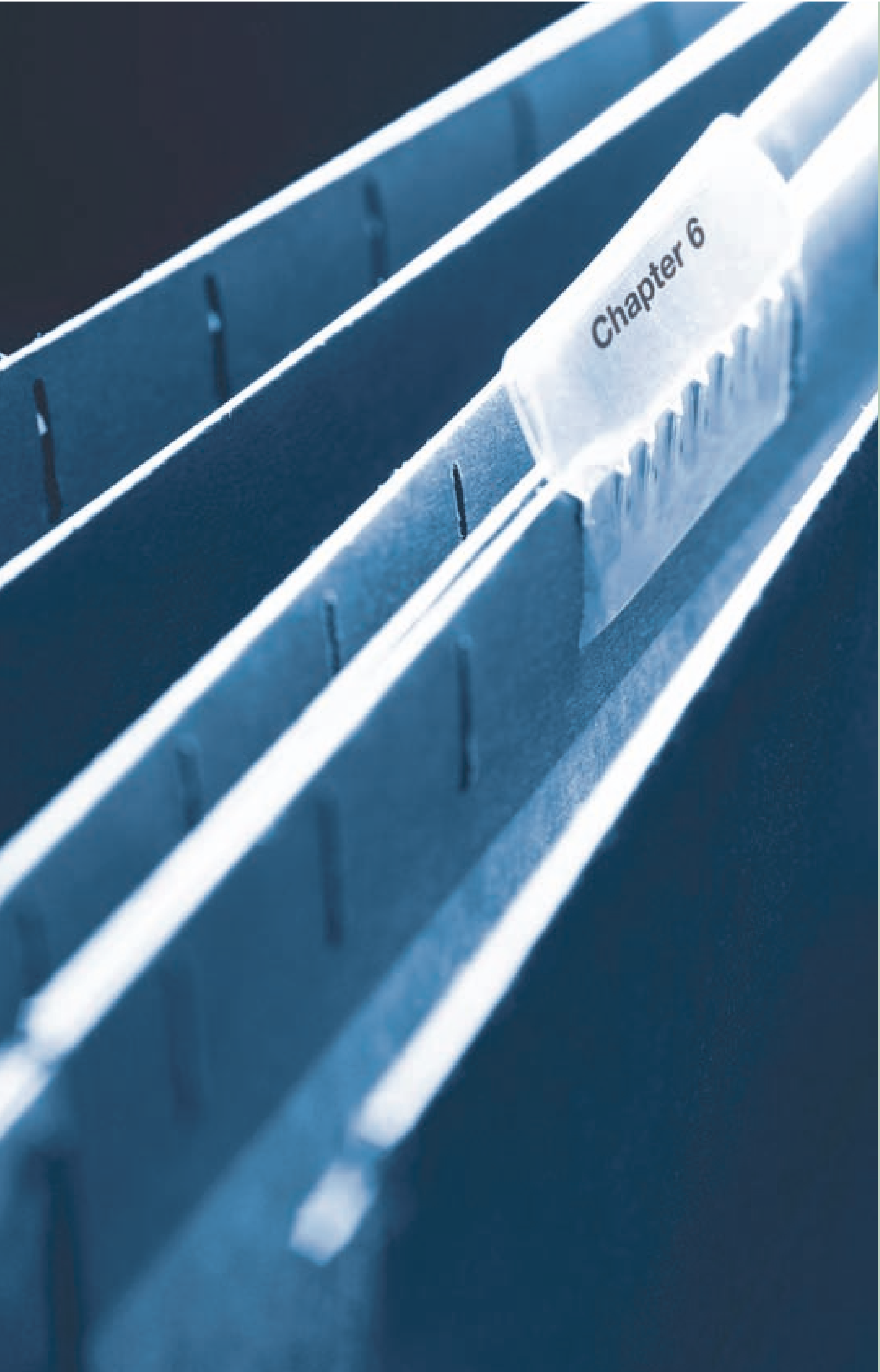
As against these concerns there is a view that holding large companies to the highest standards of accountability for their operations, and ensuring disclosure and reporting of the methods they use to meet that accountability obligation, maintains the underlying goal of establishing a first class corporate governance policy for a first class economy. While the DIRT scandal may now appear to be past history, Directors' Compliance Statements will assist in ensuring that such inappropriate corporate behaviour is not repeated.

Conclusions of Review Group on impact analysis

The Review Group noted that the compliance landscape in Ireland today is very different from the one that existed when the original Review Group on Auditing was established. See Chapter 2 for a full consideration of the new regulatory, legislative and organisational changes.

The key question in relation to the DCS is whether it has struck the right balance between costs and benefits and represents an appropriately measured response to the need to ensure high standards of corporate governance. The negative reaction of such a large number of key stakeholders, professional bodies and companies etc. as recorded in this report, (see Chapter 6) coupled with the anticipated very significant additional costs emerging from the analysis and the disproportionately adverse effect on national competitiveness, would suggest that it has not achieved this balance.

This consideration of likely impact analysis suggests that the most appropriate course of action to take and the goal of the Review Group should be the development of legislative proposals which would reduce (as far as possible) the cost increasing elements of the compliance provision, pursuing a principle of "light-handed regulation" i.e. introducing the minimum and most cost-effective number of requirements needed to achieve the desired regulatory goal.



Chapter 6

Directors' Compliance Statement - Submissions

6

Directors' Compliance Statement - Submissions

This Chapter provides an overview of the submissions received from a broad range of organisations and stakeholders in response to the directors' compliance statement in the following three stages:

1. Submissions made in response to the public invitation for submissions made by the Review Group for the purposes of the current review;
2. Submissions made to the ODCE in the course of drafting the Guidance for 45/2003; and
3. Submissions received by the Department of Enterprise, Trade and Employment following the presentation of Bill to the Oireachtas.

1. Summary of submissions received by CLRG in response its review of the Directors' Compliance Statement

The Review Group sought written submissions from its members' organisations or representative bodies on the basis that the Review Group's membership was broadly representative of a range of interests and included key stakeholders. Additionally, a public invitation for submissions was published on the Review Group's website and in both the *Irish Times* and the national Irish language paper *Foinse*. By the closing date of 28 June 2005 the Review Group had received 41 submissions from the following organisations and/or interested parties:

Arthur Cox
Association of Chartered Certified Accountants
Bank of Ireland Group
Citigroup
Clery & Co
Data Protection Commissioner
Environmental Protection Agency
Equality Authority
Ernst & Young
Financial Regulator
Financial Services Ireland
Food and Drink Industry Ireland
Hertz Group
Industrial Development Authority
Institute of Certified Public Accountants
Institute of Chartered Accountants in Ireland
Institute of Chartered Secretaries and Administrators
Institute of Internal Auditors
Irish Association of Investment Managers
Irish Bankers Federation
Irish Business and Employers Confederation
Irish Congress of Trade Unions
Irish Insurance Federation
Irish Small and Medium Enterprises Association Ltd
Irish Stock Exchange
Irish Taxation Institute
KPMG
Lavery Kirby Gilmartin
Law Society of Ireland
Matheson Ormsby Prentice
McCann Fitzgerald
Musgrave Group
O'Brien, Mr Tony
ODCE
Omnipro
Pharmachemical Ireland
PriceWaterhouseCoopers
Revenue Commissioners
Robert J Kidney & Co
Vale Oil Ltd

Most submissions received were in some way critical of the legislation *as it is currently enacted*. A number of primary issues or concerns were raised in the bulk of these submissions. For reasons of brevity, and to minimise repetition, these are summarised below:

* 45/2003 in its current form is not a proportionate or appropriate means of achieving its objectives having regard to (among other things):
  • Regulatory measures already in place to deal with non compliance and improve corporate governance;
  • The potential cost and other burdens placed on individual businesses and the Irish economy by the implementation of the regime; and
  • Regulation and practice in comparative jurisdictions.

* There has been considerable change in both the regulatory environment and the level of corporate compliance since the RGA report thereby reducing any demonstrable need for the directors' compliance statement regime.
* The legislation puts Ireland out of step with the rest of the EU and international corporate governance best practice:
  • The requirements are more onerous than anything imposed in all other EU member States;

- The Irish corporate governance regime should be aligned with the proposed amendments to the 4th and 7th EU Company Law directives

* The implementation of the legislation will have a considerable negative impact upon Ireland's competitiveness, including:
  - Discouraging direct inward foreign investment; and
  - Encouraging companies to incorporate in other competitor jurisdictions.

* The additional responsibility imposed by the legislation upon directors will further discourage quality candidates from becoming non-executive directors.
* The legislation is too prescriptive and directors should be able rely upon established risk based methods for the purposes of a compliance statement.
* The range of companies to which the legislation applies is inappropriate and inconsistent with the initial objectives of the RGA. Submissions suggested various modifications including:
  - Applying the legislation exclusively to listed public companies;
  - Increasing the thresholds for private companies;
  - Exempting companies already subject to Sarbanes-Oxley; and
  - Modifying the requirements so that it may apply to all companies. That is, it was argued that either all companies should be required to comply or none.

* The nature and scope of the responsibilities imposed on external auditors is unclear
  - Furthermore, auditors do not have the necessary qualifications to determine whether compliance statements are fair and reasonable;

* The legislation as enacted does not fulfil the six principles of the Government's "Regulating Better" White Paper (necessity, effectiveness, proportionality, transparency, accountability, consistency)
* If the compliance statement concept is retained, the provisions, in whatever form they end up taking, should not be implemented without a considerable lead in time and preferably not until the Company Law Consolidation and Reform Bill is enacted.

Of those submissions received that were broadly in support of the DCS *in its current form*, the following issues were raised:

* The legislation does not create any new obligations for directors and companies should already have compliance procedures in place.
* The costs of implementation and prescriptive nature of the legislation have been over-emphasised by some interests
* Costs attributed to the legislation should only be the incremental costs of complying with the requirements of the legislation
* Although regulatory reform since the RGA report has increased corporate compliance there are still issues of non-compliance that the DCS could assist in addressing
* The third limb of 'relevant obligations' would include a broad range of legislation including that relating to data protection, equality, and the environment therefore the DCS would contribute to:
  - Wider awareness of obligations under such legislation;
  - Contribute to a planned and systematic approach to compliance with such legislation; and
  - Raise levels of compliance with such legislation.

<u>Summary of Submissions</u>

The following extracts are intended to provide an overview or summary of individual submissions and do not purport to reflect the content of the submissions in their entirety. These 'summaries' concentrate on issues that may not have been raised *en masse* by the bulk of submissions and any alternative solutions or conclusions proffered by the submitting organisation or individual. The focus has been on extrapolating the core substantive points in each submission.

American Chamber of Commerce in Ireland

Notes that the US is Ireland's single largest source of foreign direct inward investment and a major feature of Ireland in terms of attracting this investment has been the country's balanced regulatory approach. The Chamber of Commerce considers that, while section 45 may well improve corporate compliance in Ireland, it may do so in a way that is detrimental to Ireland's ability to attract and retain US foreign direct investment.

The requirements of section 45 in its present form appear to go beyond what is required in addressing the recommendation of the RGA. They exceed emerging international norms and, given the regulatory regime

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that now exists, are out of proportion with what is needed. These factors, along with the additional costs which section 45 will give rise to, are likely to have a significantly negative impact on the external perception of the regulatory environment in Ireland.

The alternative of introducing a requirement that boards of directors should collectively acknowledge their responsibility for compliance should be considered. If a more onerous regime is to be adopted it should apply only to listed companies with an exemption for those companies subject to the requirements of SOX.

Arthur Cox

Auditing requirement

The nature and scope of responsibilities imposed on a company's auditor are unclear

- the section does not define what constitutes 'fair and reasonable'. Any attempt to judge the standard according to the ODCE guidance is ill-conceived as the meaning of those words can only be ultimately determined by the courts after taking into account the particular circumstances of the company concerned

- the courts will encounter problems in interpreting the meaning of 'fair and reasonable' due to, for example, a lack of precedent and a lack of clarity regarding the perspective from which the test of fairness is to be applied

Proposed section 205F (the audit requirement) should be postponed indefinitely

Scope

Consideration should be given to whether the application of DCS requirements to listed companies will serve any purpose

- once Market Abuse Directive implemented in Ireland later this year the disclosure regime for all listed companies will be considerably improved
- listed companies are already subject to continuing obligations under the Listing Rules and Combined Code

If the DCS requirement is to apply to listed companies, those companies subject to Sarbanes-Oxley reporting regimes should be exempt.

Specialist industries (funds industry and the whole area of securitisation) should not be subject to the DCS. Specialist industries developed out of the IFSC have proved to be successful in many respects on account of an absence of unnecessary bureaucracy

Balance sheet and turnover exemption criteria

- have no consistency with other aspects of company law which for example include consideration of employee numbers
- compliance regime may be appropriate for large public companies on stock exchange but severely onerous imposition for small firms

thousands of small companies are finding themselves within these thresholds on account of property price inflation alone

Content

Many industry participants would like to see a comprehensive list of legislation which should be considered by companies for the purpose of determining their "relevant obligations". Requiring each subject company to create their own list is an unnecessary cost item particularly as this cost will have been or could be borne by various State agencies charged with the responsibility of enforcing these obligations.

Association of Chartered Certified Accountants

Four major concerns:

- cost of compliance with the section exceeds the benefits;
- the number of companies who are obliged to comply with the requirement. At a minimum the DCS should be limited to quoted and very large companies excluding companies with a similar existing compliance statement under, for example, Sarbanes-Oxley
- the scope of the legislation included within the matters that directors must ensure compliance with, is open ended and should be narrowed down by specifying the legislation; and
- duplication of existing requirements. The purpose of the DCS is to encourage compliance; however, money laundering regulations and other legislation have ensured that any departure from existing regulations results in a report to the Gardai from the companies auditor, accountant and other professional advisors.

Bank of Ireland

The primary objective in introducing DCS is that companies should develop a compliance culture that

"starts from the top", achieved by the requirement that directors acknowledge responsibility for compliance. Additionally, the Act introduces a methodology for compliance (further elaborated in ODCE guidance) which is formulaic in nature. Whether or not it was intended, the result is that companies cannot use existing risk- based compliance processes, which are in line with best practice, to back up DCS. Instead companies must create new, separate and resource-intensive frameworks to support these statements in the manner required.

Companies based in less demanding jurisdictions within the EU or elsewhere will enjoy a significant competitive advantage over Irish companies when trading in Ireland while Irish companies will carry an additional burden as they attempt to expand abroad.

The CLRG should recommend the elimination of the 'third limb' frameworks leaving those obligations to be governed by appointed regulators. Regulators are in place for many of the main legal frameworks in the State. Where such regulators exist, they have duties and powers appropriate to their responsibilities. The provision is a duplication....

Citigroup
DCS requirements do not apply to non-Irish incorporated companies and therefore do not apply to companies incorporated in a foreign jurisdiction (the UK for example), which subsequently moves its residence to Ireland.

This therefore gives rise to the situation wherein it is advantageous to operate in Ireland by way of companies incorporated outside of Ireland but resident in Ireland. As Irish resident companies they are within the charge to corporation tax in Ireland but as non-Irish incorporated companies they are outside the DCS and other corporate regulation.

In the context of this potential loophole companies that must be Irish incorporated, such as financial institutions, are at a greater disadvantage, particularly where they operate internationally.

Clery & Co
Submit that the following matters need to be addressed:

- the implementation date be postponed until at least January 2007. Hurried implementation will put undue pressure on management, directors and professional advisers resources and may result in a shabby implementation;
- the qualification thresholds need to be significantly uplifted
- consideration should be given to phased implementation over a number of years; the legislation should be applied to listed companies firstly and then reviewed for further implementation
- legislation puts certain Irish companies at a competitive disadvantage vis a vis many competitors who operate either with unlimited status or with branch status of a foreign entity
- issues with the ODCE guidance

Data Protection Commissioner
Other 'relevant obligations' should include data protection law, consequently the DCS will:

- raise the level of data protection compliance and
- increase levels of awareness among employees of their data protection obligations and rights.

Environmental Protection Agency
To reflect the increasing scope and emphasis on environmental legislation in Ireland

- the directors' compliance policy statement should include and make explicit reference to the company's policies in relation to its compliance with relevant environmental legislation affecting the company; and
- the scope of the annual DCS should be extended to provide confirmation regarding company's compliance with its environmental obligations.

Equality Authority
Employers are liable for discriminatory acts of an employee in the course of his or her employment unless they can prove that they took reasonably practicable steps to prevent the conduct. Such steps would include putting in place:

- a formal written policy establishing the commitment of the organisation to equality, an accommodation or diversity and non-discrimination;
- procedures to deal with incidents of discrimination including sexual harassment should they arise;
- initiative to prevent discrimination including sexual harassment and harassment, one of which initiatives would be ensuring full knowledge and understanding among all staff of the equality policy and the procedures put in place.

The DCS should cover compliance with equality legislation and should set out the steps taken to address their potential liability in this area. Therefore the DCS would contribute to:

- wider awareness of obligations under equality legislation;
- a reduction in the allegations of discrimination; and
- a planned and systemic approach to equality, diversity and non discrimination in place of current approaches which can often be ad hoc, informal and reactive.

This would benefit employees, employers and therefore business itself.

Ernst & Young

Section 45 has made no reference and is not consistent in its language or requirements with the Turnbull Guidance, which is the established conceptual framework for internal control in Ireland. The DCS also does not accord with the main alternative conceptual framework which has formed the basis for listed groups reporting under SOX. The absence of a conceptual framework for section 45 makes the task of compliance extraordinarily difficult. Particular concern for smaller groups who do not typically have formal governance/compliance structures required to demonstrate compliance with s 45.

While EU company law directives continue to evolve and define responsibilities of directors and auditors, there is no evidence of any appetite by any interested parties in creating s 45/SOX type public reporting on control effectiveness by listed or public interest groups, and particularly not for private companies.

Section 45 would require a fundamental change in the skill sets and role of directors for private companies

Practical obstacles to implementing s 45 as drafted:

(a) Requiring individual legal entity level reporting rather than group level is exponentially increasing the cost of compliance

(b) Requiring organisations to start by identifying 'all relevant obligations' is simply not how commercial organisations operate > commercial reality dictates that events/the nature of individual's/entity's activities over a period drive the decision as to what legislation might apply and appropriate research to result

(c) Exemption thresholds too low and no consistency with other companies law

(d) Burden of compliance so large it creates a highly undesirable 'opt out'

Cannot support the implementation of 45/2003.

Financial Services Ireland

Notwithstanding the laudable intent underpinning the 2003 Act, section 45 is wholly inappropriate for the following very important reasons

- it imposes an enormous and unjustifiable cost burden on industry - primarily because of the scale of its scope and the depth of prescriptiveness implied by its requirements;
- it is out of step with international corporate governance practices;
- it is out of step with national policy on better regulation and seriously conflicts with national enterprise policy and is anti-competitive;
- it does not sufficiently take into account other regulatory developments therefore giving rise to concerns regarding duplication;
- the time of the legislation presents further complications specifically in relation to cost and competitive pressures from other jurisdictions, sourcing expertise and other legislative/regulatory developments.

"FSI believes that Ireland should be in step with corporate governance practice in other regimes...This is not to suggest that we should slavishly follow others for the sake of it but to acknowledge the realities of our trading position as a country and to act in a way that protects our national interest. As a small, open, exporting economy, it is important for Ireland to be at the cutting edge of corporate governance, but not beyond it."

Section 45 conflicts with the stated principles of the *"Regulating Better"* white paper as set out below:

Necessity

Section 45 is unnecessary given the other corporate governance measures available and in practice in other jurisdictions.

Effectiveness

There is no meaningful targeting in s 45 - the thresholds contained in the legislation are very broad, moreover, there is little evidence to suggest that the companies excluded by the limits in the legislation are more compliant than those that are covered by the scope of

the legislation. Further, the current approach is not effective in that it will create a tick box culture rather than deal with substance.

Proportionality
DCS is disproportionate in terms of scope, prescriptiveness and cost.

The significant additional costs are primarily driven by an approach in which the legislation does not sufficiently provide for the leveraging off existing corporate governance and compliance approaches - it causes a duplicate spend with little additional value delivered. It is precisely because the method of establishing compliance is prescribed, that existing compliance processes cannot be used; fundamentally the prescribed method is out of step with the risk-based approach that is regarded as best practice.

This is a seriously disadvantageous methodology and there are smarter ways of achieving the same goal.

Transparency
Not clear that sufficient account is taken of international practice and competitiveness concerns prior to the enactment of section 45. Sufficient cognisance and inter-linkage with the EU on this matter is essential.

Accountability
The level of accountability placed on directors under s 45 is clear, but it goes beyond what would be contemplated in other sectors (including the public sector). The legislation places accountability on directors, including non-executive directors, for a level of detail that is simply inappropriate

Consistency
For the regulated financial sector, s 45 gives rise to anomalies vis-à-vis the Central Bank & Financial Services Authority of Ireland Act 2004.

Given forthcoming EU legislation on location of company seat, it will become much easier for companies to migrate away from jurisdictions that impose overly onerous obligations on enterprise. In this context, s 45 represents a very substantial 'own goal'.... Ultimately s 45 places a substantial price premium on doing business in Ireland...

Other legislative/regulatory developments
The most important consideration vis-à-vis the interaction between s 45 and the broader legislative/ regulatory environment is, not just whether s 45 is desirable in this context, but what, specifically, does it achieve above & beyond what the establishment of the ODCE, IFSRA and IAASA already achieve?

Ideally, a more rigorous "Higgs" style process of review would be/would have been more appropriate - the purpose of which would be to devise a workable Irish approach to corporate governance that is compatible with a highly globalised competitive economy and is reflective of international norms.

Food and Drink Industry Ireland
Main concerns with proposed DCS:
- requirements out of step with international practice. As a small open economy, it is important to have best practice corporate governance practice however it is equally important not to gold-plate best practice standards
- imposes a serious cost burden on industry; in particular the requirement will greatly reduce the profitability of SMEs
- timing of legislation is problematic - Ireland under mounting pressure from competitor jurisdictions and companies faced with problems in implementing other regulatory and legislative developments
- scope of legislation too broad in terms of thresholds applied and breadth of requirements placed upon directors.

Possible options:
- amend s 45 to reflect an approach more aligned with international practice;
- suspend the commencement of s 45 and wait for a European solution;
- undertake a 'Higgs' style process of review with an aim of devising an Irish approach to corporate governance that is competitive and in line with international norms.

Hertz
The lack of definition in s 45 of key terms and phrases results in a lack of certainty as to what is required, accordingly companies are erring on the side of caution by including areas which may not have been the intention of the Act to capture, thus increasing costs.

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Overlap and inconsistency between s 45 and 2004 Financial Services Act:
- no annual requirement to produce a statement, the Financial Regulator has discretion to request it at any time;
- compliance statement under 2004 Act imposes an obligation to opine on actual compliance rather than the "reasonable endeavours" requirement under 2003 Act;
- no mandatory obligation on a company's auditors to review the compliance statement. IFSRA has the discretion to require the Auditor to carry out a review.

The 2004 Act states that IFSRA may rely on a DCS issued by Directors of regulated entities.

Industrial Development Authority

The view of multinational companies on the DCS provision can be summarised under the following headings:

* Increasing regulatory burden/perception of less friendly business environment
  - Clear sense that the DCS exceeded the requirements to ensure good governance

* Increasing compliance costs and reduced competitiveness
  - DCS requirement will add significantly to general business operating costs in Ireland especially for smaller PLCs
  - Add to perception of Ireland as an increasingly high cost location
  - National Competitiveness Council (NCC) recently identified better regulation "as a means of developing a competitive edge in the race for investment and jobs". The DCS was viewed as contrary to this approach.

* Host versus home country regulation
  - When multinational companies contemplate investing in Ireland they are sensitive to changes in the respective regulatory and compliance environments between their home country, Ireland and competing locations.
  - In terms of promoting foreign direct investment, it is the relative extent and costs of Ireland's compliance requirements that matter most.
  - The s 45 approach will place Ireland's corporate governance regime on a track rather different to other EU jurisdictions thus increasing the attractiveness of those jurisdictions as compared to Ireland

* DCS could encourage off-shore incorporation and undermine efforts to create stronger relationships between Irish-owned and overseas companies
  - There is a risk the DCS could encourage firms not to incorporate in Ireland; a first class corporate governance regime should surely have the opposite effect and encourage companies to want to be associated with Ireland in every way possible

* Balancing costs with benefits
  - Negative reaction of such a large number of key stakeholders, professional bodies and corporates would suggest that the DCS has not struck the right balance between costs and benefits, and does not represent an appropriately measured response to the need for high standards of corporate governance.

Institute of Certified Public Accountants in Ireland

The main problem with the proposed legislation is the additional costs it will impose on Irish businesses with little benefit to be gained and the resulting loss in terms of Ireland's competitiveness on the global stage. The extent of the problem is illustrated in the following points:

* The level of corporate governance imposed by the DCS is only appropriate for listed entities or large public interest entities;
* Scope of legislation goes beyond that of other countries thereby placing Ireland at a competitive disadvantage from a FDI viewpoint
* Costs associated with compliance with the legislation will by far exceed the benefits to be gained. These additional costs will be passed on to consumers in the form of higher prices, thus reducing Ireland's export competitiveness, attractiveness as a tourist destination etc
* There are already several pieces of legislation in existence which ensure breaches of legislation are reported to the relevant authorities for eg anti-money laundering regulations; s 59 of Criminal Justice Act; s 194 Companies Act 1990. These provisions negate to a large extent the original need for DCS
* Obligations imposed by the legislation on directors could impact on the number of non-executive directors willing to take on appointments.

Institute of Chartered Accountants in Ireland

Since the publication of RGA report, almost 5 years ago, there have been many developments, both domestically and internationally, aimed at improving corporate governance, corporate compliance and internal control reporting...It might be appropriate, therefore, to ask whether there is a continuing need for a compliance statement of the nature envisaged by the legislation or whether, indeed, the lacunae that were perceived to have existed before have since been addressed. What will a 'compliance statement' regime actually achieve?

It is our understanding however from Ministerial pronouncements, that company law will, in future, require some form of acknowledgement by company directors of their legal obligations, and comments are made in light of the Governments stated intentions.

In light of SOX, the Combined Code and section 45, certain Irish companies are faced with a 'triple whammy' of having to comply with similar but different internal control reporting regimes of three jurisdictions.

In considering possible modifications to section 45 it might be useful to note the relative ease with which the Combined Code has recently been amended...There is obvious advantage, therefore, in perhaps removing from law, overly detailed requirements in this area. A more appropriate approach might be to keep the legislation at a high level which could be supported by more detailed guidance or codes developed by a group made up of relevant stakeholders.

Proposed EU initiatives - particularly the proposed amendments to the 4th, 7th and 8th Company Law Directives - are primarily directed at capital market companies, will in due course need to be transposed into domestic legislation. It would seem sensible to allow time for consideration of these new requirements, in particular how they would sit alongside any DCS.

Costs

If one assumed that in the region of 8,000 Irish companies come within the scope of the legislation as it currently stands, it would not be unreasonable to suggest that the cost to the Irish economy would be not less than €500 million.

Possible alternative model

Using the Turnbull guidance on internal control as a starting point, a possible model might comprise:

- Directors acknowledgement of responsibility for ensuring processes are in place designed to ensure compliance with 'relevant obligations' (as redefined)
- Confirmation from directors that such processes have been put in place and which ensure that instances identified as material non-compliance are reported to them and notified to the relevant regulatory authority, if required;

- A description of the monitoring of the compliance process (similar to the current Turnbull model); and
- Directors' confirmation as to whether anything has come to their attention indicating that the processes have not been operating as designed.
- The role of external auditor in the process should be limited to reporting on whether the information provided by the directors in their report is consistent
- with information that has come to his attention during the course of the audit

Institute of Chartered Secretaries and Administrators

Definition of "relevant obligations" is too broad:

- its application to each section of the Companies Acts should be limited to those provisions of the Act under which an offence can be committed and in respect of which penalties can be levied. As presently drafted it extends to cover administrative issues
- its third limb will vary substantially from one sector to the next and, in any event, most companies will be operating within an established regulatory framework with which they will have to comply

Commencement of s 45 unique in the EU would disadvantage companies in Ireland on two counts:

- competitively by adding costs thereby hindering Irish companies to compete in the open market; and
- by exacerbating the difficulties Irish subsidiaries of foreign companies (especially financial services companies) are currently encountering in persuading executives to become Irish company directors

Submit that, due to previous compliance and enforcement measures and the pending introduction by EU of corporate governance measure, section 45 should not be commenced. Argues that the objective of section 45 can be achieved by obliging directors to make a statement acknowledging their responsibility for compliance and confirming that they have had arrangements, in line with internationally accepted best practice, in place to discharge this responsibility throughout the financial year under review.

Any attempt to adjust thresholds or extend exemptions would be inherently flawed as it would place those companies still obligated to comply at a competitive disadvantage vis-à-vis those exempted from the requirement.

Institute of Internal Auditors

Summary of participant feedback from Workshop Session on Directors Compliance Statement.

General comments

* Broad agreement with thrust of the legislation however legislation will not have real impact on very small minority of companies who do not already seek to comply with the legislation.
* A number of members suggested an alternative approach to encouraging compliance. Proposed that legislation be passed requiring all public/large private companies to implement comprehensive risk management procedures which would drive the establishment of processes to deal with all risks including that of compliance failure

Specific comments - legislation

* Thresholds for private companies should be increased; broadly suggested that a more sensible level would be in line with the thresholds set out in s 42 of the Act relating to Audit Committees.
* Groups should have the option of making a single compliance statement relating to the group as a whole rather than at individual company level.
* Widespread confusion over what level of work was expected from the "annual review" by the auditor of a company. Not clear from the Act whether specific additional procedures are required or whether the auditors' opinion is based on information obtained during normal audit.
* The need for auditor review should be removed.

Irish Association of Investment Managers

Necessity

The overall level of scrutiny to which the sector is now subject is such that it is appropriate to reflect on whether there is as clear a need for s 45 to be implemented as was previously the case.

Proportionality

Doubts about necessity taken with the likely implications for competitiveness are such that it could be argued s 45 is a disproportionate legislative response to perceived weaknesses in corporate governance practices. Lack of comparable provisions in other jurisdictions is further evidence it lacks proportionality.

Effectiveness

It is likely that prescribing a method by which Directors must satisfy themselves that compliance has been achieved may have some negative consequences - these include disproportionate expenditure of resources, including senior management time, on evidencing compliance with largely technical legislative provisions to the detriment of efforts to ensure that material, risky areas receive appropriate attention.

A risk based or principles based approach to regulation is preferable.

Conclusion

"...it may be the case that any benefits will be disproportionate to the costs involved...therefore...a period of regulatory pause should be considered with a view to observing the effectiveness of existing and recently introduced measures, following which the necessity of a s 45 type measure could be re-evaluated."

Irish Bankers Federation

* Section 45 is virtually without precedent internationally.
* A method of compliance is implicit in the legislation and explicit in the related guidance. The method is exhaustive in nature, which is at odds with the best practice approach of risk-based management of compliance.
* The nature of the statement and the scope of application differ from recognised standards. Typically, corporate governance controls apply to listed companies and many of the relevant controls are already in place.

* The legislation arrives at a time when industry is being burdened with increasing compliance requirements, nationally and internationally, and when the laws relating to corporate governance are being rewritten at EU and national level.

Instead of setting up national standards, using an arbitrary yardstick, we should seek a solution within the EU framework. This will allow us to maintain the standards that we aspire to, without damaging our national competitive position.

Consideration of s 45 within terms of reference of CLRG

The costs of complying with s 45 are wholly in excess of any such benefit and its application should be suspended pending the harmonisation of corporate governance requirements in this areas at European level.

Scope of application and requirements of DCS

In the case of listed companies the objectives set out in the Terms of Reference are fulfilled by compliance with the Combined Code on Corporate Governance and the provision of annual statements, including the Statement on Internal Control, which the Combined Code requires. The IBF noted the regulatory environment had been strengthened and was still changing, including compliance statement under CBFSAI Act 2004

Ensuring the integrity of companies' reporting systems

The explicit focus of s 45 is on compliance with legal obligations > it does not focus on the management of operational risk and financial risk> the proposed requirements may require a change in focus of existing risk management systems which effectively manage companies risk but are not designed with the same emphasis on legislative risks as envisaged by the Act.

* Potential costs issues -CLRG should consider future economic effects and opportunity costs of implementing s 45.
* Potential competitiveness issues
* Potential implementation issues
    - Materiality > experience has shown that minor breaches of regulation can result in heavy costs to an organisation; cost of such breaches is not measured only in the applicable or likely fines but includes the costs of investigation and restitution which cannot reasonably be forecast
    - Application to groups
    - Key skills - shortage of key skills required for implementation

Conclusion

Any legislative recommendations should be fully aligned with six principles of regulation proposed in "Regulating Better". Seek to avoid any duplication of, or inconsistency with impending IFSRA compliance statements and reporting requirements contained in forthcoming amendments to 4th and 7th EU Directives...

There is very little tangible benefit to be derived from the scheme envisaged by s 45. The developments in corporate governance and the general regulatory environment as outlined above are more than sufficient to deliver the objectives of s 45...Section 45 should not be commenced and policy makers should await the outcome of developments at EU level...

Irish Business and Employers Confederation

* As the key issue arising from the DIRT Enquiry which the Public Accounts Committee were concerned with were financial and as the financial management of companies was the key compliance issue for the RGA, the DCS should confine itself to reporting on financial compliance and internal controls. The third clause should be removed as it is of dubious benefit...[and] is the area where most extra costs are being incurred by companies.
* If the scope of obligations is diluted by deleting the third clause, the thresholds should be combined and would be more manageable. If the scope is not reduced then DCS should be limited to listed companies only.
* A compliance statement is a good idea...[h]owever there is a balance to be had between the benefits deliverable by a reasonable compliance statement and the costs incurred from trying to comply with an overly extensive compliance statement.

Conclusions

CLRG recommendations should focus on:

* Bringing Ireland back into line with international practice in this area and ensuring the approach taken reflects global corporate governance practice - Ireland should not be seen as taking a solo run in this area;
* Restricting the scope of s 45 and ensuring an approach that is aligned with a risk-based compliance methodology;
* Avoiding duplication with other regulatory/legislative measures;

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* Ensuring that there is alignment with the six principles articulated in Government White Paper "Regulating Better";
* Substantially reducing the proposed costs of implementation.

Irish Congress of Trade Unions
(NB-Observations and Recommendations on ODCE Guidance)

New compliance framework increases the transparency and raise the bar of Irish corporate conduct and as such should increase Ireland's international business reputation. In this respect Congress rejects the [comments] on the adverse affect this legislation will have on foreign investment into Ireland. Similar laws have been passed or are being prepared for enactment in other jurisdictions notably the US SOX Act, which goes further in its requirements for companies in the USA than Ireland's legislation.

In addition the requirement that companies should comply with the law is not new, what this Act changes, is that company directors are now required to acknowledge their responsibility for that compliance and discharge it through the preparation and publication of statements...

The Financial Regulator
The Financial Regulator's approach to supervision is principles-based, that is, it places the primary responsibility on regulated entities on ensuring that they are prudently and soundly managed and are in compliance with all relevant requirements.

The Financial Regulator's main focus is on the law as it applies to financial entities. Notes that s 26 of the Central Bank and Financial Services Authority of Ireland Act 2004 provides.

"In the case of a regulated financial service provider that is a company to which section 205E of the Companies Act 1990 applies, the Bank may, instead of serving on the financial service provider a notice under this section, rely on a compliance statement prepared under that section if it is satisfied that the statement contains the information that would be required to be included in a compliance statement under this section."

In interpreting this Section the Financial Regulator wishes to avoid any unnecessary duplication of requirements and accordingly will have regard to the outcome of the current debate.

Irish Small and Medium Enterprises Association
Turnover threshold - the figure should be increased to €20 million in order that no more companies are affected than was planned initially.

Balance sheet threshold - should be refined in order to ensure company directors to distinguish between assets that are used actively in the course of business and those that are not; the numerical value should also be increased substantially. A doubling of the current amount to €15 million would not appear unreasonable if companies are not to be drawn into the compliance net unnecessarily.

Requirement that directors specify whether they have used 'all reasonable endeavours' to secure compliance with relevant obligations is unclear and the ambiguity regarding what is required should be eliminated.

Irish Stock Exchange
Application of s 45 should NOT be restricted to listed companies. It would act as a further disincentive to companies from going public. Furthermore:

* Listed companies already operate in a highly regulated, transparent and public environment. Consequently, the listed companies represent far less risk than other larger public interest companies
* Applying a disclosure purely to listed companies can only be justified on the basis that such disclosure is essential for shareholder value; there is no implication that s 45 will achieve additional disclosure of price sensitive information over that already provided by listing rules and the Market Abuse Directive currently being implemented.
* If s 45 serves a purpose for stakeholders beyond shareholders then this purpose would apply equally to non-listed companies.

If s 45 is to remain it should be applied to those companies which are defined under s 42 of the 2003 Act.

Critical that investment funds and securitisation vehicles are excluded from the application of the section.

Debate and discussion of DCS has been largely dominated by the Irish domestic political agenda without appropriate consideration and analysis of:

* The existing regulatory regime which applies to listed Irish companies;
* The complexity of the issues surrounding corporate governance;
* The international nature and mobility of the capital market which makes issues of this nature impossible to conclude in a purely domestic context;
* The long, considered and documented international debate on this issue and the best practice arising therefrom

The proposed DCS "offends two accepted realities in the debate on corporate governance" - a principles based approach to corporate governance together with a 'comply or explain' regulatory approach is the only feasible method given the dynamic nature of companies and the cross sectoral spread.

The Combined Code provides an internationally acceptable and established framework for corporate governance which also achieves the aims of s 45. It would be entirely illogical to confine any element of s 45 purely to listed companies > any such move would render the Irish capital market entirely unattractive to Irish companies.

Irish Taxation Institute

Broad position is that the DCS imposes a disproportionate burden on Irish companies and company directors in demonstrating that their business is compliant with all necessary regulations and laws.

Competitor nations have adopted a very different approach to corporate governance matters. Governance statements in EU countries (and the US)

- are only focused on listed companies;
- do not include published statements of effectiveness;
- are not focused solely on legal compliance.

It has been recognised internationally that legislation is not the answer to improving corporate governance culture see the Higgs and Turnbull Reports which concluded the appropriate approach is to develop codes based on broad principles of good governance.

Submit that s 45 will weaken Ireland's competitive position, be punitive for the great majority of compliant companies and will not lead to an appreciable increase in tax compliance in those companies where a compliant culture does not already exist. Corporate governance, including tax compliance, should be overseen by Directors and should be based on broad principles and structures rather than detailed rules.

Compliance culture has been transformed since RGA report. Regulatory bodies now in place include ODCE, IFSRA and IAASA. The Revenue Commissioners have been granted robust new powers to obtain information directly or via High Court order from companies, individuals and third party organisations in the Finance Acts of 1999, 2004 and 2005.

Specific comments and concerns:

Commencement date

- upcoming consolidation programme of Company and Finance law, questions of interpretation arising from draft ODCE guidelines and onerous requirements of s 45 as drafted would demand a lengthy lead in time if legislation commenced in anything resembling its present form.

Threshold values

- The balance sheet and turnover thresholds are completely unrealistic given the economic expansion enjoyed in Ireland and EU Fourth Directive thresholds.

List of main tax related obligations

- compilation of a list of relevant tax obligations will be an enormously time-consuming task for many companies
- the Revenue Commissioners should produce a list of the main tax related obligations with an emphasis on themes of correct and timely tax returns and payments. This list would then be presented as a single point of reference in relation to tax obligations. If Revenue wishes to follow up in relation to other obligations it has the necessary powers to do so.

Conclusion

From a tax perspective, section 45 will be very substantial, driven by the need for exhaustive documentation and, as a result, very expensive.

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KPMG

Essential for CLRG to consider the OECD Principles of Corporate Governance as a whole, and to develop an argued case against each of the principles in the Government paper "Regulating Better" to support its conclusion.

Part of the challenge faced by the Group is that the provisions of section 45 have their origin in a considerably different environment to that in which Irish business operates today. Corporate governance received far more attention today that at the time in which the DIRT issues emerged. Powers of regulators to demand and obtain information are vastly different. It is vital that the outcome of the review takes account of current conditions and does not result in the imposition of provisions whose form is rooted only in past problems.

Specific provisions of the DCS are overly complex and go further than is necessary to implement the recommendations of the RGA. If there is to be compliance reporting a more straightforward form that allows better congruence with company boards' other activities is needed.

Any revised reporting requirement recommended by the Group should apply to listed and very large companies only.

Proportionality - section 45 as it stands is not proportionate.

Efficacy

Wrong to conclude that boards will only address issues of compliance with law if a provision of this nature is in place - such an assumption ignores the fact that the majority of directors seek to work within the law and implies that the powers and actions of regulatory authorities charged with overseeing compliance in particular areas are ineffective. The assumption that the imposition of a reporting requirement will alter behaviour is also debatable at best. For the minority who are uncommitted to working within the law, direct regulatory action is more effective.

Appropriateness

Issue of compliance with applicable law is addressed in the Combined Code with which Irish listed companies are required to apply. It is appropriate for stakeholders in listed companies to receive reports covering steps to ensure compliance with law. It is not appropriate, however, in the form applied by section 45 nor to apply the requirement to the range of private companies affected.

Concerns regarding the appropriateness of the auditor role in section 45. The prime function of the company auditor is to provide assurance that businesses report sound financial information to the markets. Auditors can extend their work to report on other related matters - such as the operating of internal financial controls - but ultimately auditors are not compliance officers.

Scope of application and requirements of DCS

A reporting obligation of this nature should apply primarily to listed companies; application to private companies if any should be limited to significant entities possibly using the same threshold as in the 2003 Act for audit committees. The reporting duty should be applied on a group basis.

Potential competitiveness issues

No equivalent provision exists in other jurisdictions. Section 45 is a significant disincentive to establishing business in the State. Given that corporate governance is under consideration in the EU, any recommendation by the CLRG should establish a position consistent with requirements applying in other member states.

Potential implementation issues

The wording of the section has introduced a degree of complexity and uncertainty that seriously jeopardises its practical implementation.

Lavery Kirby Gilmartin

Main problems:

* Scope of the definition of relevant obligations too broad
* Involvement of external auditors - the compliance by a company with legal obligations are not really within the scope of expertise of an auditor particularly where the legal obligations are defined so widely
* The number of companies subject to the requirements > due to nature of thresholds quite small companies will be caught by provisions
* Overall approach of requiring a positive certification that policies and procedure were designed to ensure compliance as opposed to an approach of ensuring accurate financial reporting and of reviewing lapses in systems and controls which had come to light.

* Necessity of subjecting private companies to such requirements? Already a substantial body of law for the protection of creditors and to ensure compliance with company law. Hard to see how requirements under DCS will significantly improve the position of investors and creditors.
* Argument is stronger in relation to listed public limited companies (bearing in mind that such companies are already subject to a high degree of regulation). The key is to ensure accuracy of financial reporting so investors and potential investors can make informed decisions.
* Any replacement legislation should:
  - Apply to listed companies only
  - Be aimed at ensuring the accuracy of financial reporting;
  - Require directors to take steps to review and address any breaches of internal controls or non compliance with legal obligations which have come to their attention in a particular financial year.

Law Society

* Current law and steps taken in recent years to achieve a culture of improved corporate compliance (particularly since RGA Report)
* Provisions in s 45 are not found in other jurisdictions > no case has been made to render the requirements in Ireland more stringent than other jurisdictions; the proposed approach puts Ireland well out of line with rest of the EU
  - Vast resources are spent by Departments of the State harmonising laws with other EU jurisdictions, however, the DCS represents time and effort being expended by the State to make the laws of Ireland diverge from other EU jurisdictions in the absence of any apparent need for such divergence.

* The Government/DETE should concentrate on proposals at EU level which, when implemented, would have an equal effect across all EU jurisdictions

Likely effect of section 45

* Cost of executive time and potential loss of enterprise in Ireland cannot be safely calculated
* Proposals distract executives from 'the business of taking their company to new markets in a cost effective manner'. This will suck real value out of the real economy
* For companies wanting to avoid the burden of stringent compliance requirements, the obvious route is to incorporate in Northern Ireland or the UK > as more companies operating in Ireland are incorporated outside the jurisdiction they will be beyond the regulatory control of the ODCE and any other regulatory authority
* Additional cost created by audit requirement > totally unreasonable to expect auditors to determine whether a DCS is fair and reasonable, as auditors do not have a legal qualification and cannot be expected to become a legal expert for this purpose. The uncertainty regarding a potential duty of care upon auditors arising from the DCS regime 'makes it unlikely that auditors will feel comfortable enough to conduct their review and issue their opinion in a balanced manner that would not impose significant additional costs on companies'.

Need for a statement

* If some form of statement is retained, it needs to be as to matters of a material nature and at worst no more onerous than those applying under SOX>the statement should be signed only by the chief executive and finance director rather than all directors of the company
  - maintaining this requirement will only further increase the reluctance of people to act as non-executive directors.
* In the enhanced climate of good corporate governance fostered by the ODCE, the audit requirement is excessive.
* There is no good reason in principle why a company of a certain size should be subject to good governance procedures and companies of another size should not.
* There is no additional merit in providing more extensive duties for directors than those already outlined in the draft heads of the proposed Consolidated Bill

Conclusion

Ireland should not be placed at a competitive disadvantage to other jurisdictions particularly other EU jurisdictions. The State should instead follow and embrace EU good corporate governance procedures. If there is still a perceived need for DCS, the need may be more properly addressed by regulators with regard to relevant fields of activity.

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Matheson Ormsby Prentice

Section 45 should not be implemented because:

* The regulatory landscape has changed since the report in 2000 of the Review Group on Auditing to such an extent that there is no case at present for the implementation of s 45;
* Section 45 has caused, and if implemented will continue to cause, disproportionate damage to Ireland's business case as an attractive base for overseas companies to invest or to maintain investments, and
* Section 45 does not reflect best practice either at a European or an international level

Possible alternative solution:

* Require the board to acknowledge their responsibility for implementing arrangements with a view to securing compliance with "relevant obligations" (with a more meaningful materiality filter, also applying to company and tax law)
* Require companies to whom the provisions of section 42 apply to appoint a compliance committee of the board, with specific responsibility to implement arrangements with a view to securing material compliance with relevant obligations;
* Require compliance committees to report to the board on an annual basis on compliance with relevant obligations
* Require auditors to review compliance committee's reports as part of their audit of the company's financial statements, but with no requirement for a separate certification.

Improving s 45 (while respecting original objectives)

* Widen the Ministers power to make exceptions
* Remove the 'fair and reasonable' review by auditors but give specific legislative effect to existing audit reviews of compliance in the course of annual audit;
* Change the way the materiality filters in the legislation work so that the exercise of determining materiality is more meaningful;
* Apply materiality to the company and tax law obligations;
* Provide that the Minister may prescribe obligations to be "relevant obligations" regardless of materiality;
* Provide that the Minister or Director of Corporate Enforcement may, where specific grounds exist for the request, request compliance statements from companies or classes of companies in relation to specific obligations, whether relevant obligations or not
* Clearly allow directors to rely on confirmations and assurances given by senior management.

McCann FitzGerald

The proposed DCS is 'fundamentally flawed' and rather than attempt to modify the detail it is most appropriate to start again by:

- focusing exclusively on the purpose the DCS was intended to achieve; and
- being guided (if not directed) by relevant EU initiatives in the fields of corporate governance, financial statements and auditing procedures (such as the proposed amendments to the 4th and 7th Company Law Directives, relating to corporate governance statements, and risk management and internal control statements).

Purpose

It is clear the compliance statement was conceived as a bolster to the role of the statutory auditor. It seems, however, that the DCS as enacted are different in form and intent from the purpose they were conceived by the RGA as fulfilling a dimension of the audit function.

Assessment

"The Irish economy is not of a scale so as to mandate that people must conduct their business here. Rather, those who engage in commerce in Ireland must choose to do so in this jurisdiction."

Conclusion

The DCS run counter to numerous initiatives and other national strategies, not least harmonisation of laws and regulations with our EU partners; enhancing national competitiveness; principles-based regulation; on-going reinforcement of the role of regulators (such as ODCE and the Financial Regulator) and law enforcement agencies (including Revenue); and effective and efficient regulation generally. The DCS requirements focus the attention of management on legal obligations, to the exclusion of operational risk.

Perhaps most significantly, section 45 may also be futile
> Firstly, they create an ironic correlation: the better managed a company is, the more detailed and conscientious (and thus burdensome) a compliance exercise under s 45 is likely to be, while the less well-managed a company is, the less conscientious (and thus less burdensome) s 45 would be. Secondly, s 45 would have no application to a non-Irish company thus underlining their arbitrary nature. Thirdly, the focus of s 45 is limited in that it applies to legal risk only and will not in any meaningful way address the operational or financial risks to which every company will be exposed.

Musgrave Group PLC

Fully supportive of a compliant corporate culture in Ireland and respect for the objective to make directors focus on their legal responsibilities, but submit it must be done in a manner where:

* Irish owned businesses are not at a competitive disadvantage to international competitors and the rules are consistent with international regulatory standards;
* The rules can apply to all companies;
* The costs to business are taken into account

Small number of companies to which s 45 applies

Current proposal means that only large Irish limited companies will be required to comply. We do not see why such important legislation should only apply to large limited companies. Surely it would be preferable to adopt a standard that directors of all companies could comply with, large and small, limited and unlimited. The proposed legislation should apply either only to listed companies or to all companies.

Alternatives to current proposal

Propose that the DCS should be one where directors would acknowledge that they are responsible for securing a company's compliance with its legal obligations. If this is not possible, at the very least the requirement to confirm that directors comply with all tax law and obligations under the Companies Acts should be qualified so that directors are required to confirm compliance only with obligations which are material to the business and not all such obligations.

Conclusion

Current DCS is not appropriate, is anti-competitive and is unbalanced. It will impose a burden of compliance where the costs outweigh any benefit and which is inequitable as it only applies to large limited companies.

ODCE

It is clear that global best practice, as evidenced by the OECD Principles, aspires to structures of risk analysis, management, process implementation, control, review and reporting in a clear and transparent manner, taking responsibility at Board level for compliance. The process of preparing Compliance Statements will expose for each affected company those relevant risks and ensure that they are properly addressed. The OECD Principles therefore directly and explicitly promote a corporate governance structure that is consistent with that required by the DCS.

It is understood that it was the intention of Government to apply the provision to companies meeting both thresholds and perhaps should be implemented in legislation.

Insufficient attention given to s 45(7) which provides for the concept of "reasonable compliance in all material respects" applicable to all relevant obligations.

The cost of putting in place the processes and procedures to secure material compliance with statutory obligations is not a cost which should be attributable to the DCS; the cost that is properly attributable is primarily the cost of the reporting arrangements which apply.

Potential competitiveness issues

* EU Corporate Governance Forum and expert advisory group to examine best practice in Member States > these bodies would look to the Irish legislation as the benchmark by which to measure others
* New EU States (e.g. Lithuania) and other States viewed as our competitors for foreign direct investment (India, Singapore, Korea and Thailand) have also taken major steps in the recent past to improve their corporate governance structures
* High standards of corporate governance (as evidenced by legislation in the area) clearly signal an intolerance of shoddy commercial practices....As a form of self assessment the DCS may actually enhance our competitiveness rather than be a threat to it and there is no reason why Ireland Inc should not aspire to be a jurisdiction of high and consistent standards in the corporate arena

Potential implementation issues

* Worth noting that portions of ODCE Revised Guidance were adapted from the Turnbull Guidance in order to align existing company procedures with the requirements of the DCS
* Some overreaction to the DCS - excessively detailed and rigorous approach adopted by some companies
* The provisions can still be commenced for financial years starting 1 Jan 2006 if no major legislative changes are required as a result of this Review

Conclusion

The lessons of the last few years indicate that directors did not take their compliance responsibilities seriously. The DCS merely seeks to get directors to address their responsibilities by identifying major risks to non-

compliance and putting the necessary procedures and arrangements in place to secure material compliance.

* Proportionality - remedy for evasion of significant corporate responsibility in the form of the DCS is targeted at major Irish companies and directed at addressing material non-compliance. It is therefore entirely proportionate.
* Efficacy - DCS obligations have already shown significant capacity to produce a new corporate focus on compliance
* Appropriateness - Conscious that breaches of company law remain an everyday occurrence and much corporate misconduct occurs out of the public eye. Thus both necessary and appropriate.

DCS will bring greater transparency, lower business risks and a more equitable competitive business environment. With appropriate support, they can be lauded as a competitive advantage of the State ensuring security and reliability in local operations. They will protect shareholders, employees, creditors and other stakeholders including the State ensuring, for example, that proper taxes are paid to Revenue and so contributing directly into the general welfare of the nation.

DCS should be retained without significant amendment and implemented as soon as possible.

Omnipro

* Due to recent rapid economic expansion in Ireland the thresholds are relatively low and will affect more companies than was originally intended, therefore turnover limits should be increased
* Costs of implementing DCS may be unnecessary and unsustainable to even the most successful of medium sized companies

Pharmachemical Ireland

As a member of IBEC made a "form" submission mirroring that of Food and Drink Industry Ireland.

PriceWaterhouseCoopers

Existing section 45 would achieve the objective of emphasising the importance of the directors' role and responsibility in regard to a company's compliance with its legal obligations, however, it would place significantly disproportionate and inappropriate costs and burden on Irish business that would act as a disincentive to investment and employment in Ireland and would be out of line with current international norms.

Principal reasons for conclusions that not proportionate and appropriate relate to:

- cost and burdens it would place on business
- increasing compliance and regulatory pressures already being placed on companies, both large and small
- the inappropriateness of Ireland imposing requirements that are out of line with international norms, in the increasingly competitive international business environment.

Also question whether it is appropriate to impose a DCS requirement ONLY on companies above the size thresholds set out in section 45. There is no persuasive evidence that smaller companies are any more compliant than large companies particularly in relation to tax compliance.

Alternative model

* More proportionate and appropriate to introduce a requirement along the lines of the existing section 45 - 205E(5)(a)-whereby the directors would acknowledge that they are responsible for securing the company's compliance with its legal obligations. This approach would be consistent with the approach taken by the European Commission in its proposed amendments to the 4th and 7th Directives (and even this requirement may well exceed that of other EU members or competitor jurisdictions)
* If such a requirement is introduced it should be re-examined after perhaps 2 years.

Revenue Commissioners

* DCS is designed to reassure a company's stakeholders, including shareholders, customers and regulatory authorities that all reasonable steps are being taken to ensure compliance by the company. A statement by the directors, based on their review of the procedures, that they have used all reasonable endeavours to secure compliance reinforces that assurance
* Failure to comply with tax and other obligations has ramifications far beyond the company itself > the build up of tax liabilities can have serious financial consequences for company itself, shareholders and taxpayers.
* Responsibility for compliance rests with the company itself and it is appropriate that the associated costs should be borne by the company; these costs are currently being borne by compliant companies

* Evidence that non-compliance with tax obligations remains an issue in the large companies
* Apart altogether from the DCS it must be asked how directors could fulfil their compliance responsibilities in relation to compliance without having effective policies and procedures in place. There is a growing awareness of the need to formalise the requirement for such procedures > Turnbull and SOX
* Value added by DCS is in the formal sign off - brings home to directors their responsibilities in regard to compliance; provides a form of ongoing self-regulation as regards company's compliance and should minimise the need for regulatory intervention; the role of the external auditor is a safeguard by providing an independent evaluation based on information available that the directors statements are fair and reasonable
* CLRG should only have regard to the incremental costs of implementing the DCS in individual companies
* Revenue argues that compliance reporting obligation should continue to apply to tax law; recognises a strong link between tax compliance and effective procedures for compliance with company law.
* No further limitations should be placed on the scope of application of the DCS.

Robert J Kidney & Co

Relevant obligations subject to the compliance statement

Whilst requirement to make a statement regarding company law and tax law obligations is reasonable, the requirement regarding 'any other enactments' places an onerous responsibility on Directors, Auditors and other professional advisors even though the guidance uses the term that Board have used all 'reasonable endeavours' to secure the companies compliance.

Companies affected

Companies required to prepare a compliance statement fall under too broad a heading

The inclusion of the obligation for all public limited companies, listed or otherwise, places undue conditions on use of a PLC as a method of incorporating a business in Ireland. At a minimum the requirement of PLCs, not listed on a recognised stock exchange, to comply with the terms of the Act should mirror the limits set out in respect of private limited companies.

As the requirements of the Act do not apply to foreign companies there is the risk larger listed public companies may follow the example of other smaller companies who have undertaken the re-domicile process.

The thresholds for private limited companies are inappropriate - the limits set out in section 42 regarding the requirement to establish an audit committee are more appropriate. Furthermore, a number of additional private companies specifically charities and not for profit entities should be offered exemptions.

Timing

Companies should be allowed time to implement international accounting standards, which will entail significant demands on the accounting function and directors, before the DCS is commenced. This earliest section 45 should be commenced is 1 January 2007.

Vale Oil

Small scale family run private limited company with a comparatively modest facility, however, massive increases in oil prices combined with the high level of government duty has resulted in substantial turnover in monetary terms. Although the company is well below the balance sheet threshold, it is caught by the turnover criterion and therefore will be subject to the DCS requirements.

The DCS would therefore introduce an unreasonable and unrealistic level of expensive - and unproductive - bureaucracy to the company, and would put it at a huge commercial disadvantage vis-à-vis its competitors.

Therefore the thresholds should be reviewed.

2. Submissions received by the ODCE in response to the Draft Guidance on the Obligation of Company Directors to Prepare Compliance Policy & Annual Compliance Statements under the Companies (Auditing & Accounting) Act 2003

As previously outlined in Chapter 3, the ODCE issued a Consultation Paper [C/2004/1] seeking 'comment from interested parties' on the Draft Guidance on the Obligation of Company Directors to Prepare Compliance Policy & Annual Compliance Statements under the Companies (Auditing & Accounting) Act 2003 prepared by the ODCE, CCAB-I, IoD, IBEC and the Revenue Commissioners. Following a public

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consultation and further engagement with the above bodies and with the Financial Regulator, the ODCE issued Revised Guidance in December 2004. The submissions received in relation to the timing and phasing of the commencement of, and on any exemptions from, the Compliance Obligation, were synthesised by the ODCE:

Exemptions
Specific types of investment company should be exempted from the obligation. Reference was made to government statements indicating such exemption would be made.

Exemption of some public limited companies and application to unlisted public companies of the same turnover and balance sheet thresholds applying to private companies limited by shares.

Two companies with hospital facilities subject to the obligation proposed that they be specifically exempted. Suggested other private companies limited by shares, with charitable status and operating on a not for profit basis also be exempted.

Subsidiary companies be exempted on the basis that the obligation would apply on a group basis.

Threshold changes
Various proposal s were made suggesting the raising of both the turnover and balance sheet thresholds. Maximum value of €14.6million and €29.2 million for balance sheet and turnover respectively, which are currently allowed for medium sized companies in the Fourth Company Law Directive as amended, attracted some support.

Date and form of commencement
While most submissions adopted 'the financial year starting on or after (date)' formulation for application of Section 45 as a whole, a few suggested staggering commencement.

One popular option was the splitting of the introduction of the Compliance Policy Statement and the Annual Compliance Statement.

Most of the respondents felt that the obligation should apply for company financial years starting on or after either 1 July 2005 or 1 January 2006 with a majority favouring the latter option.

The ODCE's response to the specific issues set out above was as follows:

* the directors' compliance statement requirements be commenced on a phased basis for financial periods starting on or after 1 July 2005 for certain significant companies qualifying under section 45 and that it be introduced for the remaining qualifying companies a year later;
* specified investment companies which are subject to Part XIII of the Companies Act 1990 or the UCTIS Regulations be exempted from Section 45 for the first year, pending a policy decision by the Financial Regulator on the manner in which these companies will be treated under the compliance statements regime contained in the Central Bank and Financial Services Authority of Ireland Act 2004

The ODCE also noted that companies, and the ODCE, had been undertaking a substantial amount of planning and development work in anticipation of the implementation of section 45 in its present form and, therefore, any decision to reduce the scope of section 45 would see the time and associated investment having to be largely written off.

The Director also argued, that reducing the scope of the compliance statement regime would undermine the strong message of compliance which the State, through its various regulatory agencies including the ODCE, "has been successfully communicating to the public in recent years". Implementing section 45 in its present form on the phased basis recommended by the ODCE would, in the Director's view, respond appropriately to the representations which business, professional and other interests made in response to the Consultation paper. It is noted that the ODCE recommended a review of the impact of section 45 could be useful but would be best undertaken after rather than before the implementation of the legislation when more reliable information would be available on its actual effects.

3. Summary of submissions received by the DETE on the Companies (Auditing and Accounting) Bill 2003
The following table is a summary of the issues raised in submissions made to the Department of Enterprise, Trade and Employment, in response to the Companies (Auditing and Accounting) Bill as introduced into the Seanad on 12 February 2003.

The main concerns/issues voiced about the proposal were:

* High cost imposition, especially on smaller companies, for meaningless outcome. The compliance statement affords no additional protections to shareholders and creditors.
* At most, compliance statement should only apply to PLCs.
* Limit application to company and tax law.

In summary the main concerns expressed were that the provision afforded no additional protection in law, that it gave rise to a competitiveness issue and that it gave rise to substantial additional costs.

It should be noted that a number of significant amendments were made to the provisions of the Bill relating to the directors' compliance statement, before the legislation was passed by the Oireachtas. Consequently, the following differences between the Bill as initiated, and the legislation under the review of the CLRG should be borne in mind when considering these submissions:

* The scope of the obligations was significantly broader under the Bill. The obligations under the Bill applied to the directors of all companies except private companies eligible for an audit exemption[76] or those exempted by Ministerial regulation[77] [see subsections 43(2)&(6)]. Under the Act, the provisions apply only to public limited companies (whether listed or unlisted) and to private companies limited by shares which have a balance sheet total exceeding €7,618,428 or a turnover of €15,236,856. [78]
* In the proposed Bill, the 'initial' directors' compliance policy setting out the company's policies, procedures and arrangements[79] had to be included in directors' report or notes to the company's annual accounts[80] or in the notes to the company's accounts.81 The provisions as enacted require the initial compliance policy to be included in the directors report attached to every balance sheet laid before the annual general meeting of shareholders.[82]
* The proposed Bill required directors to include in their annual directors compliance statement a statement specifying whether based on the procedures set out and review of those procedures, that they are of the opinion that (a) they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year and (b) that (except for instances of non-compliance of minor or otherwise immaterial nature that may have occurred) the company has complied with its relevant obligations, and (c) if they are not of that opinion, specifying the reasons. The legislation as enacted does not require directors to make such a statement. The directors only have to state that they believe they used all reasonable endeavours to secure compliance and specify reasons if they are not of that opinion.

76 Under section 32 of the Companies (Amendment) Act 1999 small private companies are exempted from auditing provisions where they meet certain criteria

77 The Bill referred to a company of a class exempted under s 46(1)(j), the equivalent of which is s 48(1)(l) in the Act. Section 48(1)(l) specifically gives the Minister power to make regulations "prescribing for the purposes of the definition of "large private company" and "relevant undertaking" in section 205B of the Act of 1990 or for the purposes of section 205E(9) of that Act, amounts that are higher or lower than the euro amounts specified in those definitions or in section 205E(9) as the case may be, and that apply instead of the euro amounts.

78 In other words companies exempt from section 45 are all guarantee companies, all unlimited companies, private companies not meeting the balance sheet or turnover thresholds and any companies exempted by Ministerial regulation.

79 The obligations under s 205E(3)&(4) - companies subject to the obligations are required, as soon as possible after the commencement of the legislation, to prepare a directors compliance statement containing the policies, procedures and arrangements for the company to secure compliance with its relevant obligations, to be approved by the board of directors and reviewed at least once every 3 years.

80 Where the report or notes are required by the Companies (Amendment) Act 1986 to be annexed to the company's annual return

81 Where the company as permitted by section 10(2) of that Act does not annex the directors report to its annual return

82 Pursuant to section 158 of Companies Act 1963

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Issue Raised by Submission	Organisation
Cost of implementation	
Direct and indirect costs of implementation are unduly burdensome/costly; preparing DCS will create a substantial extra cost burden, no option but to seek assistance and advice of legal experts; auditing fees are likely to rise; directors fees are likely to rise	PricewaterhouseCoopers; Horizon Technology Group; Superquinn; John Sisk and Son Holdings; Institute of Directors; IDA and Enterprise Ireland; Institute of Directors Financial Services Ireland; IBEC
Comparative corporate governance regimes	
Legislation is "unique and unrealistic" in an international context and exceed international corporate governance best practice. The directors' compliance statement legislation encapsulates pre-existing requirements and potentially setting a high standard that could conceivably represent interest best practice	Institute of Chartered Accountants in Ireland; PWC; KPMG; Horizon Technology Group; Institute of Directors IBEC View referred to by IDA and Enterprise Ireland but not argued by their submissions
Obligations imposed by the directors compliance statement are more onerous that those under the Sarbanes-Oxley Act, which are not analogous but are the closest comparative requirements.	Institute of Directors IBEC
Necessity of provisions in Irish context	
Directors compliance statement is unnecessary because there is existing legislation seeking to encourage probity - company directors already have a specific duty to ensure compliance by the company with the Companies Act (ss383(3) CA1963); - the Director of Corporate Enforcement is charged with encouraging compliance with the law Need for Regulatory Impact Assessment	CLRG IBEC
The directors' compliance statement will create an excessive administrative burden - the requirements will result in the bureaucratisation of business	ICAI IBEC CLRG

Impact on competition and investment	
Places Ireland at a competitive disadvantage vis-à-vis competing EU economies:	ICAI, Institute of Certified Public Accountants in Ireland; KPMG; PWC; IBEC; John Sisk & Sons Holdings Limited Horizon Technology; KPMG; IDA; Enterprise Ireland
It will create barriers for competition and undermine Ireland's ability to attract investment. Ireland will not be able to compete in the longer term if the cost of complying with regulation is higher than in other comparable countries;	CLRG
may deter foreign companies from operating in Ireland or avoid additional regulation by operating through companies established in Northern Ireland or Great Britain.	Horizon Technology Group, KPMG IBEC
Perception that Ireland is over-regulated and more expensive location for business.	IBEC
increasing risk to directors will lead to reduction in the number of Irish start-ups; potential Irish entrepreneurs will either give up or go abroad	
Irish companies will be disadvantaged requirements will not apply to non-Irish incorporated companies operating in Ireland (whereas it will apply to directors of Irish incorporated companies formed under the Companies Acts)	Law Society; John Sisk & Son Holdings Limited; IDA and Enterprise Ireland IBEC
Risk of self incrimination for directors - requirement under the Bill to disclose instances of non-compliance	John Sisk & Son Holdings Limited
Scope of obligations	
The companies to which the DCS provisions apply should be further restricted: - Publicly listed companies only - publicly listed and 'very large companies' - special purpose vehicles should be excluded (n.b the decision to exempt SPVs by the Minister has been taken in principle)	KPMG Financial Services Ireland IBEC
- Voluntary not-for-profit organisations (charitable companies) should be exempted [nb guarantee companies are now exempt thus issue largely dealt with	Disability Federation of Ireland; CV12 Group

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Smaller companies should not be excluded from obligations except where companies exempt from audit requirement - Alternatively apply compliance reporting obligation to the widest range of companies in re: to company and tax law but restrict the third limb to larger companies	Revenue Commissioners
Each separate company within a group should not be required to prepare the necessary compliance statements.	PWC; IBEC; John Sisk & Sons Holdings Limited
The scope of the legislation creates an un-level playing pitch - this could be rectified by requiring the same of all unincorporated businesses such as overseas companies conducting significant business activities through their branches in Ireland, Government departments, partnerships and sole traders	John Sisk & Sons Limited
Content of obligations	
The 'third limb' of relevant obligations is too broad and should be either completely removed or modified in some way.	IBEC
- many submissions stated that if the compliance statement is non-negotiable the term relevant obligations should be defined solely in terms of tax and company law	John Sisk & Son Holdings Ltd; PWC; KPMG; TV3; IBEC
- the third limb should be limited to laws and regulations that are 'central to the company's operations';	PWC
- separate regulatory requirements for particular industries or activities should specify any specific compliance reporting requirements in those instruments.	CLRG; Law Society
- Enactments which are to be subject of DCS should be few in number and specified along with subordinate regulations in updated Ministerial Orders, so there is a small reference list of enactments for companies to consult.	Padraic White

The company and tax law elements of 'relevant obligations' should be given materiality requirement [DCS should be restricted to all material aspects of Irish company law and taxation law]	Crowleys DFK
The statement of requirements should not exceed those under the Sarbanes-Oxley Act	Superquinn; Musgrave Limited; IBEC
Inappropriate that companies should be required to include a full compliance statement in their annual accounts - public nature of compliance statement may compromise confidentiality and create a competitive risk to companies as they are required to disclose their systems and practices; issue of commercially sensitive information being disclosed via DCS - It may be appropriate and necessary for public companies to have publicly accountable disclosure requirement, that is not the case for private companies.	PWC IBEC John Sisk & Son Holdings Limited
Audit requirement	
Auditors do not have the expertise to perform the functions required of them under the legislation [provisions extend the function of auditors to express opinions on matters outside their competence] - Auditors will be cautious about confirming a compliance statement is fair and reasonable due to insufficient knowledge of enactments that provide the legal framework within which companies operate. - The legislation potentially extends the responsibilities of auditors beyond those of directors (by requiring auditors to make an assessment of what is fair and reasonable). - The legislation risks making auditors perform a 'policing' role which is inconsistent with their primary responsibility of reporting to shareholders on financial statements	Crowley's DFK The Auditing Practices Board

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Impact on directors	
The provisions impose excessive responsibility and personal legal liability on directors	IDA and Enterprise Ireland; Heiton Holding PLC; Institute of Directors in Ireland; IBEC
- the burden of responsibility would inevitably fall on the non-executive directors, since it is the performance of the company and therefore of its executive directors on which review, assurance and confirmation is being demanded by the provisions of the bill.	
- it will be more difficult for companies to attract appropriately qualified non-executive directors due to increased risks and responsibility; [provisions unworkable because of the lack of qualified non-executive directors willing to accept the burden of work responsibility and personal legal liability];IDA and Enterprise Ireland; Heiton Holding PLC; Institute of Directors in Ireland; IBEC	
- potentially imposes a completely new role on directors - the director as policeman and detective	Superquinn; Institute of Directors Ireland; IBEC
Miscellaneous	
A trimmed back DCS should be implemented through a code of practice monitored by IAASA.	IBEC

Chapter 7

Comparative Analysis - Other Jurisdictions

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Comparative Analysis - Other Jurisdictions

A number of representations and submissions have requested the Review Group conduct a comparative analysis of the competitive impact of 45/2003 vis-à-vis provisions in competitors' jurisdictions, to determine the extent to which the legislation is above and beyond what is in place in other jurisdictions and whether 45/2003 will, therefore, erode Ireland's competitiveness.

The Review Group accepted these recommendations and considered the requirements that other, particularly competitor jurisdictions have relating to:

* risk management and internal control beyond monitoring accounting systems for preparing financial statements;
* compliance verification, as opposed to compliance proper, with relevant obligations;
* the development, maintenance, disclosure and external assessment of companies' corporate governance (internal control and compliance) practices and procedures; and
* the public assertion of such prescriptive measures of compliance verification.

No other comparative jurisdiction is known to have, or is known to be contemplating the introduction of, legislative requirements analogous to 45/2003. In most comparable jurisdictions, PLCs have an obligation to make disclosures regarding internal control procedures under the listing rules of the relevant securities exchange. These listing rules often 'piggy back' legislation and are enforceable only in the sense that a company may be de-listed for failure to comply.

The Irish model under 45/2003, requires:

* Directors' to make a statement of the company's general compliance policy;
* Directors' to make an annual statement setting out the company's actual specific internal procedures, confirming that they have reviewed the effectiveness of those procedures and specifying whether they have used all reasonable endeavours to secure the company's compliance with its relevant obligations; and
* An independent/external audit of both statements and the company's procedures.

The Review Group concluded that 45/2003 imposes additional obligations of a singular nature that are absent in all other jurisdictions reviewed.

Where there is an obligation for directors to provide a periodic statement or a report, for example in the United States, they are generally confined to financial reporting or accounting obligations. The requirement that the statement cover all companies and tax law and any other relevant obligations that may have a material affect on the financial position of the company is singularly unique to Irish law. Furthermore the Irish model does not limit those obligations to listed companies but also imposes them upon public companies generally and 'large' private companies.

As there is no corporate governance legislation or regulation in any other jurisdiction that may truly be described as analogous to the Irish model, the only approach available is to contrast the DCS envisaged by 45/2003 with the corporate governance regimes adopted in comparative jurisdictions. It must be borne in mind however, that Irish companies listed on the ISE are required to comply with a voluntary and principles based corporate governance code, and therefore Ireland does have a system in place that is directly comparable to those of other jurisdictions. The DCS is a very different proposition and should be regarded as such when making a comparative analysis.

European Union

There are no existing European Union requirements related to risk management and internal control.[83] The European Commission has only published proposals for such requirements in 2004 in the form of the proposed Directive on Statutory Audit and proposed amendments to the Fourth and Seventh Directives. The EC Communication on Company Law and Corporate Governance of May 2003, the precursor to these proposals, included an Action Plan including the following relevant 'short term' commitment:

* clarify the collective responsibility of the board members for financial statements and key non-financial information and oblige all listing companies annually to make a public corporate governance statement

83 FEE Risk Management and Internal Control in the EU Discussion Paper p 18, 30 March 2005.

The Action Plan also led to the establishment of the European Corporate Governance Forum to "examine best practices in member states with a view to enhancing the convergence of national corporate governance codes and providing advice to the Commission."

The EC Communication on Preventing and Combating Corporate and Financial Malpractice, issued 27 September 2004, noted that the Action Plan for Company Law and Corporate Governance already provided "the right policy response for an effective EU framework" for dealing with corporate financial scandals. The purpose of the Communication was to set out a 'holistic approach' on how to reduce the risk of financial and corporate malpractice covering also taxation and law enforcement. It refers to four lines of defence against corporate malpractice, the first line being 'internals controls in the company and corporate governance.'

Whilst the Forum has announced that it will be considering all models of corporate governance within member states, at this stage the EC appears to favour a principles based approach that focuses on listed companies. There is no indication it will be seeking the adoption of the Irish model.

The proposal for amending Council Directives 78/660/EEC and 83/349/EEC, published by the European Commission on 28th October 2004, concerns the annual accounts of certain types of companies and consolidated accounts. The Commission proposes collective board responsibility and more disclosures on transactions, off balance sheet vehicles and corporate governance. The aim of the proposal is to further enhance confidence in the financial statements and annual reports published by EU companies by requiring companies to make available more reliable and complete information to shareholders and other stakeholders.[84]

Generally speaking, under the listing rules of their relevant securities exchange, most European Union member states require publicly listed companies to comply with a corporate governance code and issue a regular report (whether to shareholders or to the listing authority/securities exchange) on its internal control mechanisms. No other member state, however, imposes a requirement upon directors of listed companies analogous to that provided for in 45/2003.

The European Commission has recently endorsed a voluntary "comply or explain" regime for a limited number of companies only, i.e. companies whose securities are listed on a recognised stock exchange (see COM2004/0205).

United Kingdom [85]

Companies that are on the 'official list' of the London Stock Exchange must comply with the Listing Rules of the UK Listing Authority which includes the Combined Code on Corporate Governance. Listed companies have to state how they have applied the Code principles and whether or not they have complied with Code provisions. If they do not comply they have to explain why not ('comply or explain').

The Code requires that '[T]he board [of directors] should maintain a sound system of internal control to safeguard shareholders' investment and the company's assets'. Furthermore the board should at least annually conduct a review of the effectiveness of the group's system of internal controls and should report to shareholders that they have done so. The review should cover all material controls, including financial, operational and compliance controls and risk management systems. The Turnbull guidance, 'Internal Control - Guidance to Directors on the Combined Code', issued in September 1999 is intended to provide a framework for the compliance with the requirements of the Combined Code. Annually boards have to disclose that there is an ongoing process for identifying, evaluating and managing the significant risks faced by the company, that it has been in place for the year under review and up to the date of approval of the annual report, that it is regularly reviewed by the board and, most significantly, that it accords with the Turnbull guidance. Boards have to conclude on the effectiveness of their systems of internal control, however, there is no requirement to make a public statement on their conclusions.

Listed companies are required to follow the rules of the Financial Services Authority and the 'comply or explain' requirements of the Combined Code. The internal control aspects of the Combined Code, however, do not attract specific legal sanctions.

84 Please see the DETE website at www.entemp.ie/commerce/companylawlegislation/developments.htm#Actionplan
85 The following material is drawn from FEE Discussion Paper pp 80-82

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Listing Rule 12.43A provides that a company's statement under 12.43A(b) - the directors' compliance statement - must be reviewed by the auditors before publication insofar as it relates to certain principles of the Combined Code. The Auditing Practices Board (APB) Bulletin 2004/3 clarified that this requires external auditors to assess (by way of a review rather than an audit) whether the disclosures of the board's summary of the process it has applied in reviewing the effectiveness of the system of internal control is both supported by documentation and appropriately reflects the auditors' understanding of the process undertaken by the board.[86]

Publicly listed Irish companies are also governed by the Combined Code and are required to comply with the Code or explain why they have not complied.

The following extract is drawn from Financial Reporting Council's submission to the April 2005 SEC Roundtable on the Sarbanes-Oxley Act (SOX):

> *The [UK] Combined Code also contrasts with section 404 SOX by taking a wide business and investor perspective of controls rather than the more limited approach of internal control over financial reporting…*
>
> *The Turnbull guidance is part of a framework that comprises:*
> *- Company and common law;*
> *- The Listing Rules;*
> *- The Combined Code on Corporate Governance; and*
> *- The Turnbull Guidance.*
>
> *As the UK's competent authority under the Financial Services and Markets Act 2000 the UK Listing Authority, part of the Financial Services Authority, is charged with making and enforcing the Listing Rules governing admission to listing.*
>
> *Rule 1.1 of the Listing Rules states that issuers must comply with all listing rules applicable to them. The Combined Code on Corporate Governance is appended to the Listing Rules. Rule 12.43A of the Listing Rules states that in the case of a company incorporated in the UK, the following items must be included in its annual report and accounts:*
>
> *(a) a narrative statement of how it has applied the principles set out in Section 1 of the Combined Code, providing explanation which enables investors to evaluate how the principles have been applied; and*
> *(b) a statement as to whether or not the company has complied throughout the year with the Code. A company that has not complied with the Code provisions, or complied with only some of the Code provisions or in the case of provisions whose requirements are of a continuing nature complied for only part of an accounting period, must specify the Code provisions with which it has not complied, and (where relevant) for what part of the period such non-compliance continued, and give reasons for any non-compliance.*
>
> *In respect of internal control in the Combined Code, there is one Principle and one Provision*
>
> *Principle C.2 states that "The board should maintain a sound system of internal control to safeguard shareholders investment and the company's assets"*
>
> *Provision C.2.1 states that "The board should at least annually, conduct a review of the effectiveness of the group's system of internal control and should report to shareholders that they have done so. The review should cover all material controls, including financial, operational and compliance controls, and risk management systems."*
>
> *The Turnbull guidance provides guidance on how to apply 1998 Code Principle D.2 (now principle C.2 in the 2003 Code), comply with the related provisions and make the disclosures required of directors.*
>
> *Paragraph 7 of the guidance states that it should be followed by board of listed companies in:*
> *- assessing how the company has applied the Code Principle on internal control;*
> *- implementing the requirements of Code Provisions on internal control; and*
> *- reporting on these matters to shareholders in the annual report and accounts.*

86 See FEE Discussion Paper p 81; http://www.asb.org.uk/images/uploaded/documents/Bulletin%202004-3%20(November%202004).pdf

On 19 June 2005, the Financial Reporting Council published its findings of its review of the Turnbull Guidance. The FRC recommended only limited changes to the Guidance to bring it up to date and it is anticipated the revised guidance will come into effect on 1 January 2006.

United States [87]

The Sarbanes-Oxley Act 2002 ("the SOX Act") has been criticised as being a singularly invasive and costly step in requiring compliance verification by US companies. Indeed, the Review Group has been cognisant of the mitigation of the SOX Act that has taken place in recent months. The SOX Act, together with associated Securities Exchange Commission (SEC) and Public Company Accounting Oversight Board (PCAOB), imposes obligations upon the management of publicly listed companies regarding the implementation and disclosure of internal control mechanisms.

Section 302 of the SOX Act covers disclosure controls, that is, those controls over disclosures in SEC filings, which will include financial reporting controls and compliance with certain other sections of Securities Acts and SEC rules. Section 404 covers financial reporting rules.

Under section 302 of the SOX Act, Chief Executive Officers and Chief Financial Officers are required to certify on a quarterly or annual basis their responsibility for disclosure controls which they have designed to ensure their material information is known to them and evaluated for effectiveness, presenting their conclusions in the filing with details of significant changes and disclosing to the audit committee and auditors any significant deficiencies/fraudulent acts.

Section 404 requires management to state in their annual report their responsibility for establishing and maintaining adequate controls over financial reporting together with an assessment of effectiveness (and the framework used in accordance with that framework. The SEC rule on section 404 specifies that the internal controls of a company are to based on an "appropriate" framework including COSO, [88] CoCo[89] and the Turnbull guidance.

Failure to comply with either section 302 or 404 is subject to enforcement action by the SEC.

In regards to the requirements under section 404 of the SOX Act, PCAOB Auditing Standard No.2 requires auditors to carry out an integrated audit of internal control with the audit of financial statements and to express an opinion as to whether (a) managements assessment is fairly stated and (b) the company has maintained effective internal control over financial reporting as of a specified date. The Standard sets out a detailed process for auditors to follow and the guidance is very prescriptive in terms of the extent to which management's own work can be used, issues that automatically imply significant weaknesses and the extent of testing required.

It was noted in many submissions made to the Review Group that the only legislative requirements in any other jurisdiction similar to the DCS are those under the SOX legislation. However, the DCS will be more onerous than SOX in the following respects:

* the DCS requirement under 45/2003 applies to a broader population of companies than SOX.
* the DCS covers all "relevant obligations", (which for some subject companies, extends to thousands of specific Statutory Instruments) whereas SOX deals primarily with financial information requirements and related controls.
* All Board members, both non-executives and executives are required to complete the DCS, while SOX applies to the CEOs and CFOs only

Australia[90]

A voluntary 'principles based' corporate governance regime, similar to that which applies to companies governed by the Combined Code, has been adopted in Australia. Pursuant to the "governance disclosure" requirements of the Australian Stock Exchange (ASX), [Listing Rule 4.10.03], a publicly listed company is required to include in its annual report provided to the ASX, a corporate governance statement explaining the main practices, control mechanisms and governance processes employed by the Company during the reporting period. Furthermore, the Listing

87 The following material was drawn from FEE Discussion paper pp83-84.
88 The Committee of Sponsoring Organizations of the Treadway Commission produced the "Internal Control - Integrated Framework" report in 1992, commonly known as the COSO Report.
89 A system of internal controls or Control Framework defined by the Canadian Criteria of Control Board of the CICA.
90 The following material is drawn from "Corporate Governance in Australia" ASX Corporate Governance Council, March 2003

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Rules provided that the annual report must also include a statement disclosing the extent to which the Company has followed the best practice recommendations set by the ASX Corporate Governance Council. If the company has not followed all recommendations it must identify which of those recommendations it hasn't followed and give reasons for not doing so.

New Zealand[91]

The approach taken to corporate governance in New Zealand broadly mirrors that in Australia. Pursuant to Listing Rule 10.5.3(h) of the New Zealand Exchange [NZX], a listed company's annual reports must include "a statement of any corporate governance policies, practices and processes, adopted or followed" by the entity. The NZX Corporate Governance Best Practice Code fleshes out how listed companies can comply with the listing requirements and provides guidance as to corporate governance best practice. Listing Rule 10.5.3(i) requires directors to make a statement whether, and if so how, the corporate governance principles adopted or followed by the company materially differ from the Corporate Governance Best Practice Code or a clear reference to where such statement may be found on the issuer's public website.

The Securities Commission New Zealand (SCNZ) has developed corporate governance Principles, consistent with the NZX Best Practice Code, to be generally applied to the governance of entities that have economic impact in New Zealand or are accountable, in various ways, to the public including listed companies, public companies, state-owned enterprises, community trusts and public sector entities. Although the Principles and associated guidelines were designed to be used by a broad range of companies, compliance with the principles is not compulsory or enforceable.

Singapore

Public companies listed on the Singapore Stock Exchange(SGX) are required, pursuant to Rule 710 of the Exchange Listing Manual to make certain disclosures in respect of the Corporate Governance Code issued by the Corporate Governance Committee in March 2001.

Hong Kong

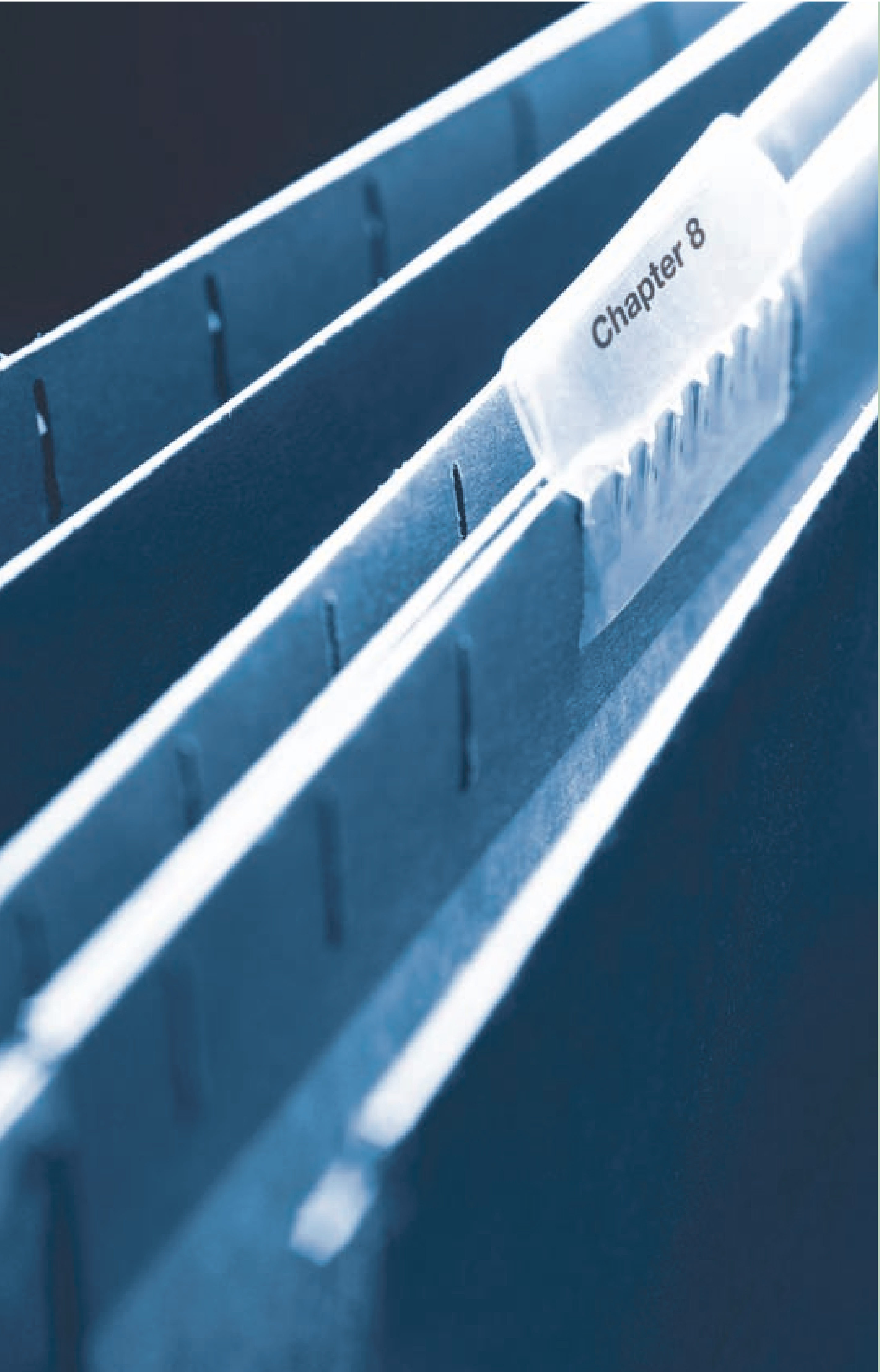
On November 19, 2004, the Stock Exchange of Hong Kong published a final report on its new "Code on Corporate Governance Practices" (initially released in late January 2004 for public comment). It has been published in conjunction with a new set of rules requiring issuers to include a "corporate governance report" in their annual reports.[92]

Conclusion

The Irish DCS, as contemplated by 45/2003, is unique to Ireland. Those jurisdictions which have decided to introduce some requirements for compliance verification all confined this to listed companies and, with the exception of the United States, have introduced the requirement with voluntary 'comply or explain' and 'principles based' Codes required by Stock Exchanges/Listing Rules rather than having the requirement enshrined as a mandatory requirement in legislation. Moreover, those jurisdictions that have vaguely comparable legislation have confined their proposed rules to verification with financial and accounting obligations. No country has sought to legislate for compliance verification with the general laws of the land, or even their equivalent company law legislation or tax legislation. Even those jurisdictions that have taken significantly lesser measures have mitigated their originally promulgated proposals.

The Review Group concludes that there is a significant apprehension that 45/2003 represents a materially significant divergence from international and EU proposed or contemplated developments on corporate governance and compliance developments. This finding of the Review Group is especially significant in the context of the concerns expressed concerning 45/2003 by the Irish Industrial Development Authority (IDA) regarding the competitiveness of the Irish economy were 45/2003 to be implemented.

91 "Corporate Governance in New Zealand: Principles and Guidelines" New Zealand Securities Commission, February 2004
92 http://www.acga-asia.org/content.cfm?SITE_CONTENT_TYPE_ID=12&COUNTRY_ID=292



Chapter 8

Some Options in Reforming Section 45/2003

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Some Options in Reforming Section 45/2003 Directors' Compliance Statement (DCS)

1. GENERAL - Change the DCS or Leave it as is

Option	Arguments "For"	Arguments "Against"
1(a) - Make no change to DCS	1. The DCS promotes compliance with laws. 2. Companies should already have policies and procedures in place to secure compliance with their relevant obligations. 3. Directors will not be able to say that they were unaware of any breaches of relevant obligations. 4. The DCS is a necessary *quid pro quo* for the privilege of being given the licence that is limited liability. 5. Ireland will become a centre of excellence for corporate governance. 6. The DCS assists the Revenue Commissioners, ODCE and other regulatory bodies in ensuring there is compliance with law and regulations. 7. The costs of compliance with the DCS are indistinguishable from the costs of compliance with the laws to which the DCS refer. 8. The State has a right to enquire as to how citizens propose to comply with the laws of the land. 9. Prevention is better than punitive sanction and the best law is the one that is complied with, without having to resort to enforcement. 10. The DCS sets an example of an approach to compliance, which can be broadened to include other companies, individuals, the public service and public representatives. 11. Being seen to be compliant is as important as complying.	See **1(b)**

1(b) - Mitigate the Provisions of the Existing DCS	1. The direct and indirect costs, burdens and bureaucracy of the DCS are disproportionate to the benefit which is acknowledged as being simply to "promote compliance". 2. Ireland will lose its competitiveness due to the imposition of a regulatory burden not found in any other country, whether inside or outside the EU. 3. The consumer will ultimately pay for the DCS which will have the effect of increasing prices or driving companies out of business (or out of Ireland). 4. The DCS will cause dysfunctional behaviour - avoidance of a Draconian Irish regulatory regime through incorporation in Northern Ireland and elsewhere is likely to arise. 5. Companies and their directors are already required to comply with all relevant obligations - the additional requirements are gratuitous: statute is not required to repeat itself for emphasis. 6. There is likely to be a significant decrease in the numbers of quality persons who are available to be NEDs. 7. The reasons for the RGA's proposal for a DCS have diminished or disappeared - since the introduction of amendments to s 383(1)/63 by the 2001 Act, directors are as a matter of law responsible for their company's compliance with the Companies Acts so that a claim of "I was not aware" will no longer be an excuse. 8. The promotion of compliance is now adequately addressed by the activities of the ODCE, and the CRO too has increased awareness campaigns. 9. The impact of auditors' duties to report their suspicion of an	See **1(a)**

	indictable offence to the ODCE significantly reduces the need for a DCS. 10. There are no obvious examples of any specific mischief that will be cured by the introduction of the DCS. 11. In seeking to make a science of compliance, the DCS requires companies to slavishly follow written procedures and militates against the reliance upon the judgment of professionals. 12. From a philosophical perspective, it is arrogant and patronising for the State to enquire of its citizens as to how they propose to comply with an existing legal obligation. 13. It is discriminatory to introduce a requirement for a section of the private sector that does not apply to the public sector or Departments of State. 14. Section 45(6) is possibly unconstitutional in that it continues to usurp the privilege against self-incrimination.	

2. Options on Companies in Scope

Option	Arguments "For"	Arguments "Against"
2(a) - Continue to apply it to all companies to which it currently applies.	1. Compliance will be promoted for the greatest number of companies currently in scope. 2. Large private companies should continue to be included. 3. All PLCs should continue to be included (save those already subject to exception in s 45). 4. The existing thresholds are appropriate. 5. Principles of good governance apply to all companies. 6. Those companies required to make a DCS have sufficient resources available to them to make DCS as proposed.	See **1(b)** and **2(b).**

2(b) - Limit application to Listed PLCs only (an equity listing)	1. Original focus of RGA was a DCS for the benefit of "shareholders" and so should be confined to the investing public; 2. The investing public are the intended recipients of similar benefits that come from the Combined Code, Listings Rules etc. 3. Alignment of scope of Irish provisions with Sarbanes Oxley. 4. Shareholders in a listed PLC would have great difficulty in organising themselves to cause their company to adopt a similar provision on a voluntary basis by changing the articles of association. 5. The inclusion of private companies is unnecessary - shareholders can adopt their own provisions. 6. The market in debt securities is sophisticated, specialised and international and it is unnecessary to include such companies in the provision.	See **1(a)** and **2(a).**
2(c) - Limit application to PLCs - Listed and unlisted	1. All companies whose shares are capable of being offered to the public should be the subject of DCS. 2. See points 1-5 above.	See **2(a)** and **2(b)**
2(d) - Increase thresholds for affected Private Companies	1. Existing thresholds are too low and apply a disproportionate regulatory burden to private companies whose shareholders are few and not drawn from the investing public.	See **2(a)**

3. Options on Contents of DCS in the Extent of "Relevant Obligations"

Option	Arguments "For"	Arguments "Against"
3(a) - Continue existing definition of "relevant obligations"	1. Promotes compliance by companies with the greatest number of statutes that are relevant to particular companies.	1. Too costly, bureaucratic and unnecessary. 2. Makes Irish companies uncompetitive. 3. Disproportionate cost benefit. 4. See **1(b).**

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3(b) - Remove the "third-limb" of the definition of relevant obligations;	1. Certainty is furthered by confining the DCS to company law and revenue obligations. 2. RGA Report concerns with "third limb" obligations largely confined to financial institutions which are already regulated by the Financial Regulator and the CBIFSRA No 2 Act. 3. Costs are substantially reduced by removing the uncertainty of what laws are 'relevant' and 'material' to particular companies. 4. The third limb is extraneous to Company law and compliance with third limb obligations is a matter for other State agencies and regulators. 5. The third limb requirements unfairly discriminate against companies vis à vis other forms of business association.	1. It is reasonable to require companies to take steps to ensure compliance with third limb obligations. 2. Creditors have an interest in ensuring that third limb obligations are complied with since breach can affect companies' accounts. 3. The RGA's concerns were not confined to financial institutions and extended to other industries too. 4. The additional costs of proving compliance in a DCS (as opposed to being compliant) are difficult to see. 5. See **1(a).**
3(c) - Introduce a materiality requirement for the first limb - Companies Acts. *(Whether by utilising a similar formula to the existing 3rd limb or by specifying particular provisions of the CAs)*	1. There are myriad provisions in the Companies Acts that could contain an element of compliance and without any materiality test, the cost of compliance is disproportionate to the benefit that derives. 2. Acknowledges the hierarchy of compliance provisions and would direct focus on the most important. 3. Costs are substantially reduced by introducing a materiality or focal point for relevant obligations.	1. It is reasonable to require companies to have a policy and written procedures on all requirements imposed by the Companies Acts. 2. There is a danger that in creating a hierarchy, certain laws are seen as less important. 3. The additional costs of proving compliance in a DCS (as opposed to being compliant) are difficult to see. 4. The ODCE and CRO should be assisted in achieving compliance by retaining a blanket requirement as to company law compliance, without any de minimis reform
3(d) - Introduce a materiality requirement for the second limb - tax law *(Whether by utilising a similar formula to the existing 3rd limb <u>or</u> by specifying particular provisions of the Taxes Acts)*	1. There are myriad provisions in the Taxes Acts that could contain an element of compliance and without any materiality test, the cost of compliance is disproportionate to the benefit that derives.	1. All companies must pay their taxes and it is reasonable to require companies in scope to state their policy and procedures in respect of compliance with all taxes, without any de minimis limit.

	2. Acknowledges the hierarchy of compliance provisions and would direct focus on the most important. 3. Costs are substantially reduced by introducing a materiality or focal point for relevant obligations	2. There is a danger that in creating a hierarchy, certain taxes are seen as less important. 3. The revenue commissioners should be assisted in achieving compliance by retaining a blanket requirement as to tax law compliance without any de minimis reform.

4. Options on Contents of DCS in the Extent of Prescription Regarding the "Compliance Policy Statement"

Option	Arguments "For"	Arguments "Against"
4(a) - Continue to require the directors to make a Compliance Policy Statement	1. Promotes compliance by companies by requiring them to specify their policies respecting compliance with relevant obligations, their internal financial and other procedures for securing compliance with relevant obligations and their arrangements for implementing and reviewing effectiveness of said policies and procedures. 2. This requirement is the core of the requirement, the satisfaction of which promotes compliance with relevant obligations. 3. Companies should already have policies and procedures in place.	1. It is unnecessary to require companies and their directors to disclose their detailed policy or procedures on securing compliance. 2. It is sufficient to promote compliance that companies and directors state that they have policies and procedures. 3. See **4(b)**
4(b) - Make the Compliance Policy Statement less prescriptive *(e.g. Require directors of companies in scope to confirm that they (a) have policies, (b) have internal financial and other procedures for securing compliance and (c) have arrangements for implementing and reviewing the effectiveness of said policies and procedures)*	1. The essence of the policy behind the DCS is that a company has policies, procedures and reviews them. It is relatively unimportant what those procedures are and the likelihood is that all affected companies' statements will follow a uniform formulation. 2. Costs of compliance would be reduced. 3. Review by auditors is reduced as are the attendant costs.	See **4(a)**
4(c) - Drop the requirement for a Compliance Policy Statement but retain an Annual Compliance Statement.	1. The policy behind the DCS is sufficiently furthered by a form of *Annual Compliance Statement* and a specific Compliance Policy Statement can be dispensed with.	1. The more public references to compliance required of companies and their directors, the better to promote compliance.

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Option	Arguments "For"	Arguments "Against"
	2. An annual statement to be published in the accounts is the most appropriate means of promoting compliance since compliance will be one of the matters to be included annually at the annual signing of the accounts.	2. It is not unreasonable to continue to require both statements. 3. Compliance is not being promoted to the maximum.

5. Options on Contents in the Extent of Prescription Regarding the "Annual Compliance Statement"

Option	Arguments "For"	Arguments "Against"
5(a) - Continue to require the directors to make an Annual Compliance Statement, as prescribed.	1. Promotes compliance by companies by requiring them to specify their policies respecting compliance with relevant obligations, their internal financial and other procedures for securing compliance with relevant obligations and their arrangements for implementing and reviewing effectiveness of said policies and procedures. 2. This requirement is the core of the requirement, the satisfaction of which promotes compliance with relevant obligations. 3. Section 45(6) is useful in that it forces directors to say whether their procedures have worked or whether they have broken down giving rise to a breach of a requirement, thereby enabling the agencies of enforcement to investigate and possibly prosecute something which might otherwise not have come to their attention.	1. It is unreasonable to require compliance with the present formulation of the DCS as it is disproportionate, uncompetitive and excessively bureaucratic and prescriptive. 2. See **5(b).**
5(b) - Make the Annual Compliance Statement less prescriptive. *(e.g. Require directors of companies in scope to (a) acknowledge that they are responsible for securing the company's compliance with relevant*	1. An Annual Compliance Statement in the form proposed (or similar) is likely to substantially reduce the cost and bureaucratic burdens of the existing DCS. 2. The purpose of "promoting compliance" will still be achieved.	See **5(a).**

obligations; (b) have policies, (c) have internal financial and other procedures for securing compliance; (d) have arrangements for implementing and reviewing the effectiveness of said policies and procedures; and (e) remove section 45(6) in its entirety.	3. Companies will be permitted to continue to employ their current risk mitigation policies. 4. Costs of compliance would be reduced. 5. Review by auditors and associated costs are reduced. 6. Removes the indirect curtailment of the privilege against self-incrimination in s 45(6). 7. Section 45(6) seeks to institutionalise a virtue i.e. self-reporting without due regard to due process or the constitution - whilst it is fine that directors and companies may decide to go to a regulator and advise them of a breach (usually inadvertent if self-reported) it is unreasonable to require disclosure of the possible breach of laws due to a discovery that for some reason the directors' endeavours to secure compliance, whether in a particular instance or circumstance or on a particular date, were not reasonable.	
5(c) - Drop the requirement for an Annual Compliance Statement but retain a Compliance Policy Statement	1. Compliance is sufficiently promoted by requiring companies to have a Compliance Policy Statement.	See **4(a)**

6. Options on the Maker of the DCS

Option	Arguments "For"	Arguments "Against"
6(a) - Continue to apply the law to all of a company's directors	1. The existing law reflects the position that directors are in law collectively responsible. 2. Any change could create a two-tier class of directors - those on the hook and those off the hook.	1. Good people are discouraged from going forward as NEDs since they are required to sign up to the DCS in circumstances where despite best efforts, there may be gaps for which they are responsible. 2. NEDs need freedom to be independent, objective and act as watchdogs and a duty of the kind envisaged by the DCS restrains that freedom.

6(b) - Confine the obligation to the Managing Director and/ or Chairman and/ or Finance Director	1. Brings DCS into line with the requirements of Sarbanes Oxley. 2. Reduces the likelihood that it will be difficult to find willing non-executive directors.	See **6(a)**
6(c) - Confine the obligation to the Audit Committee	1. For those companies that have an audit committee, it is most appropriate that that sub-set of the Board which is charged with securing compliance should make the DCS.	See **6(a)**

7. Options on the Review of the DCS

Option	Arguments "For"	Arguments "Against"
7(a) - Continue to have auditors to undertake an annual review of the directors' compliance statement and opine upon whether it is fair and reasonable	1. The reasonableness of the directors' opinions are reviewed by an independent third-party. 2. The involvement of an independent third party enhances the robustness of directors' statements.	1. It is excessive and unreasonable and goes beyond promoting compliance. 2. The requirement fails to have regard to the duties of auditors and the diligence which they must bring to any statutory duty imposed which gives rise to disproportionate costs to business.
7(b) - Change the requirement to that of requiring the auditors to say whether the Directors' compliance statements are "inconsistent" with matters that have come to the auditor's attention in the audit of the company	1. The duty on auditors will be reduced as will the associated cost of the DCS. 2. It is sufficient merely to require auditors to give an opinion on whether the information given in the Directors' Report is consistent with the financial statements.	1. This measure insufficiently mitigates the existing requirements as auditors' duties continue and the cost may not be substantially different. 2. See **7(a)**
7(c) - Remove the involvement of auditors entirely	1. The cost of this level of assurance is disproportionate to the value added to the process. 2. It is quite sufficient to promote compliance that the directors of a company make a statement. 3. It is unreasonable for the State to seek corroboration from a third party of a directors' statement in circumstances where that director has a statutory obligation to ensure compliance with the Companies Acts (and other laws, including taxes).	See **7(a)**

	4. A company's auditors are already required to report their suspicion that indictable offences under the Companies Acts have been committed. 5. Five Auditing Standards already require that auditors undertaking a financial statement audit: * perform specific steps in relation to a company's compliance with law and regulations consideration (see ISA (UK & Ireland) 250 Part A "Consideration of laws and regulations in an audit of financial statements") and report non-compliance to those charged with governance and, if appropriate, to a regulatory authority; and * read all other information included in documents that contain audited financial statements and, if that other information appears to contain material misstatement, to discuss the matter with a view to resolving the issue - failing which the auditor may refer to the matter in the audit report (see ISA (UK & Ireland) 720 "Other information in documents containing audited financial statements".	

8. Options on the Timing of the Introduction of the DCS

Option	Arguments "For"	Arguments "Against"
8(a) - Commence provisions as soon as possible	1. The DCS has been signalled for a sufficient amount of time and the sooner compliance is promoted the better.	1. The cost and additional bureaucracy to Irish business are only now becoming clear. 2. The effects on competitiveness for Irish companies arising from the fact that a country as small as Ireland, is effectively going solo on one of the most Draconian regulatory regimes in the world, is only now becoming clear.

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8(b) - Defer commencement until the commencement of the new Companies Bill, 2006	1. To require companies to devise procedures for compliance with a Companies Code that has 18 months - 24 months of a life expectancy is unreasonable and the cost disproportionate to the value derived. 2. The additional time will ensure that whatever form the DCS takes, there will be sufficient time to implement it. 3. Deferring implementation will allow time to reflect on EU and international developments.	See **8(a).**
8(c) - Commence provisions (whether modified or unmodified) for listed PLCs immediately on a comply or explain basis, policed by the ISE *(Provide that Irish PLCs, with an equities listing, must comply with the DCS whether as a matter of law or as an additional comply or explain basis i.e. an additional statutory feature of the Combined Code in Ireland).*	1. Mitigates effect of DCS on listed PLCs by allowing them to elect to comply, or alternatively to explain. 2. Follows the Combined Code model of governance. 3. This follows the EU model of comply or explain and also the general thrust of dealing with listed PLCs. 4. Would test the market reaction to the DCS and show whether there is a shareholder-appetite for companies to have such a transparent compliance regime.	1. No evidence to suggest a voluntary regime will work. 2. The DCS is about pinning down companies and a voluntary regime is inappropriate since it can be avoided. 3. Shareholders are not the only constituency that the DCS seeks to help - regulators too have a legitimate interest in being assisted in securing compliance.
8(d) - Commence provisions (whether modified or unmodified) for listed PLCs immediately (as above) and review application to other companies after 2 years.	1. Advantages as above, with the additional advantage of allowing time to see whether the DCS has worked and the cost that it has imposed upon those companies within scope. 2. The CLRG is suitably placed to keep the DCS under regular review.	See **8(a)**

Chapter 9

Screening Regulatory Impact Analysis

9

Screening Regulatory Impact Analysis

At its meeting on 21 June 2005 The Government approved the introduction of Regulatory Impact Analysis (RIA) to be applied to all proposals for primary legislation involving regulatory change, to draft EU legal instruments and to significant Statutory Instruments. The Government also approved publication in July 2005 of a Report on the Introduction of Regulatory Impact Analysis. The template for a Screening RIA set out in that report is as follows:

Screening RIA

1. Description of policy context, objectives and options (for example different forms of regulation)

(i) A brief description of the policy context.
(ii) An explicit statement of the objectives that are being pursued.
(iii) An identification of the various policy options or choices which are under consideration.

2. Identification of costs, benefits and other impacts of any options which are being considered

(i) Identification of likely costs, an estimation of their magnitude and to whom they fall.
(ii) A description of expected benefits and where these will fall.
(iii) Verification that there will not be disproportionately negative impacts on
(a) national competitiveness
(b) the socially excluded or vulnerable groups
(c) the environment
and that the regulations do not
(d) involve a significant policy change in an economic market
(e) impinge disproportionately on the rights of citizens
(f) impose a disproportionate compliance burden on third parties and other criteria to be decided from time to time by Government
(iv) Summary of costs, benefits and impacts of each option identified in 1 identifying preferred option where appropriate.

3. Consultation
Summary of the views of any key stakeholders consulted - which must include any relevant consumer interests and other Government Departments.

4. Enforcement and compliance
Brief description of how enforcement and compliance will be achieved.

In drawing up its report the Review Group had, in any event, followed the principle of conducting its analysis and structuring the report consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis, a forerunner to the RIA policy as now adopted by Government. Thus, the detailed analysis as to context, objectives, and options and the treatment as to costs, benefits and proportionality are integrated in the relevant thematic chapters. This chapter takes a global overview of the likely impact of the DCS and summarises its anticipated outcomes in the form of a template for a Screening RIA, as prescribed by the Government.

1. Description of policy context, objectives and options (for example different forms of regulation)

1(i) A brief description of the policy context [93]

The July 2000 Report of the Review Group on Auditing recommended the introduction of a directors' compliance statement.

> *"Directors of a company should be required to report on an annual basis to the shareholders on the company's compliance with its obligations under company law, taxation law or other relevant statutory or regulatory requirements. The report should confirm that any instances of non-compliance have been reported to the relevant regulatory authority and that in all other respects the company has complied with its obligations under company law, taxation law and other relevant statutory or regulatory requirements. The report should be appended to the annual financial statements (Recommendation 14.1, RGA)"*

93 See, generally, for a comprehensive background to the DCS, Chapter 1, Directors' Compliance Statement - Background.

That report was itself a response to the revelations in the July 1999 Report of the Comptroller and Auditor-General into the administration of D.I.R.T. and the ensuing report of the Public Accounts Committee of Dail Eireann. Those reports indicated systemic high levels of abuse of DIRT, mainly through the use of bogus non-resident accounts. The reports strongly criticised the individuals involved, the financial services companies involved and the external auditors involved.

1(ii) An explicit statement of the objectives that are being pursued

A key purpose of legislation is to define the 'rules of engagement' between parties, so that there is some transparency, certainty and equity in the manner in which relationships are made and are sustained. In the corporate sphere for instance, legislation facilitates the development of fair and competitive markets and it is important that rules developed with that objective in mind succeed in achieving that objective in practice. It is clearly consistent with the public interest that all companies should pay appropriate attention to ensuring that they comply with the law as a means of minimising market risk and disruption.

The objective of the directors' compliance statement as envisaged by 45/2003 is to foster a culture of compliance by developing a greater sense of accountability and responsibility among company directors and by developing good systems of internal controls within companies so that conscientious directors can commit themselves to compliance statements in good faith. As the RGA Report notes at p 217:

> *"Imposing a requirement on Boards of Directors to make a positive statement regarding compliance will emphasise to members of Boards the importance of their role and responsibilities in this regard."*

Other objectives that were being pursued by the RGA in recommending that there should be a DCS were:

a) Ensuring that directors of companies take additional steps to ensure that the company conducts its affairs in a responsible manner in particular in relation to its compliance with law and regulations. (RGA Report, p 217);

b) Ensuring that directors of companies cannot claim to be unaware of their duties regarding compliance with their companies' legal obligations i.e. make directors accountable for ensuring that companies comply with certain stated obligations; and

c) Ensuring the there is an independent verification/review of the DCS by requiring auditors to state whether the DCS is fair and reasonable.

It may be stating the obvious, but the Review Group[94] [95] considers that the adverse consequences and likely consequences of implementing 45/2003 that have been considered herein and identified throughout this Report are properly considered as unintended negative consequences of the objectives being pursued, not objectives in themselves. By negative consequences are meant: additional cost to companies which reduces the competitiveness of Irish business; the attractiveness of Ireland as a destination for FDI; the reduced attractiveness of the ISE as a place to list and of Ireland as a place to incorporate; and the requirement for companies to engage in non-productive, bureaucratic activities.

1(iii) An identification of the various policy options or choices which are under consideration

The DCS is not a legislative proposal but an enacted legal provision, s.45 of the Companies (Auditing and Accounting) Act 2003. While enacted, the section has not been commenced yet. Indeed, it was never the intention to launch it pending the clarification of Guidance to it and of obligations arising under it. In consequence, the range of options that are now available for consideration are relatively narrow: to leave the section as is and implement, to delay implementation of the section in whole or part, to repeal the section or to mitigate the obligations it imposes on company directors. There are gradations of options with regard to scope, timing, and materiality provisions and these are addressed in the relevant thematic chapters. The Review Group undertook a risk analysis of the potential outcomes among these options and draft Chapter 10, *Conclusions and Recommendations* considers this.

94 The ODCE does not consider that this conclusion represents a balanced review of the likely impact of 45/2003. See the ODCE reservation at end of this Report.
95 See the reservation of the Revenue Commissioners at end of this Report.

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Whilst the Review Group considers that it is impossible to perform a screening RIA in retrospect, in order to understand, fully, the options that must now be considered, it is necessary to artificially apply the premises of a true RIA, namely, that there is a green field, and look back at what policy options and alternatives were available at the time of the RGA's recommendation, that would have been available instead of a DCS in the form proposed.

The Review Group [96] [97] considers that the following policy options and alternatives to a DCS in the form of 45/2003 were open for consideration as alternative measures to achieve the objectives that were, and are still, being pursued:

(a) Make Directors Responsible for Compliance with Company Law

The Review Group considers that *in lieu* of a DCS in the form set out in 45/2003, an alternative option which would have furthered the stated objectives was to provide in law that directors of companies are responsible for securing compliance with company law obligations, so as to ensure that directors of companies cannot claim to be unaware of their duties regarding compliance with their companies' legal obligations, i.e. make directors accountable for ensuring that companies comply with certain stated obligations. In addition to this alternative, consideration could have been given to the reversal of the burden of proof against directors in cases of non-compliance with the Companies Acts.

The Review Group considers that it is significant that this alternative, which would have been just a proposal in 2000, has now been enacted. Section 100/2001 amended 383/1963 and now provides:

"(1) For the purpose of any provision of the Companies Acts which provides that an officer of a company who is in default shall be liable to a fine or penalty, an officer who is in default is any officer who authorises or who, in breach of his duty as such officer, permits, the default mentioned in the provision.

(2) For the purposes of this section, an officer shall be presumed to have permitted a default by the company unless the officer can establish that he took all reasonable steps to prevent it or that, by reason of circumstances beyond his control, was unable to do so.

(3) It is the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company.

(4) In this section 'default' includes a refusal or contravention."

The effect of this enactment is to promote compliance by removing any confusion as to responsibility, or claim by directors that they were unaware of their responsibilities, in company law.

The Review Group notes that the provision stipulating that it was the duty of every director and secretary to secure compliance with company law was included in the 2001 Bill on the recommendation of the Working Group on Company Law Compliance and Enforcement "for the avoidance of doubt" (para. 7.30 of their Report). The DCS is one process or means by which this high level statement could be given effect and the Review Group notes that another means is to require that persons becoming directors should acknowledge their duties under company law, something that has also been effected in law by the CRO in Form B10. Accordingly, the Review Group is aware that there is merit in the concept of a DCS, as an additional means to promote the acknowledgement of duties.

(b) Establish Corporate Regulators

The Review Group considers that in lieu of a DCS in the form set out in 45/2003, an alternative option, which would have furthered the stated objectives, was to establish a dedicated Office of Corporate Enforcement. Although the RGA would have been aware of the proposal to establish the ODCE, the establishment of that office was in 2000 merely a proposal which had not been shaped. The Review Group considers it significant that the ODCE has now been established and is operating

96 The ODCE wishes to point out that the recommendations in the RGA Report (2000) and the subsequent Government endorsement of those recommendations were made in the full knowledge of the earlier recommendations of the Company Law Compliance and Enforcement Working Group (1998) and the PAC DIRT Inquiry Report (1999). In the view of the ODCE there is no persuasive evidence to suggest that compliance performance has improved to such an extent in the interim that a DCS is no longer necessary. See the ODCE reservation at the end of this Report.

97 The Revenue Commissioners consider that the DCS provides added value over and above the alternatives examined in this chapter. Many of the alternatives deal with increased regulation or strengthening the powers of the regulators. The DCS provides a form of ongoing self-regulation that minimises the need for ongoing regulation and the costs that this entails.

a high profile compliance and enforcement regime which is generally accepted by the social partners and other commentators to be operating very successfully.

In addition to the more general benefits of having a well-resourced professional State agency dedicated to the enforcement of company law, the Review Group considers that it is especially notable that the statutory functions of the ODCE include the function of *"encouraging compliance with the Companies Acts"*. The Review Group considers that the effect of establishing the ODCE was to dramatically change the Irish company law compliance and enforcement landscape and that the situation that prevailed in 2000 has been radically transformed and is likely to continue to improve through the offices of the ODCE.

The Review Group also considers that it is significant that the establishment of the Irish Auditing and Accounting Standards Authority (IAASA) has been provided for in the Companies (Auditing and Accounting) Act 2003. In addition to the more general company law compliance and enforcement functions of the ODCE, there is now a body charged with, inter *alia*, the objective to

> *"monitor whether the accounts of certain classes of companies and other undertakings comply with the Companies Acts and, where applicable, Article 4 of the IAS Regulation".*

Again, positive action has been taken to encourage compliance with Company Law, which was at best a loose proposal in 2000.

The Review Group also notes that in recent years several additional sectoral regulators have been established, and existing regulators had their powers bolstered, to the extent that it may be reasonably opined that the "other enactments that provide a legal framework" within which companies operate (i.e. the third-limb in 45/2003) are now more effectively policed with the resulting consequence that companies (and other persons) are less likely to be complacent in their compliance regimes. Examples here include the establishment of the Financial Regulator and the bolstering of the powers of the Competition Authority, the Health and Safety Authority, the Data Protection Commissioner and others.

While greater attention is now undoubtedly being given by companies, and company directors, to meeting their legal obligations, regulatory authorities continue to receive a large number of cases of suspected misconduct. The DCS is therefore seen as another means by which the virtue of compliance can be more readily embedded in the mindset of company directors, management and staff to the benefit of the economy generally in terms of delivering more predictable and transparent business markets.

(c) Require Auditors to Report Indictable Offences to a Regulator/ Thefts to Gardai

The Review Group considers that another alternative means of securing the policy objectives of the DCS is to impose on companies' auditors the duty to report to a regulator instances of suspected non-compliance which may amount to indictable offences that they encounter during their audit. Again, this was but a proposal in 2000 and the Review Group considers it to be highly significant that there is now such a duty on all company auditors, without limitation. Section 74(e)/2001 amended section 194/1990 by the introduction of a new 194(5)/1990:

> *"Where, in the course of, and by virtue of, their carrying out an audit of the accounts of the company, information comes into the possession of the 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 an indictable offence under the Companies Acts, the auditors shall, forthwith after having formed it, notify that opinion to the Director and provide the Director with details of the grounds on which they have formed that opinion."*

Requiring auditors to report to the ODCE suspicions of the committing of indictable offence(s) which the auditors find in the course of their audit work has and will continue to achieve the stated objective of the DCS since the knowledge that the company's auditor will be required to whistle blow to a regulator is likely to encourage compliance by companies and their directors.

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The Review Group also considers that an alternative to achieving the objectives of the DCS would have been to introduce a further reporting requirement on auditors to the Garda Siochana in the case of suspicion of theft. Again, the Review Group considers it to be significant that since 2000, section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 was enacted. Section 59(2) provides:

Where the accounts of a firm, or as the case may be any information or document mentioned in *subsection (1)(b)*, indicate that-

(a) an offence under this Act (other than sections 8, 12 to 15, 49(1) and 52(8)) may have been committed by the firm concerned, or

(b) such an offence may have been committed in relation to its affairs by a partner in the firm or, in the case of a corporate or unincorporated body, by a director, manager, secretary or other employee thereof, or by the self-employed individual concerned,

the relevant person shall, notwithstanding any professional obligations of privilege or confidentiality, report that fact to a member of the Garda Síochána.

The Review Group considers it to be reasonable to conclude that the existence of this requirement is also likely to further the attainment of the objective of the DCS. Correspondingly, a DCS obligation could prove to be complementary in reducing the incidence of actual non-compliance.

(d) Strengthen Revenue Commissioners' Powers

An alternative to requiring directors to provide a DCS is to empower the Revenue Commissioners to obtain information on compliance with companies' tax obligations.

Since 1999, with the powers available to the Revenue Commissioners to police taxpayers' compliance, their obligations have been significantly enhanced. Revenue now has specific powers of audit in relation to–

* the operation of PAYE, VAT and RCT;
* the records of all businesses;
* the operation of deposit interest retention tax (DIRT) by financial institutions;
* the exit tax regimes in respect of payments made by life assurance companies and collective funds;
* repayment claims made, under the tax relief at source (TRS) arrangements, by medical insurers, mortgagors and long term care insurers;
* the operation of the Special Saving Incentive Account (SSIA) regime by SSIA managers;
* the operation of the dividend withholding tax (DWT) regime by companies and their agents; and
* the operation of the professional services withholding tax (PSWT)regime

In addition, Revenue now has specific powers to require a taxpayer or a third party to supply information and documentation where the taxpayer's tax liability is under enquiry.

The addition of these powers have in themselves strengthened the compliance regime applicable to companies in that directors are more likely to be forthcoming in making returns and causing their companies to pay their taxes in circumstances where the Revenue Commissioners may exercise or apply to exercise such far-reaching powers of investigation, entry and demand for assistance.

(e) Model Best Practice on EU and International Developments

In Chapter 2, *Enhancing Compliance: The Purpose of the Directors' Compliance Statement and Other Corporate Governance Initiatives,* the developments in Irish and UK corporate governance, international corporate governance initiatives such as the Sarbanes Oxley Act in the US, the OECD principles of Corporate Governance and the EU Commission initiatives and proposals have been described. The Review Group[98] considers that it was and remains an alternative policy option to await the formulation and shape of EU and international initiatives in the area of corporate governance, directors' responsibilities and corporate compliance.

98 The ODCE disagrees with this option. Subsidiarity is a well recognised principle in the EU, and substantial discretion remains available to all Member States to regulate their own corporate compliance and enforcement environments. In addition, much of the current focus of EU governance proposals is on listed companies only. The Directors' Compliance Statement has arisen from a particular set of domestic circumstances, and there is no legal or other prohibition on the State implementing a DCS in its current or an amended form.

(f) Requiring a Less Prescriptive DCS

Having identified that a number of significant negative, unintended, consequences arise from the proposed introduction of the DCS in the form set out in 45/2003, the Review Group consider that it is appropriate to conclude that there is now another alternative open which will seek to achieve the stated objectives but without the negative consequences.

The Review Group[99 100] considers that it is the form of DCS envisaged by 45/2003, which is highly prescriptive and involves significant cost to companies in the form of internal costs and external additional legal and audit fees, that is at the heart of the issue under consideration. The Review Group believes that it is reasonable to consider whether it is desirable to pursue a less prescriptive approach that does not require directors to follow such a bureaucratic or prescriptive path before resorting to the heavy-handedness of section 45 as drafted. A less prescriptive DCS would aim to add no additional costs to companies in scope and should permit their directors to confirm, without the need for specialist legal or accounting advice, that they are doing what should be done to secure their companies' compliance with relevant obligations.

(g) Analysis of Alternatives

The purpose behind 45/2003 can be achieved in a number of ways substantially different from the presently drafted DCS. At the time of recommending a DCS, some of the alternatives set out above (for example, establishing the ODCE) would not even have been considered as being viable stand-alone alternatives for achieving the objectives in 45/2003 because of the significant costs associated with, for example, the establishment of the ODCE, for the purpose alone. It is reasonable to conclude that the alternatives at points (a) to (d) provide a substantive alternative approach to 45/2003. It is, of course, significant that all of the alternatives at (a) to (d) have been implemented and that, in consequence, the policy objective for 45/2003 has been greatly advanced, if not entirely achieved, without its implementation. Given the costs associated (see below and Chapter 5) with the implementation of 45/2003, it is considered that 45/2003 now represents a disproportionate response to achieving the objectives and there is little that can be said in favour of commencing it in its present form.

It is recognized, however, that there remains some merit in the concept of a compliance statement which involves directors acknowledging their responsibilities, having a compliance policy statement if appropriate and having appropriate arrangements in place for securing compliance, provided that any such DCS does not add additional cost to companies, operate as a likely disincentive to Foreign Direct Investment or reduce the competitiveness, including profitability, of Irish business.

2. Identification of costs, benefits and other impacts of any options which are being considered

2(i) Identification of likely costs, an estimation of their magnitude and to whom they fall.

Costs of compliance with the DCS, 45/2003, are likely to arise as a result of additional certification procedures, documentation of policies, and extensive and formal ongoing monitoring. The two major factors influencing the estimated costs that would arise for any particular company are the scale (and complexity) of the company' operations and the complexity of the regulatory environment within which it operates.

The Review Group worked with Goodbody Economic Consultants in seeking to obtain an objective estimation of the costs involved in compliance with 45/2003. Twelve legal and accountancy firms were surveyed and asked to assess the costs of the new compliance regime as set out in Section 45. Eight firms furnished replies. The firms were asked to identify costs arising from compliance with: Company law; Tax law; and other material enactments. Information was also sought on how these costs broke down as between:

* External legal costs;
* External audit costs;
* Internal company costs; and
* Other third party costs.

It was also recognised that initial or set up costs would differ from ongoing costs, and a breakdown along these lines was also obtained.

99 The ODCE does not accept that the evidence of cost and prescription in the analysis is sufficiently sound to justify the strong denunciations of the possible impact of Section 45 which are indicated in this paragraph.
100 The Revenue Commissioners agree with the ODCE views.

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(a) Source and Determinants of Additional Costs

Source of Additional Costs - From the data and the commentaries provided by survey respondents, it is clear that compliance with 45/2003 would give rise to additional costs over and above existing expenditure on compliance issues. This was because the Section was seen to require additional certification procedures, documentation of policies, and extensive and formal ongoing monitoring.

Determinants of the Costs - Respondents identified two major factors influencing the costs that would arise for any particular company, viz.

* Scale (and complexity) of the company; and
* Complexity of the regulatory environment facing the company.

Other factors, such as whether the company was listed or not, were seen to contribute to the scale of the costs. The perceived need to rely on external experts as opposed to own resources was also identified as a factor influencing initial or set-up costs in particular. It was noted that there would be additional costs even for smaller companies operating in a less complex regulatory environments, because generic enactments would have to be encompassed. This would require a minimum level of resources, irrespective of company size.

(b) Synthesis of the Cost Estimates

The cost estimates exhibited a number of consistent features:

* Initial or set-up costs were some two to three times that of ongoing costs;
* External legal cost were identified as the largest cost element, with other third party costs being generally lowest;
* Costs generally increased with company size; and
* Large companies in the financial sector indicated very high levels of cost in excess of €12m for set-up and €7m for ongoing costs.

Excluding the large financial companies, it is possible to provide a synthesis of the cost estimates as per Table 1. This sets out the range of costs provided by the two data sources. The cost estimates provided by IBEC tend to be larger. This probably reflects the fact that the IBEC survey related to relatively large companies, whereas the information from legal and accountancy firms covered a wider range of company sizes. The minimum set-up costs and ongoing costs are €90,000 and €40,000 respectively. These estimates could be regarded as applying to smaller companies in less regulated sectors. The maximum set-up and ongoing costs are €1,000,000 and €600,000. These estimates would be relevant to large companies in regulated sectors. Of course, as indicated above, the costs for very large financial companies lie well above these estimates.

Table 1: Synthesis of Cost Estimates

Cost Element	Source			
	Legal and Accountancy Firms		IBEC Companies	
	Set-up	Ongoing	Set-up	Ongoing
Minimum cost	€90,000	€40,000	€140,000	€50,000
Maximum cost	€750,000	€210,000	€1,000,000	€600,000

(c) Aggregate Cost Estimates

A consultancy study undertaken for the Department of Enterprise, Trade and Employment in 2002 identified 2,490 companies to which Section 45 will apply. This includes 738 Section 17 companies that have a group structure, so that the above figure may be an underestimate. Taking the minimum cost estimates provided above, the 2,490 companies would incur €224m in set-up costs and almost €100m in ongoing costs. However, a more realistic estimate would take account of the higher costs incurred by larger companies.

This estimate was made by:

* Assuming that private limited companies (1,703) would incur the minimum costs of €90,000 set-up and €40,000 ongoing;
* Assuming that the remaining 787 companies would incur costs one-quarter of the maximum costs identified viz. €250,000 set-up and €150,000 ongoing; and
* Adjusting the estimates for the special case of large financial companies.

This process yields set-up costs of €377m set-up and €202m ongoing.

(d) Sensitivity Analysis of Costs

The estimate of costs outlined above is sensitive to a number of factors:

* The assumption that the 787 companies would incur costs one-quarter of the maximum costs identified is somewhat arbitrary and may prove conservative; and
* There is uncertainty as to the numbers of firms to which 45/2003 might apply, with estimates in excess of 6,000 companies being mentioned, if only one of the thresholds were met.

A test of the sensitivity of the cost estimates to both of these factors was carried out.

With regard to the first factor, it was assumed that the larger companies would incur costs of one-third rather than one quarter of the maximum costs identified by the data collection exercise. This increases the set-up and ongoing costs to €442m and €242m respectively.

With regard to the second factor, if 6,000 companies are affected, then the set-up costs rise to €692m and to €343m for ongoing.

A minimum estimate of aggregate cost to industry is €377m set-up and €202m ongoing costs. Depending on assumptions made regarding the number of affected companies, this could rise to €692m for set-up and to €343m for ongoing costs.

(e) Conclusions from Analysis

Costs of compliance with Section 45 are likely to arise as a result of additional certification procedures, documentation of policies, and extensive and formal ongoing monitoring. The two major factors influencing the costs that would arise for any particular company are the scale (and complexity) of the company and the complexity of the regulatory environment within which it operates. The minimum set-up costs and ongoing costs are estimated at between €90,000 and €40,000 respectively. These estimates could be regarded as applying to smaller companies in less regulated sectors. The maximum set-up and ongoing costs are estimated to be €1,000,000 and €600,000. Large companies in the financial sector indicated very high levels of cost in excess of €12m for set-up and €7m for ongoing costs. [101]

A minimum estimate of aggregate cost to industry is €224m in set-up costs and just €100m in ongoing costs. A more realistic estimate, taking account of the higher costs incurred by larger companies, results in an estimate of €377m set-up and €202m ongoing.

Moreover, it is significant to note that these costs are estimated on the basis of the DCS applying to approximately 2,500 companies on foot of a study carried out for the Department of Enterprise, Trade and Employment in 2002. A more recent estimate of companies to which the DCS would apply was taken in 2004, in the context of preparation by ODCE of Draft Guidance on the DCS. That estimate suggested the DCS might apply to up to 6,600 companies (if only one of the thresholds were met). If this model is to be used the set up and ongoing costs would increase proportionately.

101 The ODCE does not support the conclusions in this paragraph.

The Review Group acknowledges that it has proven to be impossible to secure unanimous agreement on the extent of the additional costs that arise to companies by reason of 45/2003. This difficulty is due in a large measure to the fact that the wording of 45/2003 is open to different interpretations: a liberal, less prescriptive interpretation and a more conservative, more prescriptive and more costly interpretation. Ironically, it is the case that the more conscientious the company concerned, the more conservative the interpretation and the more costs that will arise in verifying compliant companies' compliance regimes.

2(ii) A description of expected benefits and where these will fall

The expected benefits from the achievement of the objectives of the DCS are considered to be incapable of specific quantification. It is possible, however, to opine upon the general nature of the benefits that are considered to flow from the adoption of a DCS and to identify the stakeholders who are expected to derive such benefit.

(a) National Benefits

An international recognition of positive action on the part of Ireland to promote good corporate governance, encourage compliance with relevant legislation and increasing the probity of Irish companies will be of benefit to Ireland. The existence of a robust and embedded culture of compliance will operate to encourage conscientious and reputable companies to locate in Ireland and should operate to encourage Foreign Direct Investment (FDI). It may also be reasonably assumed that such a culture of compliance will actively dissuade disreputable enterprises from locating in Ireland.

(b) Economic Benefits for Companies

There are economic benefits to be derived from implementation of the compliance measures. For example, having incurred the short-term costs, certain benefits can be envisaged as accruing to the company over time. These include lower enterprise risk on financial, reputational and other grounds in consequence of a reduced likelihood of legal or other external scrutiny. Overall therefore, an improved compliance environment in the wider marketplace will support the development of fair and competitive markets in the public interest.

Non-compliance with the laws covered by the statement can cost a company money or even threaten its existence. A catalogue of a company's "relevant obligations" would assist in the management of that risk.

(c) Benefits for Corporate Stakeholders

The shareholders, employees, investors and lenders to companies that are required to have a DCS will benefit to the extent that a DCS will provide a degree of assurance that the company in which they have an interest is being managed and its business conducted to a high standard of corporate governance.

(d) Corporate Governance Benefits for Companies

Between positive compliance and non-compliance there is likely to be an area where a business is not actually conscious of its legal obligations but happens not to be deviating from them. That position increases risk because it is easier to shift to a position of non-compliance. That becomes less likely when the business has gone through the exercise of positively identifying its compliance obligations.

Furthermore, once a company has a comprehensive catalogue of those obligations it would ease the task of ensuring management continuity when one person hands over to another; it would be easier for one person to succeed to the role previously occupied by another when they have express guidance as to what that role involves.

(e) Benefits to Regulators and State Agencies

The existence of a regime that requires certain companies to opine in a public and transparent manner on their compliance policies and regimes will be of considerable benefit to those charged with enforcement of compliance with "relevant obligations". The acknowledgement by directors of their obligation to secure compliance by a company with its relevant obligations will be of undoubted assistance to ODCE, CRO and IAASA in discharging their statutory obligations concerning enforcement of compliance with the Companies Acts. Equally, a DCS will be of undoubted benefit to the Revenue Commissioners who are charged with securing enforcement of compliance with tax law. Other regulators and State

agencies too would benefit from the 'third limb' series of relevant obligations, although because of the lack of specificity in the third limb, the benefits to such regulators and agencies are likely to be less concrete.

(f) Analysis of Benefits

If the costs of introducing the DCS envisaged by 45/2003 are difficult to estimate the benefits are even more difficult to quantify, because of the nebulous nature of the "promotion" aspect of the policy objective. The benefits identified, however, at (a) - (e) are sufficiently tangible to be stated in a meaningful way. It is significant, however, that almost all of the benefits as identified could still be achieved through the adoption of a DCS that is not entrammeled by the negative side effects of the DCS required by 45/2003.

2 (iii)(a) Impact on national competitiveness

In addressing the issue of the DCS the Review Group recognised that it is important that Ireland should be viewed internationally as a business friendly location and one where investors would be happy to establish deep roots. Moreover, it is recognised that the imposition of additional cost to indigenous companies that does not add appreciably to their probity or profitability could create unanticipated behaviour and result in an adverse outcome to a policy objective designed to promote compliance. The importance of the existence of an attractive and vibrant Irish Stock Exchange is also considered paramount and the negative effects of a DCS must be weighted carefully against the benefits arising.

(a) Competitiveness of Indigenous Companies

The DCS contained in 45/2003 will undoubtedly lead to an increased cost base for Irish companies in scope - Public Limited Companies (PLCs) whether listed or unlisted and large private companies which meet the monetary thresholds for application of the provision. Whilst there remains some disagreement amongst the members of the Review Group[102] [103] as to the extent to which the costs generated by 45/2003 are in addition to existing costs, from the research and analysis conducted and commissioned by the Review Group, it is reasonable to conclude that there will be additional costs and that those costs will, in the case of certain companies, be particularly high. The cost to the financial services sector is likely to be especially high (several millions for the large banks).

It is indisputable that an increased cost base will reduce the money that is available for distribution to all stakeholders, be they shareholders or employees. Companies are likely, however, to off-set the additional costs by passing them on to their consumers in the form of increased charges for goods and services which, if significant, can be inflationary. The Review Group considers it to be virtually impossible to quantify the cost to the national economy of a DCS that creates significant additional cost.

Another factor that would affect the country's competitiveness would be if indigenous companies were to re-locate to another jurisdiction to avail of what would be a less onerous compliance verification regime. In this regard there has to be an apprehension that Irish companies could, with relative ease, re-register or invoke EU migration provisions to move their seat to Northern Ireland. Not alone would this affect national competitiveness, but so too would it have a dysfunctional effect on national compliance with Irish Company Law since the effect of migration would be to oust the jurisdiction of the agencies of Irish corporate enforcement, viz., the ODCE, CRO and IAASA.

(b) National Competitiveness - Foreign Investment

When multinational companies contemplate investing in Ireland, they are sensitive to changes in the respective regulatory and compliance environments between their home country, Ireland and other competing locations. The issue here is to achieve standards of corporate governance that are at least equivalent to, if not better, than those experienced by multinationals in their home countries, but in a manner that does not lend itself to perceptions of over-regulation and the imposition of excessive costs.

102 The ODCE re-affirms that it has serious reservations about the value of the costs analysis. See the ODCE reservation at the end of this Report.

103 The Revenue Commissioners agree with the view of the ODCE.

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In the context of promoting Foreign Direct Investment (FDI), it is the *relative* extent and costs of Ireland's compliance requirements that matter most. This is because multinational companies are continuously comparing locations in terms of their cost-quality proposition. Concerns that the directors' compliance statement will impact negatively on the competitiveness of Irish business vis à vis peers in other EU and third country jurisdictions were raised in a significant proportion of the submissions made to the Review Group. Such concerns have also been raised directly with the IDA in negotiation with potential investors.

The IDA provided the following model of the potential effects of implementing the Directors' Compliance Statement as currently drafted, assuming that its commencement would reduce the inflow of FDI by 10%. This assumption is made on the basis of the preceding analysis in this report and on the basis of the disproportionately negative effect of the DCS on competitiveness.[104 105]

Table 2: IDA Model of Effects on Competitiveness

1) A loss of circa 1,000 new jobs p.a. given the average of circa 10,000 p.a. new jobs we have been achieving over the last few years.
2) Assuming that the IDA would, in the absence of this effect, be achieving broad stability in FDI job numbers (with a growing proportion of high quality jobs etc), this would become a net loss of 1,000 p.a., and result in a 10% shrinkage of the overall base in circa 13 years.
3) Current FDI sourced Corporation Tax take is about €2.7bn p.a. Therefore on average a 1,000 job loss would represent about 0.7 to 0.8% p.a. of this overall tax take. If we assume the lost FDI would be new high quality and hence high value added and profitable, the loss in corporation tax take could be circa 1% of the total p.a. cumulative, i.e. it would fall as our overall employment base fell as outlined in 2) above.
   1% p.a. of the annual Corporation tax take would on current figures be circa €27m. p.a. In addition, to maintain government finances in their current state would require raising that €27m somewhere else, thus subduing economic activity in some other part of the economy.
4) Other tax yields would also be hit to some degree, e.g. income tax, various indirect taxes etc. Even with virtually full employment in the economy this would not be insubstantial, but very hard to estimate accurately.
5) Annual Irish Economy Expenditures from IDA clients is circa €15.5bn p.a. so a loss of 1,000 high quality jobs p.a. could be expected to impact on total Irish Economy Expenditures in a similar manner to corporation tax (which is included in Irish Economy Expenditures), i.e. an annual loss of circa 1% p.a. or about E155m Irish Economy Expenditures p.a.
6) The impact on trade would also be significant, we could expect export growth from FDI clients to be reduced by circa 1% p.a. , about €700m based on current figures.
7) The indirect down stream effects would be significant as well, studies show that for every direct job we lose we probably lose at least 1 indirect job in services companies etc somewhere else in the economy.

Under 45/2003 time and effort is, in effect, being expended to make the laws of Ireland diverge from other EU jurisdictions in the absence of any apparent need for such divergence. There is a more detailed treatment of competitiveness issues in Chapter 5, *Impact Analysis,* but the analysis suggests that there will unequivocally be a negative and disproportionate impact on national competitiveness.

(c) The Competitiveness of the Irish Stock Exchange

Although small in terms of the number of listed companies, the Irish Stock Exchange (ISE) is very significant to the national economy and the attractiveness and prestige of Ireland as a world economic participant. Serious concerns have been raised by the ISE on the possible negative impact of a DCS on the ISE international reputation and, indeed, viability. The ISE has consciously aligned its listing requirements to those in the United Kingdom and has consistently adopted in a timely manner all developments in best practice for corporate governance, by adopting the *Combined Code,* including Turnbull Guidance on Internal Controls, as part of its listing requirements.

104 The ODCE has seen no analysis which would satisfactorily justify the indicated assumption that the present Directors' Compliance Statement would reduce the flow of FDI by 10%. See the ODCE reservation at end of this Report.
105 The Revenue Commissioners agree with the view of the ODCE.

The Review Group requested a sensitivity analysis of the effect on the economy and the ISE of even one company de-listing on the ISE and moving its listing to another jurisdiction to avail of what would be a less onerous compliance verification regime.

Analysis undertaken by the ISE suggests that the costs arising for a company in changing the jurisdiction of its incorporation are not very high, so that even a small adverse change in costs or increase in regulatory burden in the current home jurisdiction can precipitate such a move.

(d) Analysis of Impact on National Competitiveness

The Review Group accepts that there are serious concerns that the DCS as constituted in 45/2003 will adversely impact on national competitiveness. Empirical data on the negative effects of the DCS will only be readily available *post factum,* at which time the damage would have been done. The Review Group accordingly considers that in moving forward with recommendations, the only realistic method of taking an objective position is by risk analysis. In Chapter 10, *Conclusions and Recommendations,* the Review Group sets out the relative risks of implementing the DCS as contained in 45/2003 as against the risks of repealing 45/2003 or repealing 45/2003 and replacing it with a less prescriptive DCS.

2(iii) (b)Impact on socially excluded or vulnerable groups

The DCS as envisaged in 45/2003 is not a measure that impacts differentially or to any identifiable degree, empirically or intuitively, on socially excluded or vulnerable groups.

2(iii) (c) Impact on the environment

It can be contended that the review of processes and practices likely to be set in train by the obligation under the 'third limb' of the DCS [(Section 205E(1)(c) of the 1990 Act as inserted by the 2003 Act] which requires the directors to report on compliance with "any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements" could have a positive effect on the environment. Any impact would, however, be conditional upon a particular company's financial accounts being adversely materially affected by a breach of an Irish legislative enactment on environmental protection. Accordingly, whilst the impact of 45/2003 is more likely to be positive than negative, the tangibility of the benefits are very difficult to quantify and unlikely to be a significant factor in companies' compliance with environmental legislation. It is certainly the case the existence of the Environmental Protection Agency with powers of enforcement and prosecution is significantly more likely to encourage compliance by companies (and others) with environmental legislation.

2(iii) (d) Involve a significant policy change in an economic market

It is indisputable that the enactment by Ireland of 45/2003 represented a significant change in Ireland's compliance verification regime. It is thought to be important to distinguish a change in compliance with legal obligations from a change in the country's compliance verification regime. The DCS envisaged by 45/2003 introduces no substantive change to compliance with legal obligations;[106] the entire substance of the provision is to do with compliance verification.

Ireland will, in effect, be going it alone in the international economic market with a highly prescriptive compliance verification regime, which represents a radical departure from accepted EU and international standards of compliance verification.

2(iii) (e) Impinge disproportionately on the rights of citizens

One of the concerns the Review Group had was whether the requirement under the DCS for directors to acknowledge that they are responsible for securing the company's compliance with its relevant obligations could operate to create a new legal duty on directors to that effect. The legal advice available to the Group suggests in fact that it does not create any new legal duty, but simply acknowledges the pre-existing legal position. Therefore, there would be no suggestion of any new cause of action for breach of statutory duty

106 It introduces one change in the form of an additional compliance obligation to the extent that it makes it an offence for companies in scope not to make a compliance statement.

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under Section 205 E (5) of the 1990 Act as inserted by the 2003 Act by a director joined into a case alleging breaches of the law committed by the company, unless the directors themselves were in breach of their accepted duties and obligations to the company, shareholders or creditors.

There is a concern, however, that the DCS as contained in 45/2003 discriminates between companies that are "in scope" and other companies, bodies corporate (such as co-operatives), partnerships and sole traders. The Review Group acknowledges that the courts have not extended the same Constitutional guarantee as to equality under the law to companies as it does afford to natural persons. The Review Group believes, however, that whether or not rights exist under the Constitution, any discrimination should be minimal and strictly proportionate to the purpose or objective of discriminatory legislation.

2(iii) (f) Impose a disproportionate compliance burden on third parties

The DCS is targeted at company directors and requires them to follow the prescription contained in 45/2003. The company of which these persons are directors is a "third-party" under the long established and consistently upheld principle in *Salomon v. Salomon & Co.* In this respect, the compliance costs of 45/2003 fall directly on the third party that is the company and, indirectly, on the company's stakeholders in the form of a reduction in the profits available for distribution to shareholders and employees and a possible passing-on of the cost to consumers in the form of increased charges for goods and services.

2(iv) Summary of the views costs benefits and impacts of each option identified in (1) and identifying preferred option where appropriate

It is the conclusion of a majority of the Review Group[107] [108] that it is not feasible to pursue the option of implementing the 45/2003 on the basis of the additional costs it gives rise to and the negative and disproportionate effect on national competitiveness and possible encouragement for dysfunctional behaviour. Whilst a Screening RIA does not support the commencement of 45/2003 the Review Group considers that there still is some merit in the concept of a compliance statement which involves directors acknowledging their responsibilities, having a compliance policy statement if appropriate and having appropriate arrangements in place for securing compliance, provided that any such DCS does not add additional cost to companies, operate as a likely disincentive to FDI or reduce the competitiveness, including profitability, of Irish business. In Chapter 10, *Conclusions and Recommendations* the Review Group [by majority] recommends the replacement of 45/2003 with a DCS that will still promote compliance and thus secure in part the original objective, without the unintended negative consequences identified by a screening RIA.

Because of the inherently subjective nature of an analysis of this kind, where costs and negatives can only be in the realm of the probable, that in addition to this Screening RIA, it is useful to also approach the issue from the perspective of a risk analysis. This is pursued in Chapter 10, *Conclusions and Recommendations*.

3. Consultation

Since articulation of the proposal for a DCS in the RGA, consultation with all stakeholders on the proposal, and on its incarnation in law as 45/2003 Act has been unceasing, with periodic bouts of intensification of which the current consideration by the CLRG is the latest. Sequentially, there was consultation on the Companies (Auditing and Accounting) Bill, consultation in formulating the ODCE guidance and consultation in the latest round, consideration of the DCS by the CLRG.

107 The ODCE are not part of this majority.
108 The Revenue Commissioners are not part of this majority.

Of the 42 submissions made to the CLRG in this current consultative round, 36 raised concerns about costs, competitiveness and scope; 6 submissions could be considered to support the DCS as is or its extension.

Alongside this there was lobbying of the Department of Enterprise, Trade and Employment and of the Department of the Taoiseach by interests seeking mitigation or repeal of the provision.

It is assumed that the outcome of this latest round of consultation will be production of a memorandum for government by the Minister for Enterprise, Trade and Employment, at which stage other Government Departments can make their observations.

A synopsis of the views of major stakeholders made in the context of the current review follows. A fuller treatment of submissions made to the CLRG along with an analysis of their content is set out in Chapter 6.

(a) ODCE

The Director of Corporate Enforcement is of the view that there is no major difficulty with the DCS as enacted which would prevent its being implemented without change and without further delay. The DCS is fundamentally a process of self-assessment by the directors of major companies operating on 'comply or explain' principles. It will reduce enterprise risk and support the development of fair and competitive markets by harmonising compliance performance. While it is the ODCE view that the DCS does not impose significant additional costs, it has suggested that the reporting by auditors on the DCS could be postponed for two years in order to allow the relevant directors to become accustomed to the self-assessment process.

(b) IBEC

IBEC advocates restriction of the scope of Section 45 to align it with a risk-based compliance methodology. The DCS should be confined to reporting on financial compliance and internal controls designed to achieve that. The third limb "other relevant enactments" should be removed because of its uncertainty and the costs that uncertainty gives rise to.

(c) ICTU

In principle, ICTU believes the DCS should be retained without significant change.

(d) Revenue Commissioners

See the reservation of the Revenue Commissioners at end of this Report.

(e) IDA

The focus of the IDA's concern is on competitiveness. They report significant negative reaction among potential FDI investors in Ireland, on the basis of costs and proportionality.

(f) Financial Services (IFSC type activities)

The DCS is wholly inappropriate and out of step with good governance developments in other jurisdictions.

(g) Financial Services (Retail Banks)

DCS is overly prescriptive in scope, e.g. companies might not be able to use established risk-based compliance procedures, hence the additional costs; it unnecessarily duplicates existing corporate governance standards. The 'third limb' provision should be dropped as a duplication of powers and duties of sectoral regulators.

(h) Accountancy bodies

Costs of compliance far exceed benefits; the scope of the DCS is too broad and too vague; there is duplication on foot of all the legal and regulatory changes introduced since the RGA report to achieve good governance and effective compliance and enforcement.

(i) Law Society of Ireland

Legal and regulatory changes since RGA have improved compliance and enforcement. Provisions are unique to Ireland and much more stringent than any other jurisdictions. We should await and align with EU developments on corporate governance.

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4. Enforcement and Compliance

With the exception of a complete failure to make a DCS, 45/2003 gives rise to no additional legal obligations on the part of companies or their directors so, to that extent, there is nothing to enforce. This underscores the distinction, made earlier, that the DCS does not effect any change in compliance with legal obligations and is solely concerned with changes to the country's compliance verification regime.

Chapter 10

Conclusions and Recommendations

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Conclusions and Recommendations

The Review Group considered carefully all of the submissions, facts, issues, arguments and implications set out in detail at chapters 1-7 of this *Working Paper*. The Review Group also reflected on the options set out at Chapter 8 and the screening regulatory impact analysis in Chapter 9, based on the Review Group's analysis of the matters considered in Chapters 1-7, in accordance with the Review Group's terms of reference and consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis.

Major themes emerging from that analysis and ensuing discussion were:

* The concern to promote and sustain a culture of compliance;
* The fact that 45/2003 is in the nature of a statutory compliance-verification regime that is distinguishable from companies' obligations to comply with the laws of the land;
* The fact that while the consultation process undertaken by the Director of Corporate Enforcement and his subsequent guidance notes was very valuable they served to highlight the degree of prescription in 45/2003;
* The fact that 45/2003 has been interpreted, widely, as entailing compliance with a complex and highly prescriptive compliance regime and that this has given rise to considerable costs on companies;
* The additional costs imposed by 45/2003; a substantial part of those costs being brought about by the provisions on audit;
* If 45/2003 is implemented as enacted, Ireland would develop a corporate governance standard above and beyond that required by any other jurisdiction; a related point is that Ireland might not be perceived as a brand leader on corporate governance given its size and relative position in the global economy;
* The likely future impact of the Directors' Compliance Statement (DCS) as: (a) a deterrent to the establishment of a holding company in Ireland; and (b) as an incentive to the incorporation of (effectively) Irish companies in neighbouring jurisdictions.

The working premise of the Directors' Compliance Statement is to promote a culture of compliance by:

(1) Having the directors of companies in scope acknowledge their responsibility in ensuring that their companies meet the companies' obligations under certain designated statutes;
(2) Having policies and appropriate arrangements or structures in place to secure compliance with relevant obligations;
(3) On foot of those arrangements or structures, to identify and address risks relating to all relevant obligations; and
(4) The review of the effectiveness of the means for securing compliance with relevant obligations.

The achievement of these laudable and desirable business and societal ends gives rise to proportionality considerations as to means.

The Review Group's Conclusions on the Cost Benefit Analysis of the Impact of the DCS

The costs arising from the compliance statement obligation are set out in Chapter 5 and cognisance of these has been factored into the Screening RIA set out in Chapter 9. The costs associated with compliance with 45/2003 are greatly increased by the fact that a conservative legal interpretation requires a highly prescriptive approach to be taken by companies. In addition, a significant element of increased costs arise from the obligations imposed on the company's external auditor as specified in 45/2003 (s 205F of the 1990 Act) as auditors seek legal certainty for these obligations, and precise wording for the Audit Bulletin which gives effect to these obligations. The increased audit costs which arise on foot of this objective of certainty are passed on to the company which is the audit client.

Apart from internal and external set up and ongoing costs for companies there is cause to believe that there is a significant opportunity cost arising from 45/2003. Fears have been expressed about the potential difficulty in recruiting non-executive directors, particularly overseas non-executive directors. This is in a context where great store is put globally on the importance of activist, experienced and independent non-executive directors as a mechanism for improving corporate governance in companies. Moreover, the Review Group has had particular regard to the submission from the IDA, the body charged with developing and encouraging foreign inward investment to Ireland:

"In the context of promoting Foreign Direct Investment (FDI), it is the relative extent and costs of Ireland's compliance requirements that matter most. This is because multinational companies are continuously comparing locations in terms of their cost-quality proposition. The approach being taken under Section 45 will place Ireland's corporate governance regime on a track rather different to other jurisdictions in the EU. These other EU locations will increase their attractiveness for FDI if investors perceive the Irish regime as being unnecessarily demanding and expensive relative to other EU locations".

The Lack of Alignment with the Combined Code

Another significant strand emerging both in submissions and in plenary discussions is that we are creating two parallel systems of compliance and review of internal governance procedures to deliver such compliance. This would not seem to constitute good governance or efficient regulation.

The existing operational standard on corporate governance in Ireland for listed PLCs is set out in the Combined Code on Corporate Governance[109] with which companies listed on the Irish Stock Exchange (ISE) are required to comply (In order to ensure certainty and consistency of regulation the ISE imposes and polices exactly the same rulebook as applies to UK companies listed on the London Stock Exchange). The Combined Code incorporates guidance on Internal Control known as the Turnbull Guidance.

Although the code does not apply to unlisted entities it would generally be recognised as the benchmark of good practice for all types of company. Moreover, publicly funded entities in Ireland are governed by "The Code of Practice for the Governance of State Bodies" issued by the Department of Finance which in many respects mirrors the principles of the Combined Code. The question might well be asked that if Turnbull is considered sufficient guidance on internal controls for State Bodies why should it not be sufficient for PLCs? Or, by extension, for large private companies.

Turnbull is, moreover, timely in that in July 2004 the Turnbull Review Group was invited by the Financial Reporting Council (FRC) in the UK to review the impact of the Turnbull guidance on internal control since its introduction in 1999, and to consider whether it needed to be updated. In December 2004 the FRC/Turnbull Review Group issued an initial consultation paper seeking evidence as to the impact of the Turnbull guidance.

Responses to the consultation exercise showed a strong degree of consistency of opinion on the main issues, with the overwhelming view of respondents being that the Turnbull guidance has been a notable success and that companies have been able to implement it intelligently and appropriately. The evidence suggests that the guidance has contributed to better understanding and management of risk and improvements in internal control.

In the light of the evidence received in response to the December 2004 consultation, the FRC Review Group proposed certain limited changes to those parts of the guidance dealing with maintaining and reviewing the internal control system, and the disclosures companies are required to include in the annual report. The following are some of the key recommendations[110]

* Significant changes to the Turnbull guidance are not required.
* No changes should be made to the guidance that would have the effect of restricting a company's ability to apply the guidance in a manner suitable to its own particular circumstances.
* A new preface should be added to the guidance to encourage boards regularly to reassess their application of the guidance and use the internal control statement to communicate to their shareholders how they manage risk effectively.
* Amendments should be made to require the board to exercise reasonable care, skill and diligence when forming a view on the effectiveness of the internal control system (as opposed to forming a view 'after due and careful enquiry'), to reflect the proposed statement of directors' duties in the draft UK Company Law Reform Bill.[111]

109 Financial Services Authority, UK, July 2003. See http://www.frc.org.uk/corporate/combinedcode.cfm
110 Source: Financial Reporting Council, UK.
111 A non-exhaustive codification of directors' duties is also planned for the (Irish) Company Law Consolidation and Reform Bill.

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* Boards should be required to:
- confirm that, in their opinion, necessary action has been or is being taken to remedy any significant failings or weaknesses identified from the reviews of the effectiveness of the internal control system; and
- include in the annual report and accounts such information as is considered necessary to assist shareholders' understanding of the main features of the company's risk management processes and system of internal control.[112]

A Turnbull-style approach to compliance with laws and regulations would seem to address concerns about the degree of prescription on reporting systems and processes as framed at present in 45/2003 while complying with the corporate governance norms of (1) the United Kingdom, one of the largest financial markets in the world, and (2) the state sector in Ireland. Companies act out of economic self-interest and concerns expressed about the mobility of a company's place of incorporation seem well founded. For example, over the past five years at least three of the smaller capitalised public limited companies have undertaken a re-domicile exercise to move their primary listing from the ISE to the London Stock Exchange, through the establishment of new UK holding companies. It has been suggested that this was done to increase the shareholder base for these companies. As the requirements of 45/2003 to prepare a compliance statement does not apply to foreign companies there is a concern that the larger listed public companies may follow those that have undertaken the re-domicile process.

Risk Analysis of Commencing 45/2003 Versus the Risks of Repeal or Mitigation

The Review Group decided that it was apposite to review and assess the relative risks associated with the following question - whether the DCS (as set out in 45/2003) should be commenced as is or whether it should be either repealed or mitigated.

The Review Group considered that the following were the relative risks that are associated with [A], not commencing 45/2003 and [B] of not repealing or modifying 45/2003:

[A]	[B]
Risks of not commencing 45/2003 as enacted:	**Risks of not repealing or modifying 45/2003 as enacted:**
1. Companies' legal obligations under company law and tax law will continue as is, without anything additional to promote or encourage compliance therewith.	**1.** There will be substantial additional costs to Irish registered companies in scope.
2. The emphasis remains on punitive sanction and enforcement rather than prevention of wrongdoing or negligence.	**2.** Ireland may lose investment and companies may not register in Ireland because they are or are perceived as being at a disadvantage vis à vis other countries and especially EU member states in terms of their regulatory requirements. This could seriously impact on Ireland as FDI location.
3. The proposed role of the auditor as "watchdog" of compliance procedures and practices is not fulfilled and no independent verification of compliance will be provided.	**3.** There is likely to be dysfunctional behaviour that may result in companies with present or prospective operations in Ireland, either leaving Ireland and incorporating elsewhere or not incorporating here *de novo*.

112 Financial Reporting Council, frc.org.uk, 16 June 2005.

4. The tax compliance of companies is not subject to verification.	**4.** The existing enhanced corporate compliance regime (post 2001) and now subsisting in Ireland will be abandoned by existing and new entrants for other EU jurisdictions with less prescriptive and stringent regimes- outside the remit of ODCE and/or CRO - with a resulting non-compliance.
5. The use of company law to focus compliance with other legislation, e.g. Health and Safety and environmental law will be abandoned.	**5.** Listing on the ISE will involve compliance verification requirements significantly more onerous than those in other jurisdictions and are likely to cause companies to abandon the ISE.

In consequence of the foregoing analysis, by majority decision,[113] the Review Group[114 115] concluded that the risks associated with not repealing or modifying 45/2003 greatly outweigh in terms of seriousness the risks associated with not commencing 45/2003, for the following reasons:

1. The existing company law compliance regime that is currently in force will not be reduced or lessened: companies and their directors will still have the same legal obligations to ensure compliance with legislative enactments;
2. There is a clear and imminent risk that the commencement of 45/2003 will result in a substantial cost to Irish companies in scope;
3. There is a clear and imminent risk that investment in the Irish economy through Irish registered companies will be curtailed;
4. There is a clear and imminent risk that companies that are currently the subject of Irish regulation will migrate to other EU or non-EU countries;
5. Following on from the previous reason, there is a clear and imminent risk that fewer companies will be answerable to the Irish agencies of enforcement, registration and supervision;
6. With the exception of additional embedding of a culture of compliance, there is no other material tangible benefit arising from the commencement of 45/2003;
7. There is no evidence to suggest that a stand by Ireland on corporate compliance that is so far-reaching and apart from EU and international trends, will be accepted by the international community and it is likely that such would operate to encourage foreign companies to incorporate in an alternative jurisdiction; and
8. The Screening RIA in Chapter 9 supports the foregoing conclusions.

Accordingly, the Review Group recommends by a majority[116] that 45/2003 is not commenced as it is currently drafted.

The Option to Repeal Section 45

Following on from its recommendation that 45/2005 should not be commenced as it is currently drafted, the Review Group next considered whether it should recommend that 45/2003 should be repealed and not replaced with any alternative pending any EU initiative on compliance verification by directors of companies.

113 Sixteen members supported this conclusion; three members voted against (ICTU, Revenue Commissioners and the ODCE); and three members abstained (Attorney General's Office, Courts Service and IAASA). Please see footnote 126, which sets out the views of IAASA.

114 The ODCE does not accept the validity of this conclusion and believes that many of the associated reasons are insufficiently substantiated to justify it. See the ODCE reservation at end of this Report.

115 The Revenue Commissioners agree with the view of the ODCE.

116 The following members of the CLRG supported the commencement of s 45/2003 as currently drafted: ODCE, Revenue Commissioners and ICTU. The Courts Service, the Office of the Attorney General and IAASA abstained. Please see footnote 126, which sets out the views of IAASA.

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By a majority decision, of eleven for[117] and eight against[118] and three abstentions,[119] the Review Group recommends that, having regard to its analysis of the issues identified and considered in Chapters 1-7, the arguments for and against the options set out in Chapter 8 and the Screening RIA set out in Chapter 9, 45/2003 should be repealed and not should not be replaced with any alternative DCS.

The majority's reasons for so recommending are:

1. There have been significant changes to company law and its regulation since the RGA first recommended the DCS which have diminished if not entirely obviated the need for such a belt-and-braces compliance measure;
2. There is significant additional cost for companies on account of the very prescriptive nature of Section 45 in the nature of internal procedure development, internal and external legal advice and the involvement of companies' auditors. Moreover, because of the diminished necessity for such a heavy-hand, the expenditure of such cost cannot be objectively justified;
3. The effect of the increased costs on Irish companies in scope will be to reduce their competitiveness and is likely to give rise to increased costs for the consumers of their goods and services;
4. Ireland will become less competitive and will not be as desirable a place for foreign companies to locate;
5. It is prudent to await EU and international developments and to follow these, as opposed to lead the way in circumstances where Ireland will be isolated and susceptible to being considered to be a less attractive location for foreign companies and where indigenous companies will have their cost base increased to the detriment of consumers, shareholders and employees.
6. The Screening RIA analysis contained in Chapter 9 supports the foregoing reasoning.

Recommendations

The minority's reasons for not supporting this option are:

1. To abandon, entirely, the notion of a DCS is an excessive and unnecessary response to the difficulties found to be associated with the existing version of 45/2003.
2. Compliance can be promoted and cultivated by a less prescriptive DCS which would not have the same costs associated with it and which would not discourage inward investment or the competitiveness of Irish companies.
3. The Screening RIA in Chapter 9 does not support the abandonment of a DCS.

It is important to note that not all of those members who voted against the repeal of 45/2003 supported its commencement as enacted. Of the eight members who voted against the repeal of 45/2003 only three[120] of those members would support its commencement as enacted.

The Option to Mitigate - A Revised Form of Directors' Compliance Statement

The Review Group also considered the option of mitigating the adverse effects, whether direct or consequential, of the current requirements in Section 45. Although by a majority decision the Review Group has recommended that 45/2003 should be repealed and not replaced pending any EU initiative on compliance verification by directors of companies, if the Minister does not accept that recommendation, the Review Group believes that it must recommend a revised form of DCS. The Review Group's thinking is also influenced by the fact that the legislature enacted, just two years' ago, 45/2003 and whilst the Review Group does not believe that the legislature intended such a costly and burdensome DCS, the legislature's clear intention was to put in place a form of DCS.

117 The following members of the CLRG voted in favour of repeal of 45/2003: IBEC, Irish Stock Exchange, IBF, Law Society, Bar Council, ICSA, Institute of Directors, CCABI, Maire O'Connor, William Johnston and the Chairman.

118 The following members of the CLRG voted against repeal of 45/2003: ODCE, ICTU, the Financial Regulator, CRO (Paul Farrell), CRO (Nora Rice), DETE (Vincent Madigan), DETE (Tanya Holly), Revenue Commissioners; not all of these members were, however, in favour of commencing 45/2003 as currently drafted.

119 The following members of the CLRG abstained: the Courts Service, the Office of the Attorney General and IAASA.

120 Those members who supported the commencement as enacted of 45/2003 are: ODCE, ICTU and the Revenue Commissioners. Please see footnote 126, which sets out the views of IAASA.

The Review Group believes that if a political decision is taken to enact a replacement form of DCS, the resulting form of DCS should be confined to the directors of companies in scope acknowledging their responsibilities, having a compliance policy statement if appropriate and having appropriate arrangements in place for securing compliance, if appropriate, subject to a 'comply or explain' approach *provided that* such does not add unnecessary additional cost to companies, operate as a likely disincentive to Direct Foreign Investment or reduce the competitiveness, including profitability, of Irish business.

The Review Group considered that the following aspects of Section 45 were in whole or in part contributory to the adverse effects of the DCS:

1. The scope of the DCS i.e. the number of companies to which Section 45 is applicable;
2. The extensive definition of "relevant obligations";
3. The absence of a sufficiently prominent materiality requirement;
4. The prescriptive requirements for a Compliance Policy Statement and an Annual Statement in companies' Directors' Reports;
5. The involvement of companies' auditors; and
6. The immediacy of the implementation of any form of a DCS.

The Review Group recommends by a majority decision of sixteen "for"[121], three "against"[122] and three "abstaining"[123] that if Ireland is to have a DCS, it should be with the modifications as set out below, for the reasons stated, and as provided for in the redrafted 45/2003, at the end of this Chapter. The Review Group believes that this modified version of 45/2003 will continue to promote and encourage corporate compliance and achieve much of the purpose and intention underpinning 45/2003, without the adverse effects identified in this Report.

The Review Group's recommendations as to the modifications to be made to the DCS are:

1. The categories of company which are in scope for the DCS should remain as is, with the qualification that the two monetary thresholds for the inclusion of large private companies should be increased in line with the Review Group's recommended limits for a company to be a large private company for accounting purposes i.e. a balance sheet of over €12,500,000 and a turnover of €25,000,000. In addition, the provision should be made, expressly, conjunctive so that for a large private company to be "in scope" it must satisfy both monetary requirements.

Rationale: With regard to the proposed scope of any DCS, the Review Group considered that 45/2003, as it exists, applies to all PLCs and certain large private companies. It was noted that the companies exempt from application of 45/2003 are: all guarantee companies, all unlimited companies, private companies with balance sheet totals and turnover below the thresholds designated at Subsection (9), Investment companies as defined in Part XIII of the Companies Act 1990 and securitisation special purpose vehicles (this latter class of companies will need to be specified by the Minister but it is understood that the decision to exempt them has been taken in principle).

Particular consideration was given to the suggestion raised by a number of people that the scope should be confined to listed equity PLCs. Regard was also had to the financial limits relevant to large private companies. After due consideration, the Review Group recommends that it is not unreasonable to require all companies currently in scope to remain in scope for a revised DCS as is being recommended by the Review Group, subject to the monetary limits being aligned with the monetary limits that the Review Group is recommending be set for determining whether a company qualifies as a large private company for the purposes of the accounting requirements, viz., for a private company to be in-scope, it must have a balance sheet in excess of €12,500,000 and a turnover in excess of €25,000,000.

121 Although the Financial Regulator supported this option it has expressed its reservation that there will be no requirement for a review of the Directors' Compliance Statement by external auditors.
122 ODCE, ICTU and the Revenue Commissioners. The reservations of these three members are reproduced in the appendices to this Report. Both ICTU and the Revenue Commissioners support the ODCE proposal in its reservation.
123 The Courts Service, the Office of the Attorney General and IAASA. Please see footnote 126, which sets out the views of IAASA.

The Review Group also accepts that there are alternative interpretations as to whether a large private company must satisfy both limbs before qualifying for the exemption and believes that it is appropriate that the satisfaction of either limb should exempt a company from the requirement to make a DCS in its annual report and accounts. The Review Group further considers that it is the size of a company's financial operation, rather than whether the company is public or private, which is significant. The Review Group was also particularly mindful of the negative connotations that could be placed on a PLC-only requirement and of the likely adverse implications for the Irish Stock Exchange.

2. The definition of "relevant obligations" should be amended by the removal of the "third limb" and by introducing a degree of materiality by defining company law obligations as those being indictable offences.

Rationale: The Review Group considers that it is both desirable and reasonable to include compliance with the Companies Acts as a "relevant obligation" for the purposes of the DCS. It is not inappropriate that the directors of an entity that owes its existence to the Companies Acts should opine as to its compliance with those Acts. The Review Group acknowledges that whilst it seems not to have been the intention of the legislature (or of the ODCE) to require a detailed consideration of every single provision of the Companies Acts, in practice, this is how it has been interpreted. Accordingly, the Review Group recommends that only those provisions of the Companies Acts, the contravention of which gives rise to an indictable offence, should constitute a company's "relevant obligations".

The Review Group considered the appropriateness of the second limb - tax law; whilst there was concern that a provision on tax law had no place within the Companies Acts, it was on balance decided to recommend its retention. The Review Group also considered whether there should be a materiality requirement in the case of tax law. The Review Group decided against the delimitation of the second limb for the reason that the payment of all taxes due should continue to be a "relevant obligation" but recommend that the reference to "relevant obligations" itself was amenable to a materiality test which should be applied in the operative part of the new section (see s X(3) and (4) below at pp 170-171).

The Review Group accepts that one of the requirements in 45/2003 that gives rise to significant cost is compliance with the "third limb" of the definition of "relevant obligations". One of the principal reasons for this is its vagueness - "any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements". The inclusion of the third limb is considered to be a significant contributory factor to the increased costs that 45/2003 is likely to create for companies.

The Review Group believes that it is unreasonable to require companies to aver in a compliance statement to vague, unspecified obligations and considers that the only circumstances in which a compliance statement can be given (or should be sought) is where specific requirements of particular enactments have been identified.

The Review Group also considers that howsoever desirable it is that companies comply with the general laws of the land, it is inappropriate to use company law alone as the vehicle for policing laws and regulations applicable generally to all persons, be they companies, or other bodies corporate such as cooperatives, and indeed, natural persons.

Moreover, whether the original rationale for the third limb remains intact, is questionable. The RGA's recommendations were made primarily in the context of financial service providers and before the establishment of the Financial Regulator. All in all, the regulation of financial services is now on a different level to what it was in 1998. Furthermore, Section 25 of the Central Bank Act 1997, as substituted by Section 26 of the Central Bank and Financial Services Authority Act 2004 enables the Financial Regulator to require regulated financial service providers to prepare financial statements.

The Review Group does not consider that the exclusion from its proposed new DCS, of the third limb which has the requirement that directors opine on their compliance with other legislation, the contravention of which may materially affect its financial statements, will adversely affect the completeness or value of companies' financial statements. No other jurisdiction requires companies to speculate on contingent eventualities that may or may not affect their financial statements and the Review Group believes it to be

inappropriate and disproportionate to the aims of a DCS to require certain Irish companies to be subject to such a requirement.

The Review Group believes that the inclusion of the third limb is also one of the primary factors driving the additional cost of compliance with 45/2003 and, as outlined above, considers that the benefits which might derive from its inclusion are greatly outweighed by the additional cost to companies, the likely opportunity-lost costs resulting from a reduction in FDI and in conclusion believes its retention in any compliance statement to be inappropriate and not proportional to the achievement of a workable and realistic compliance verification regime.

3. The removal of the prescription surrounding companies "Compliance Policy Statements" and the mitigation of the representations that must be made in the Annual Statement on Compliance in Directors' Reports and the requirement that appropriate representations are expressed to be made in the "directors' opinion", coupled with a materiality requirement, all on a comply or explain basis.

Rationale: The Review Group is satisfied that the evidence and analysis supports the conclusion that one of the chief factors in the additional compliance costs associated with the DCS is the specificity and prescription surrounding the requirement to have a compliance policy statement and "procedures" designed to ensure compliance with a company's "relevant obligations".

The Review Group believes that the Screening RIA supports the conclusion that the provisions of 45/2003 as to prescription go considerably further than it is necessary or desirable in order to further the aim of promoting compliance.

The Review Group considers that the *Guidance* document (December 2004), which ran to over 40 pages, issued by the ODCE on the provisions of 45/2003 was particularly useful in highlighting the degree of prescription in that section. The Review Group considers that any new DCS must be capable of unambiguous interpretation without the need for guidance and would consider it a failure of the proposed provision if guidance was required. Accordingly, the Review Group has carefully chosen simple language with the intention of leaving it to the discretion of companies' directors to determine what compliance policy statement, arrangements or structures and review (if any) are appropriate to their company.

The Review Group, accordingly, recommends that the requirement to have and the prescription surrounding *compliance policy statements* should be removed. It is considered that there is a compelling case for a statutory "comply or explain" approach in the DCS. Instead, it is proposed that the directors of each company that is in scope must, in their annual Directors' Report:

* Acknowledge that they are responsible for securing the company's compliance with its relevant obligations; and
* Confirming that the company has in place a compliance policy statement, considered by the directors to be appropriate for that particular company or, if the company does not have a compliance policy statement, explaining why not; and
* Confirming that the company has in place, appropriate arrangements or structures that are, in the directors' opinion, designed to secure material compliance with its relevant obligations, which arrangements or structures may (at the discretion of the directors) include the company's reliance upon internal and or external advisors who have the requisite knowledge and experience to advise the company on compliance with its relevant obligations); and, if this is not the case, explaining why not, and
* Confirming that the company's arrangements or structures last referred to have been reviewed in that financial year and if not, explaining why not.

The Review Group believes that its suggested wording will allow companies sufficient flexibility in how they approach compliance verification. This is achieved by the use of words such as "in the directors' opinion" and the express statutory acknowledgement that directors may rely upon internal and external advisors: it is important, however, to recognise that this is permissive only and that there is no statutory requirement, or indeed veiled expectation, that any company would be obliged to rely on advisors if they do not already. Companies that do already retain internal or external advisors for compliance purposes may rely

upon that fact in demonstrating their commitment to securing compliance with their relevant obligations, although ultimate responsibility for ensuring compliance with relevant obligations rests with the company and its board of directors.

The Review Group also believes that the foregoing formulation will continue to promote compliance by requiring the directors of companies in scope to aver at least annually to the company's relevant obligations and its compliance policy and its arrangements or structures for compliance. One of the other primary cost drivers in 45/2003 was the use of the word "procedures" since it is highly prescriptive and its ordinary dictionary meaning requires that companies institutionalise an "established or official way of doing something" and refers to "a series of actions conducted in a *certain order or manner*".[124] It is unsurprising, therefore, that companies have received legal advice that a forensic examination of their "relevant obligations" is required and that prescriptive procedures are demanded by 45/2003. The use of the words "appropriate arrangements or structures" is deliberately chosen to permit companies maximum flexibility in demonstrating their commitment to securing compliance with their relevant obligations, if they chose to do so. It is thought that companies that currently adhere to Turnbull Guidance may rely upon that fact in demonstrating their commitment to securing compliance. The Review Group also believes that it is appropriate to allow companies to have their own arrangements in place and where they do not comply with the proposed new section, they are required to be transparent and to explain why not. It is also considered appropriate that the standards in the DSC should be in the subjective opinion of the directors; in circumstances where the directors are by virtue of s 383(1)/ 1963 already responsible for ensuring compliance with the Companies Acts.

4. The removal of the requirement that a company's auditors must specifically opine on the reasonableness or otherwise of the proposed revised Annual Statement on Compliance in Directors' Reports.

Rationale: The Review Group is also satisfied that the evidence and analysis supports the conclusion that the other chief factor in the additional compliance costs associated with the DCS is the requirement that the auditors of a company in scope must opine on the fairness and reasonableness of the DCS.

The Review Group believes that the Screening RIA supports the conclusion that the requirement in 45/2003 for independent review by companies' auditors goes considerably further than is necessary or desirable in order to further the aim of promoting compliance. The directors are responsible for securing compliance with a company's obligations; the DCS will now require directors to make a public statement on the company's compliance with its obligations. To require the company's auditors to review this is unnecessary and, because of the cost involved, undesirable, particularly when it is now the case that a company's auditors are required to report suspected indictable offences that they encounter in the course of their audit work to the ODCE, which would include the failure by the directors of a company in scope to include a DCS in their Directors' Report.

The Review Group further noted that auditors would continue to have responsibility to consider the directors' Annual Statement on Compliance under both company law and auditing standards:

* *company law:* as the Statement is to be included in the directors' report, it will fall within the ambit of the auditor's obligation under section 15 of the Companies (Amendment) Act 1986 to consider whether the contents of a directors' report is consistent with the audited financial accounts and to report their opinion on that matter. Any inconsistency that remains unresolved by the directors will result in a qualification of that opinion;

124 Concise Oxford English Dictionary (10th ed; 2002), p 1139.

* *auditing standards:* ISA (UK and Ireland) 720 requires auditors to read all other information accompanying audited accounts and to take action to seek correction of any material misstatement that they consider exists in that information. If the directors do not make appropriate amendments, the ISA requires them to consider highlighting the issue in their report on the financial accounts.

As a result of these provisions in company law and auditing standards, there is a degree of auditor oversight of the Statement and a framework for making a report should a statement include inaccurate or misleading information.

5. The non-commencement of Section 45 and the enactment of the Review Group's proposed alternative Annual Statement on Compliance as part of the *Companies Bill, 2006,* the heads of which the Review Group is in the process of finalising for submission to the Minister.

Rationale: The Review Group considered when, if the Minister decides to proceed with a mitigated DCS, the provisions should be commenced. The alternatives are to enact a revised provision in a stand alone piece of legislation or to include such a provision in what will be the Companies Bill, 2006, the heads of which Bill the Review Group is in the process of finalising.

The Review Group believes that the provision should not be enacted until the new companies' code, contained in the *Companies Bill, 2006,* is enacted. The Review Group is cognisant of the significant and fundamental changes that that Bill will introduce into Irish company law and believes that there is no useful purpose to be served in commencing such a provision until the Companies Acts that form its *"relevant obligations"* are the new provisions that will be contained in the Companies Bill, 2006.

Conclusion

By the decision of a majority of the Review Group's members, the foregoing model for a revised DCS is commended to the Minister. The Review Group believes that the foregoing model removes the unnecessary costs (direct and indirect) to companies and the Irish economy and avoids the undesirable behaviour that is likely to otherwise result from the enactment of 45/2003 or any variant that does not address the issues addressed by Section X. Whilst a majority of the Review Group would still have a strongly held first-preference for no DCS of any description in Ireland pending the outcome of international developments on requirements of compliance-verification, they are prepared to support the model contained in Section X if the Minister decides to implement a compliance-verification regime in Ireland. The Review Group believes that Section X would be a proportionate, effective and appropriate response to the desire to require companies to demonstrate their commitment to compliance-verification.

The three members who do not support the compromise proposal of the majority have each expressed their reservations for their own reasons and these are set out in *extenso* in the appendices to this Report.[125]

125 The Interim Board of IAASA worked closely with the Department of Enterprise, Trade & Employment during the drafting of the Companies (Auditing and Accounting) Bill and, in that context, shared its views on the Bill, including the provisions relating to directors' compliance statements, with the Department at each stage of the Bill's progression through the legislative process. Notwithstanding that section 45, as finally enacted, underwent a number of amendments during its passage through the Oireachtas, the provisions, as enacted, had the support of the Interim Board.

The Interim Board of IAASA welcomes any measures that serve to strengthen and enhance corporate governance while simultaneously achieving an appropriate balance between protection and promotion of the public interest and preservation and enhancement of the economic and other benefits accruing from Ireland's standing as an attractive, low risk environment in which to conduct business.

In that context, the Interim Board believes that, whatever course of action is adopted by the Minister on foot of the Review Group's recommendations, it is desirable that the arrangements opted for be reviewed after a period of three years with a view to determining whether, on the basis of practical experience and available evidence, the aforementioned balance is being achieved or whether such a balance might be better achieved by alternative means.

10

Draft text for Proposed New Section to Replace Section 45 of the Companies (Auditing and Accounting) Act, 2005

X.-(1) In this section-
'amount of turnover' and 'balance sheet total' have the same meanings as in section 8 of Companies (Amendment) Act 1986;

'relevant obligations', in relation to a company, means the company's obligations under-
(a) the Companies Acts, where the failure to comply with any such obligation is an indictable offence under the Companies Acts, and
(b) tax law,

'tax law' means-
(a) the Customs Acts,
(b) the statutes relating to the duties of excise and to the management of those duties,
(c) the Tax Acts,
(d) the Capital Gains Tax Acts,
(e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,
(f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,
(g) the statutes relating to stamp duty and to the management of that duty, and
(h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.

(2) This section applies to-
(a) a public limited company (whether listed or unlisted), and
(b) a private company limited by shares, but it does not apply to a company referred to in paragraph *(a)* or *(b)* that is of a class exempted under section *48(1)(j)* of the *Act of 2003* from this section or to a company referred to in paragraph *(b)* while that company qualifies for an exemption under subsection (6).

(3) The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement-
(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations, and
(b) confirming that the company has in place a compliance policy statement that is, in the opinion of the directors, appropriate for the company; and, if this is not the case, specifying the reasons, and
(c) confirming that the company has in place, appropriate arrangements or structures that are, in the opinion of the directors, designed to secure material compliance with its relevant obligations, which arrangements or structures may (at the discretion of the directors) include the company's reliance upon internal and or external advisors who appear to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations); and, if this is not the case, specifying the reasons, and
(d) confirming that the company's arrangements or structures referred to in paragraph (c), have been reviewed during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

(4) For the purposes of this section, a company's arrangements or structures are considered to be designed to secure material compliance with its relevant obligations if they provide a reasonable assurance of compliance in all material respects with those obligations.

(5) Where the directors of a company to which this section applies fail to comply with subsection (3), each director to whom the failure is attributable is guilty of an offence.

(6) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if, either-
(a) its balance sheet total for the year does not exceed-
(i) €12,500,000, or
(ii) if an amount is prescribed under section *48(1)(l)* of the *Act of 2003* for the purpose of this provision, the prescribed amount,

or, in the alternative to the provisions in (a),

(b) the amount of its turnover for the year does not exceed-
(i) €25,000,000, or
(ii) if an amount is prescribed under section *48(1)(l)* of the *Act of 2003* for the purpose of this provision, the prescribed amount.

Appendices

Directors' Compliance Statement

Appendix A

A

Reservation
by the
IRISH CONGRESS OF TRADE UNIONS
on the
Review by the Company Law Review Group
of the
Directors' Compliance Statements Provision: Section 45

Introduction

The Irish Congress of Trade Unions welcomed the introduction of the Companies (Auditing and Accounting) Act 2003 as one of the most significant Irish Company Law developments in over a decade. The legislation, importantly the inclusion of the requirement for the Directors' Compliance Statement, was proposed as part of a solution to public and political concerns about tax evasion by companies arising from the Committee of Public Accounts Parliamentary Enquiry into DIRT and the various tribunals and investigations. These concerns were subsequently underlined by a heightened awareness worldwide of weak corporate governance structures in large businesses.

The Compliance Statement was designed to ensure that compliance becomes and remains an issue at the highest level in companies and, in particular, that directors accept their proper responsibilities in this regard. The concept of a Compliance Statement is far more than an instrument aimed at creating a compliance culture or for verifying compliance. The Compliance Statement, as originally envisaged provides a means of assuring regulators and stakeholders that companies fulfil their legal obligations.

Directors who take their responsibilities seriously will already be actively involved in compliance and for them the Statement is simply a process for confirming that fact. In cases where Directors are not so involved, the Statement is essential.

Congress believes that the visible compliance of companies to standards will enhance the *'Ireland Brand',* along with building goodwill, trust and overall favourability among key stakeholders such as investors, employees suppliers, customers, business partners. Given the reputation benefits to be gained by companies it is difficult to understand the ongoing resistance to visible accounting for company behaviour.

Accordingly Congress would like to associate itself and strongly support the reservations made by the Office of The Director of Corporate Enforcement (ODCE) and by the Revenue Commissioners. We would also like to set out the following.

Cost Benefit Analysis
Congress believes the costs analysis is superficial and undermined by the fact that there has been no explanation by the CLRG as to why it is necessary for companies to incur such excessive costs. The requirement that companies should comply with the law is not new, companies have always had to be compliant, all that is new, is the requirement to be able to clearly show and demonstrate such compliance, by reference to documented and clear compliance policies and procedures.

Given that Section 45 places no additional obligations, other than company directors are now required to acknowledge their responsibility for compliance and discharge it through the preparation and publication of statements of compliance, a credible explanation needs to be offered as to why such excessive, expensive additional costs will be incurred by companies. Of particular concern to Congress is the lack of a rigorous analysis of figures, calculations and the underlying assumptions in the exercise carried out by CLRG. In this connection it is our understanding that initially costs were identified to be in the region of €30,000.

Moreover, in the Report of the Review Group on Auditing there was, as has been noted by the ODCE, no limitation on the number of companies to be captured by the compliance provision. It seems now that the number of companies is somewhere in the region of 5% of total. Further we believe that the financial data used was limited both in its source and extent and did not reflect an analysis, rigorous or otherwise of the necessary costs to be incurred in compliance. Rather it is our view that the estimation of costs provided from these limited sources reflected an excessive measure of what would be required. Despite the very clear indication given by the ODCE as to what would be required in practice. Finally on this point the extremely small number of companies who would now be captured by the legislative provisions would be substantial and most probably making provision for compliance measures in the ordinary course. In this connection we are persuaded by the assessment of the ODCE that the quantum of costs involved are more properly reflected as a percentage of profit and a relatively small one at that.

Leaving aside the question of specific costs analysis, no real consideration has been given to the positive cost benefits for Ireland and Irish business of having this reporting requirement in place. Congress believes that removing this requirement will do nothing to improve confidence in Irish business but rather will have the opposite effect giving raise to other potential *'loss of reputation costs'* not considered in the report.

Congress believes that the regulation requirement to *secure confidence in business* will be put at risk by a perception that Irish business was unable to meet the visible compliance expected. The integrity of corporations, financial institutions and markets is central to the health and stability of the Irish economy. We cannot afford to grow complacent over time, we need to remain vigilant to ensure that financial standards, regulations and methods of market surveillance are effective in maintaining investor confidence and protecting the interests of employees and other stakeholders.

Far from being considered solely as an unnecessary burden, compliance can be a positive benefit for companies. The Directors' review is the opportunity to have a fresh look at the organisations internal control processes and the management and operation of those processes. The compliance statements afford management the opportunity to set the tone from the top, in terms of compliance and to foster an improved compliance culture in the organisation. Good internal controls in relation to compliance have always been good practice and too low a value has been given to the strategic benefit to Irish Business of the approach directed by Section 45. If adopted, companies will not be caught unaware by matters that have the potential to materially affect the company. This is an important consideration as in the past many Directors have claimed that they were entirely unaware of the organisations operations.

Proposal to Remove Section 45

Congress is fully supportive of the retention and enactment of Section 45 as formulated and totally rejects the proposals to remove the Section. Congress does not accept that the mandate or terms of reference for the Committee allow for a recommendation to repeal Section 45, and believe that the question of repeal is not only precluded by those terms of reference but runs counter to the assurance of the Taoiseach in his statement of the 21st April 2005 that there was no question that the main thrust of the statement of compliance provision would be removed.

Congress further rejects the option to delay introduction of Section 45 and "wait for Europe". Congress does not support this recommendation, as it is a wholly unrealistic option. The most optimistic timetable for advancement on EU action on the *Company Law Action Plan* is 2010 and even then the issue of corporate governance is red circled as remaining in Member States' competence. So this recommendation is simply repeal in another guise.

Appendix A

A

The Review Group on Auditing in Chapter 14 of its Report made the two specific recommendations 14.1 and 14.2 which gave rise to the provisions in the 2003 Act. They did so against the backdrop referred to in the opening paragraphs of this Reservation and referred to in our previous submissions. The deliberations and report of the Review Group on Auditing encompassed the views of the interests much of whom are reflect in the CLRG. An argument has been made that the situation has changed so significantly in the intervening four or five years that there is no requirement or a significantly reduced requirement for such compliance provisions as envisioned by Recommendations 14.1 and 14.2. We are not persuaded by this argument and believe for example that the case made out based on the impact of S.100 of 2001 in amending S.383 of 1963 is overstated to say the least. In this regard we are again persuaded by the analysis of the ODCE who it is important to remind ourselves, was established arising from the deliberations of the Working Group on Company Law Compliance and Enforcement and the ensuing legislation to make such assessments and act accordingly.

With regard to the issue of competitiveness we share the view that the analysis provided by the IDA on FDI is speculative, however well intentioned. In our experience decisions to re-locate to other economies and jurisdictions are more likely to be reflective of labour costs and flexibilities rather than a deciding factor of the regulatory environment. In this respect we would respectfully offer the view that Congress and our affiliates in particular have regrettable first hand experience of this over recent years.

Congress supports Section 45 and we recommended that amendments to this section should have the purpose of strengthening it and giving greater certainly to the legalisation [sic] it refers to. We called for the section to be amended to specifically provide for *'employment legislation'* as a 'relevant obligation'. This could be defined to include; employment law relating to workers' rights, entitlements and protections; work permits; pensions; pay related social insurance; and health safety and welfare at work.

Congress also called for the inclusion of *'whistleblower'* protection. What distinguishes a good compliance programme from a bad one is simply this: a company with a good system affords an opportunity for people to talk with some level of comfort about how the company is actually doing its business. This is particularly the necessary in relation to Directors satisfying themselves that policy and practice match, as experience shows employees can be reluctant to speak out, particularly in the absence of legal or contractual protection against victimisation following on from their highlighting inadequate, inappropriate or illegal practices. 'Whistleblowing' channels can also be used by employees to seek advice in difficult situations and for the organisation to get early warning about potentially dangerous situations. Unfortunately the CLRG did not accept Congress recommendations in these key areas.

Support for ODCE Recommendations

Congress does not support the mitigated option proposed by the majority of the CLRG. Rather Congress supports the alternative option presented by the Director of Corporate Enforcement and we understand also supported by Revenue. We do so on the basis that the ODCE alternative provides a balancing of requirement on Companies, while retaining the assurance of the external auditing review, the retention of the "third limb" in the definition of relevant obligations. We are of the view that this provides a more substantial method of maintaining the thrust of the Statement of Compliance in line with the intention of the Taoiseach and Government in charging the CLRG with the Review to hand (see above - 21/4/05).

Given the gravity of what is at stake, Congress believes that both the burden of compliance and the penalty for non-compliance are fair, and overall give substance to the public policy envisaged by the work of the RGA, the Committee on Compliance and Company Law, the ODCE and indeed the work of the CLRG. To do otherwise would have the opposite effect and undermine much of the progress made to date.

Reservation
by the
Director of Corporate Enforcement
on the
Review by the Company Law Review Group
of the
Directors' Compliance Statements Provision

Summary

The Office of the Director of Corporate Enforcement ("ODCE") supports the commencement of section 45 of the Companies (Auditing and Accounting) Act 2003 ("45/2003") for financial years commencing on or after 1 January 2006.

In the event however that the Minister were to decide not to commence unchanged the existing provision, the ODCE recommends the early enactment of a mitigated 45/2003 provision on the lines of the Appendix to this Reservation.

Regrettably, the ODCE is not prepared to endorse the mitigated directors' compliance statement (DCS) provision recommended by the majority of the Company Law Review Group ("CLRG") for the following principal reasons:

1) as the body responsible for encouraging compliance with company law including the preparation of books of account which give a 'true and fair' view of a company's state of affairs, the ODCE finds unacceptable a proposal which omits reporting on obligations 'that may materially affect the company's financial statements';

2) the proposal that a company may rely, at the directors' discretion, on internal or external advisers to help secure compliance is unnecessary. It would also institutionalise the heavy advisory costs which are claimed to apply to 45/2003 and which has been the cause of much criticism to date;

3) the provision for auditor review of the directors' compliance statement has been entirely deleted. This was a key recommendation of the Auditing Review Group ("ARG") in enhancing the public interest role of auditors;

4) the proposal that a company has in place 'appropriate arrangements or structures' to secure compliance is unclear. It appears possible that an appropriate 'structure' can be independent of any arrangements or procedures for securing compliance and that it could be a designated compliance officer, regardless of their ability, expertise or authority within the company. In contrast, 45/2003 which focuses on procedures is readily adaptable to international best practice in risk assessment and mitigation (the Turnbull Guidance) with which many directors are familiar;

5) the proposed definition of 'material compliance' no longer requires that the 'arrangements or structures' in place must be reasonably effective;

6) the inclusion of the CLRG proposal as part of the planned consolidation of the Companies Acts would be likely to give rise to substantial delay given the size of the new Bill and the need for the Oireachtas to examine it in detail before enactment and subsequent implementation.

The early enactment of the alternative mitigated proposal which is proposed by the ODCE in the Appendix resolves all of the indicated principal difficulties, while delivering a shorter and easier compliance reporting provision than the present 45/2003.

History

It is five years since the ARG unanimously recommended a package of measures to address public concerns which were crystallised by the results of the Public Accounts Committee's DIRT Inquiry. Two of the recommendations urged inter alia:

- *that company directors should report annually on the company's compliance with its obligations under company law, tax law and other relevant statutory or regulatory requirements and*

- *that the company's external auditors should report as to whether, in their opinion, the directors' report of the company's compliance was reasonable.*

B

The interim period has seen extensive engagement among representatives of the Oireachtas, Government and the private and public sectors in the development of 45/2003 which seeks to give effect to the substance of these ARG recommendations. The provision, as enacted, is less comprehensive and more flexible than the corresponding ARG recommendations in that:

- *it applies to a fraction of Irish-registered companies (ODCE research suggests less than 5%) - no such limitation was contained in the ARG Report;*
- *compliance reporting relates to company and tax law and those other obligations "that may materially affect the company's financial statements" - no such limitation was contained in the ARG Report;*
- *the directors of qualifying companies are required to report the extent to which they are of the opinion that "they used all reasonable endeavours to secure the company's compliance with its relevant obligations" during the reporting year - no such flexibility was contained in the ARG Report, and*
- *effective compliance procedures are defined as providing "a reasonable assurance of compliance in all material respects" with the obligations of company, tax and other relevant obligations - no such flexibility was contained in the ARG Report.*

As a result of the qualifications adopted by the Oireachtas in response to representations received during the development of 45/2003, the ODCE sought during 2004 to develop guidance on the scope and implications of the provision in collaboration with business, professional and other interests. Following a public consultation process, this guidance was published in December 2004.

In parallel with this exercise, some of the affected companies were beginning the process of preparing for the introduction of 45/2003. This seems to have resulted in further representations to Government on the impact of the provision. This led to the recent decision of Mr Michael Ahern, T.D., Minister for Trade and Commerce, to have the present review of 45/2003 undertaken by the CLRG.

Current Non-Compliance

The Review Group identifies in its Report a number of indicators of non-compliance with laws and regulations but was unable, in the view of the ODCE, to make a persuasive case that the poor compliance environment which led to the ARG recommendations had substantially changed for the better. The reality is that in the two areas on which definitive figures were obtained (namely the reporting by auditors on indictable offences under the Companies Acts and on theft offences under the Criminal Justice (Theft and Fraud Offences) Act 2001), the incidence of reporting continues to increase. The Review Group was also aware during its deliberations of other matters in the public domain which suggested continuing non-compliance by companies with various different codes of legislation.

Insofar as the reporting by auditors to the ODCE is concerned, the vast majority (over 97% of the 1,500 annual reports) are filed in respect of just four indictable offences. Relative to the number of indictable offences in the Companies Acts (over 120), this suggests that only a small proportion of company law offences are actually coming to notice during the audit process and that further measures in the form of an effective compliance statement are required to encourage compliance with obligations the breach of which currently go undetected.

Meaning of 45/2003

It is the ODCE's view that 45/2003 is being interpreted in some quarters with excessive rigour. What it requires in simple terms is that:

- *directors define their policy with respect to compliance ('it is company policy to comply (or not to comply)...') with company law, tax law and with the minority of the company's other legal obligations that may materially affect the company's financial statements;*
- *directors ensure that the key procedures for securing a reasonable assurance of material compliance with those obligations are in place;*
- *directors include in their annual report -*
- *a compliance policy statement containing information in relation to the company's compliance policies, procedures and arrangements and*

- an annual compliance statement indicating their responsibility for securing compliance, the extent to which compliance procedures are in place, the extent to which their effectiveness was reviewed during the year and the extent to which they are of the opinion that they used all reasonable endeavours to secure material compliance.

In essence, 45/2003 is a self-review framework for directors which adopts standard 'comply or explain' principles in seeking to engage them with their duty to ensure that their company fulfils its primary legal obligations. Within the structure outlined in 45/2003, the content of the statements is a matter for the directors' discretion.

Costs

The terms of reference for the CLRG Review requires that regard be had to potential costs issues. The exercise on costs which the CLRG has had undertaken and is used to justify the need for substantial change is, in the view of the ODCE, seriously inadequate for various reasons.

Firstly, the cost projections are developed based on data supplied from two primary sources, namely IBEC members and legal and accountancy firms. While the ODCE accepts that the tendered figures properly reflect the costs being borne by or charged to the relevant companies, no evaluation appears to have been done to confirm that these costs were necessarily incurred in meeting 45/2003 and were therefore unavoidable. It appears that in some instances at least, highly forensic investigations of company legal obligations have been undertaken of client companies by legal and/or accountancy firms. It is the view of the ODCE that comprehensive legal audits are not necessarily required in preparation for the introduction of 45/2003 and that directors and senior managements (with the support of professional advisers in discrete areas) are in the best position to determine what does, or would be most likely to, comprise a company's relevant obligations for the purpose of the provision.

Secondly, the primary cost of securing the company's compliance with specific legal obligations, whether of tax, companies, health and safety or other legislation is properly attributable to the individual enactment. Similarly, the cost that is properly attributable to 45/2003 is the incremental cost of the reporting arrangements which apply to the obligation, including for instance any additional costs which will arise as a result of an increased audit fee. It does not appear that any attempt was made in the statistical analysis to confirm that the costs tendered to the consultant were limited to the incremental costs of 45/2003 as distinct from the actual costs of complying with the underlying primary enactments.

Thirdly, the aggregate cost estimates of €377 million in initial set-up costs and €202 million in ongoing costs for some 2,490[126] qualifying companies are presented without a context. No effort is made to identify the proportion of additional cost that this represents for the companies in question. In an early draft of the Report, individual case study figures were provided which suggested that initial set-up costs in a number of cases would represent less than 1% of annual profit and that ongoing costs would amount to less than 0.5% of annual profit. While the cost base of the companies in question was not indicated, the incremental cost of 45/2003 (even before discounting the potential effects of the earlier two points) will clearly be a very small fraction of the companies' overall costs.

Fourthly, no effort was made to conduct a broader economic analysis of the possible impact of the costs figures indicated as being associated with 45/2003.

The ODCE acknowledges that any cost estimates directly attributable to 45/2003 will be indicative. Any such exercise will also, for instance, find it very difficult to quantify both opportunity costs and the estimated benefits of the provision. However, it is the ODCE's view that the weaknesses in the analysis undertaken for the Review Group of the cost implications of 45/2003 have done little to enlighten the work of the Group or to make the case for radical change.

Competitiveness

The above commentary suggests that the cost of 45/2003 may not be as significant as might be imagined by the top-line figures which have been outlined in the cost analysis undertaken for the CLRG. If the cost implications of 45/2003 are not significant, it follows that any adverse impact on Ireland's competitiveness will also be low.

Appendix B

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Competitiveness is composed of many elements, including interest rates, currency stability, labour costs, tax rates, availability of a skilled workforce, grant aid, business environment, predictability of laws and regulation, science and innovation capacity, quality of infrastructure, etc. Notwithstanding the multi-dimensional character of national competitiveness, the Report speculates without an adequate basis that the DCS on its own would give rise to a 10% reduction in foreign direct investment (FDI) to Ireland and uses an IDA model to lend support to the argued negative impacts. In the absence of any analysis which would satisfactorily justify the indicated assumption that the present DCS would reduce the inflow of FDI by 10%, it appears to the ODCE that 0.01% is as valid a speculative assumption of likely impact as any other number. The ODCE also notes that the analysis makes no acknowledgement of possible benefits from the DCS, including the likelihood that as a result of improved compliance for instance with tax law, there would be greater tax revenue which would offset in whole or in part the indicated adverse effects.

The Report suggests that the DCS is undesirable in the context of moves underway at EU level in the corporate governance area. In a Working Document commenting on public reaction to the Communication on the Action Plan on Company Law and Corporate Governance (COM (2003) 284 final of 21 May 2003), the Commission has stated:

> *The very large majority of respondents agreed with the Commission's assessment that there is no need for an EU corporate governance code. The view was generally expressed that corporate governance systems would develop and progress in a natural way under market pressure. The co-existence of different national codes was not perceived by issuers and investors as presenting any major difficulty...." (Synthesis of the Responses to the Commission Communication (on the Action Plan), 15 November 2003)*

Having regard to the more recent comments of Mr Charlie McCreevy, the Internal Market Commissioner, on 28 June 2005, where he spoke of legislating at EU level in the corporate governance area only "where absolutely necessary", it is clear that there is no reason why Ireland should not proceed with implementing the DCS in national law in the light of the absence of any significant EU legislative developments in the area.

Implementation Issues

While the ODCE does not accept the validity of the analysis on costs and competitiveness attributed by the CLRG to 45/2003, it does accept that the provision has generated considerable uncertainty as to the scale of work required by directors to fulfil the reporting obligation. Some directors initiated preparatory work in 2004 in parallel with the development by the ODCE and others of guidance in anticipation of an early commencement of the provision. This initial work seems to have given rise to concern about the practical impact of the provision.

As indicated earlier, the ODCE does not see the self-review character of 45/2003 as necessarily requiring the type of exhaustive legal forensic evaluation of company compliance which seems to have been undertaken in a number of cases. It is clear nevertheless that there is a problem of perception which can probably only be alleviated at this point by a future mitigation of 45/2003. The ODCE is not however prepared to dilute the provision to such an extent that it no longer would serve to meet the original objectives set for it.

There can be no doubt that implementation will involve some additional costs for a qualifying company. The scale of cost will primarily depend on the complexity of the business and the gap between the company's current compliance status and its legal obligations. The net result at firm level will depend on the value of benefits made in reducing risk relative to the cost of the investment in demonstrating compliance. However, there are also economic and societal benefits, because the harmonisation of legal compliance performance will reduce the prospects of unfair and uncompetitive behaviour in the marketplace.

126 The ODCE believes that the actual figure of qualifying companies is some 6,000 based on 45/2003 as enacted.

Given that there are uncertain cost, competitiveness and implementation issues, the ODCE is accordingly disposed to considering a mitigation of the present terms of 45/2003. It agrees with the general proposition advanced by the Review Group that the provision is unduly prescriptive and could be shortened significantly.

The ODCE also agrees that the review process by auditors envisaged in 45/2003 may be contributing to an unnecessary anxiety on the part of directors that extensive compliance procedures and associated documentary support need to be developed to satisfy auditors that high quality compliance systems are in place. Accordingly, the ODCE believes that a less intensive scrutiny of directors' compliance by auditors may initially be warranted.

The CLRG's Recommended Mitigation Proposal

However, the ODCE is not in a position to endorse the enactment of the mitigated DCS provision recommended by the majority of the CLRG for the following principal reasons:

1) as the body responsible for encouraging compliance with company law including the preparation of books of account which give a 'true and fair' view of a company's state of affairs, the ODCE finds unacceptable a proposal which omits reporting on obligations 'that may materially affect the company's financial statements';

2) the proposal that a company may rely, at the directors' discretion, on internal or external advisers to help secure compliance is unnecessary. It would also institutionalise the heavy advisory costs which are claimed to apply to 45/2003 and which has been the cause of much criticism to date;

3) the provision for auditor review of the directors' compliance statement has been entirely deleted. This was a key recommendation of the Auditing Review Group ("ARG") in enhancing the public interest role of auditors;

4) the proposal that a company has in place 'appropriate arrangements or structures' to secure compliance is unclear. It appears possible that an appropriate 'structure' can be independent of any arrangements or procedures for securing compliance and that it could be a designated compliance officer, regardless of their ability, expertise or authority within the company. In contrast, 45/2003 which focuses on procedures is readily adaptable to international best practice in risk assessment and mitigation (the Turnbull Guidance) with which many directors are familiar;

5) the proposed definition of 'material compliance' no longer requires that the 'arrangements or structures' in place must be reasonably effective;

6) the inclusion of the CLRG proposal as part of the planned consolidation of the Companies Acts would be likely to give rise to substantial delay given the size of the new Bill and the need for the Oireachtas to examine it in detail before enactment and implementation.

The ODCE's Alternative Mitigation Proposal

The alternative mitigated proposal in the Appendix which is proposed by the ODCE for early implementation resolves all of the indicated weaknesses, while delivering a shorter and easier compliance reporting provision than the present 45/2003. Similar to the majority proposal, the ODCE's alternative proposal reduces the key reporting requirement from three subsections of 45/2003 to one. In particular:

1) it restores the requirement to prepare a compliance statement in respect of those obligations which may materially affect the company's financial statements. In making this proposal, the ODCE reminds directors that they determine the company's compliance policy, and in doing so, it is they, and not their professional advisers, who decide the relevant obligations which warrant particular attention from a compliance perspective. As indicated in the ODCE Revised Guidance, "[w]hat is material is ultimately a matter of reasonable judgement for the directors." (page 13);

2) it returns to the more satisfactory language of 'procedures' in 45/2003;

3) it removes the statutory encouragement to directors to consult their professional advisers and add to company costs, because this should be a process driven by the directors and senior managers with assistance as required from their advisers;

4) it reinstates the coherent definition of material compliance;

5) it reintroduces a role for auditors but in a much less invasive manner. It essentially requires that auditors need only act where they form the opinion that directors fail to prepare or publish a compliance statement or where any such statement is made recklessly or is materially false.

Like the majority recommendation of the CLRG, the effect of the ODCE mitigation proposal, if adopted, would be to reduce substantially the number of affected companies from about 6,000 to 2,400 (or less than 2% of Irish-registered companies), before account is taken of any exemptions of classes of companies which might be made by the Minister under regulation.

Overview

The CLRG has been asked to address the proportionality, efficacy and appropriateness of the DCS obligation. In contrast to the more critical views of a majority of the Review Group, the views of the ODCE on these elements of the terms of reference of the Review are as follows:

* **Proportionality:** The genesis of this obligation was the findings of non-compliance in a number of major Irish-registered companies some years ago. Regrettably, instances of continuing non-compliance remain a feature today. The assurance of compliance which the DCS provision seeks to achieve applies in respect of the more significant Irish companies and is directed towards addressing material non-compliance only. As such, it is an entirely proportionate response to improving legal compliance in major Irish companies;

* **Efficacy:** In its pre-commencement phase, the DCS obligation has already shown a significant capacity to produce a new corporate focus on securing compliance with a company's primary legal obligations. Any failure to implement this provision in a meaningful form will result in a diminution of effort and attention on this key objective of a responsible civil society;

* **Appropriateness:** Compliance is first and foremost a personal value which is supported in a wider culture of compliance. While we take comfort from the increasing corporate focus on compliance, we are also conscious that breaches of company law remain a regular occurrence and that much corporate misconduct occurs out of the public eye. Consequently, it is both necessary and appropriate that company directors and managements be further encouraged to address their responsibilities to secure material compliance with their company's primary legal obligations.

The benefits of Directors' Compliance Statements should not be understated. They will bring greater transparency, lower business risks and provide a more equitable and competitive business environment. They will protect shareholders, employees, creditors and other stakeholders including the State, ensuring for example that proper taxes are paid to the Exchequer and so contributing directly to the general welfare of the nation.

Conclusion

The ODCE remains of the view that there is no fundamental difficulty with 45/2003 which would prevent its implementation for financial years commencing on or after 1 January 2006.

In the event however that the Minister were to decide not to commence unchanged the existing 45/2003 provision, the ODCE recommends the following:

- *the inclusion in the next suitable Ministerial Bill of an amended DCS provision on the lines recommended by the ODCE, and*

- *the commencement of the amended provision as soon as possible after enactment.*

When it is clear what changes, if any, will be made to 45/2003, the ODCE will proceed to finalise its Guidance on the DCS, so as to assist directors in their task of giving effect to the provision.

Office of the Director of Corporate Enforcement
20 July 2005

ODCE Proposal for Amendment of Section 45

Enacted Provision	ODCE Proposal
"205E.-(1) In this section-	"205E.-(1) In this section-
'amount of turnover' and 'balance sheet total' have the same meanings as in section 8 of the Companies (Amendment) Act 1986;	'amount of turnover' and 'balance sheet total' have the same meanings as in section 8 of the Companies (Amendment) Act 1986;
'relevant obligations', in relation to a company, means the company's obligations under-	'relevant obligations', in relation to a company, means the company's obligations under-
(a) the Companies Acts, (b) tax law, and (c) any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements;	(a) the Companies Acts, (b) tax law, and (c) any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements;
'tax law' means-	'tax law' means-
(a) the Customs Acts, (b) the statutes relating to the duties of excise and to the management of those duties, (c) the Tax Acts, (d) the Capital Gains Tax Acts, (e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act, (f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act, (g) the statutes relating to stamp duty and to the management of that duty, and (h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.	(a) the Customs Acts, (b) the statutes relating to the duties of excise and to the management of those duties, (c) the Tax Acts, (d) the Capital Gains Tax Acts, (e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act, (f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act, (g) the statutes relating to stamp duty and to the management of that duty, and (h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.
(2) This section applies to-	(2) This section applies to-
(a) a public limited company (whether listed or unlisted), and (b) a private company limited by shares,	(a) a public limited company (whether listed or unlisted), and (b) a private company limited by shares,
but it does not apply to a company referred to in paragraph (a) or (b) that is of a class exempted under section 48(1)(j) of the Act of 2003 from this section or to a company referred to in paragraph (b) while that company qualifies for an exemption under subsection (9).	but it does not apply to a company referred to in paragraph (a) or (b) that is of a class exempted under section 48(1)(j) of the Act of 2003 from this section or to a company referred to in paragraph (b) while that company qualifies for an exemption under subsection (9).

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(3) The directors of a company to which this section applies shall, as soon as possible after the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:

(a) its policies respecting compliance with its relevant obligations;
(b) its internal financial and other procedures for securing compliance with its relevant obligations;
(c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs (a) and (b).

(4) The directors' compliance statement (including any revisions) must-

(a) be in writing,
(b) be submitted for approval by the board of directors,
(c) at least once in every 3 year period following its approval by the board, be reviewed and, if necessary, revised by the directors, and
(d) be included in the directors' report under section 158 of the Principal Act.

(5) The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement-

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations,
(b) confirming that the company has internal financial and other procedures in place that are designed to secure compliance with its relevant obligations, and, if this is not the case, specifying the reasons, and
(c) confirming that the directors have reviewed the effectiveness of the procedures referred to in paragraph (b) during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

~~(3) The directors of a company to which this section applies shall, as soon as possible after the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:~~

~~(a) its policies respecting compliance with its relevant obligations;~~
~~(b) its internal financial and other procedures for securing compliance with its relevant obligations;~~
~~(c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs (a) and (b).~~

~~(4) The directors' compliance statement (including any revisions) must-~~

~~(a) be in writing,~~
~~(b) be submitted for approval by the board of directors,~~
~~(c) at least once in every 3 year period following its approval by the board, be reviewed and, if necessary, revised by the directors, and~~
~~(d) be included in the directors' report under section 158 of the Principal Act.~~

(3)~~5)~~ The directors of a company to which this section applies shall ~~also~~ include in their report under section 158 of the Principal Act a compliance statement-

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations,
(b) confirming that the company has in place a compliance policy statement that is, in the opinion of the directors, appropriate for the company, ~~internal financial and other procedures in place that are designed to secure compliance with its relevant obligations~~, and, if this is not the case, specifying the reasons, and
(c) confirming that the company has in place appropriate procedures and arrangements that are, in the opinion of the directors, designed to secure

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	compliance with its relevant obligations, ~~directors have reviewed the effectiveness of the procedures referred to in paragraph (b) during the financial year to which the report relates~~, and, if this is not the case, specifying the reasons, and. (d) confirming that the company's procedures and arrangements referred to in paragraph (c) have been reviewed during the financial year to which the report relates, and, if that is not the case, specifying the reasons.
(6) In addition, the directors of a company to which this section applies shall in the statement required under subsection (7)- (a) specify whether, based on the procedures referred to in that subsection and their review of those procedures, they are of the opinion that they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year to which the annual report relates, and (b) if they are not of that opinion, specify the reasons.	~~(6) In addition, the directors of a company to which this section applies shall in the statement required under subsection (5)-~~ ~~(a) specify whether, based on the procedures referred to in that subsection and their review of those procedures, they are of the opinion that they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year to which the annual report relates, and~~ ~~(b) if they are not of that opinion, specify the reasons.~~
(7) For the purposes of this section, a company's internal financial and other procedures are considered to be designed to secure compliance with its relevant obligations and to be effective for that purpose if they provide a reasonable assurance of compliance in all material respects with those obligations.	(4) ~~7)~~ For the purposes of this section, a company's ~~internal financial and other~~ procedures and arrangements are considered to be designed to secure compliance with its relevant obligations and to be effective for that purpose if they provide a reasonable assurance of compliance in all material respects with those obligations.
(8) Where the directors of a company to which this section applies fail- (a) to prepare, or to cause to be prepared, a directors' compliance statement as required by subsections (3) and (4)(a) to (c), (b) to include a directors' compliance statement in the directors' report as required by subsection (4)(d), or (c) to comply with subsections (5) and (6), each director to whom the failure is attributable is guilty of an offence.	(5) ~~8)~~ Where the directors of a company to which this section applies fail to comply with subsection (3), - ~~(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by subsections (3) and (4)(a) to (c),~~ ~~(b) to include a directors' compliance statement in the directors' report as required by subsection (4)(d), or~~ ~~(c) to comply with subsections (5) and (6),~~ each director to whom the failure is attributable is guilty of an offence.

Appendix B

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(9) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if-

(a) its balance sheet total for the year does not exceed-

(i) €7,618,428, or
(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount, and
(b) the amount of its turnover for the year does not exceed-

(i) €15,236,856, or
(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount.

205F.-(1) The auditor of a company to which section 205E applies shall undertake an annual review of-

(a) the directors' compliance statement under subsections (3) and (4) of that section, and

(b) the directors' statement under subsections (5) and (6) of that section, to determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor, or by an affiliate of the auditor within the meaning of section 205D, in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

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(2) The auditor shall-

(a) include in the auditor's report appended to the company's annual accounts a report on, and the conclusions of, the review undertaken under subsection (1), and

(6) ~~9)~~ A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if either-

(a) its balance sheet total for the year does not exceed-

(i) €12,500,000 ~~7,618,428~~, or
(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount, ~~and~~

or

(b) the amount of its turnover for the year does not exceed-

(i) €25,000,000 ~~15,236,856~~, or
(ii) if an amount is prescribed under section 48(1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount.

205F.-(1) The auditor of a company to which section 205E applies shall undertake an annual review of -

(a) the directors' compliance statement under subsections (3) ~~and (4)~~ of that section, ~~and~~

~~(b) the directors' statement under subsections (5) and (6) of that section, to determine whether, in the auditor's opinion, each statement is fair and reasonable~~ having regard to information obtained by the auditor, or by an affiliate of the auditor within the meaning of section 205D, in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

~~(2) The auditor shall-~~

~~(a) include in the auditor's report appended to the company's annual accounts a report on, and the conclusions of, the review undertaken under subsection (1), and~~

(b) where any statement reviewed under subsection (1) is not, in the auditor's opinion, fair and reasonable-

(i) make a report to that effect to the directors, and

(ii) include that report in the auditor's report appended to the annual accounts.

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(3) Where, in the auditor's opinion, the directors have failed-

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by section 205E(3) and (4)(a) to (c),

(b) to include a directors' compliance statement in the directors' report as required by section 205E(4)(d), or

(c) to comply with section 205E(5) and (6),

the auditor shall report that opinion and the reasons for forming that opinion to the Director of Corporate Enforcement.

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(4) Section 194(6) applies, with the necessary modifications, in relation to an auditor's compliance with an obligation imposed on him by or under this section as it applies in relation to an obligation imposed by or under section 194.

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(5) A person who contravenes this section is guilty of an offence."

~~(b) where any statement reviewed under subsection (1) is not, in the auditor's opinion, fair and reasonable-~~

~~(i) make a report to that effect to the directors, and~~

~~(ii) include that report in the auditor's report appended to the annual accounts.~~

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(2) ~~3)~~ Where, in the auditor's opinion, the directors have ~~failed-~~

(a) failed to prepare, or to cause to be prepared, a directors' compliance statement as required by section 205E(3) ~~and (4)(a) to (c),~~

(b) failed to include a directors' compliance statement in the directors' report as required by section 205E(3)~~4)(d)~~, or

(c) made a compliance statement which is either false in a material particular or has been made recklessly to comply with section 205E(5) and (6),

the auditor shall report that opinion and the reasons for forming that opinion to the Director of Corporate Enforcement.

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(3) ~~4)~~ Section 194(6) applies, with the necessary modifications, in relation to an auditor's compliance with an obligation imposed on him by or under this section as it applies in relation to an obligation imposed by or under section 194.

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(4) ~~5)~~ A person who contravenes this section is guilty of an offence."

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Directors Compliance Statement
Reservations of the Revenue Commissioners

Background and Value of Directors Compliance Statement

The Director's Compliance Statement was proposed as part of a solution to public and political concerns about tax evasion by companies arising from the Committee of Public Accounts Parliamentary Enquiry into DIRT and the various tribunals and investigations. These concerns were subsequently underlined by a heightened awareness worldwide of weak corporate governance structures in large businesses.

The Compliance Statement was designed to ensure that compliance becomes and remains an issue at the highest level in companies and, in particular, that directors accept their proper responsibilities in this regard. The concept of a Compliance Statement is far more than an instrument aimed at creating a compliance culture or for verifying compliance. The Compliance Statement, as originally envisaged provides a means of assuring regulators and stakeholders that companies fulfil their legal obligations.

Directors who take their responsibilities seriously will already be actively involved in compliance and for them the Statement is simply a process for confirming that fact. In cases where Directors are not so involved, the Statement is essential.

CLRG's Proposal for New Legislation

Revenue welcomes the assurance that the scope of the tax responsibilities covered by the statement is not being reduced. While Revenue acknowledges that the original proposals were considered by some to be too onerous and specific, the new proposals are too vague and considerably weaker. Specifically, we have difficulty with:

* The absence of any definition of key phrases such as "arrangements and structures" leaves the proposal vague and difficult to implement for both companies and regulatory authorities. If the legislation is enacted as proposed the need for quite prescriptive guidance by Revenue seems inevitable.
* The removal of the independent evaluation of the compliance statement by the external auditor has removed a significant safeguard.
* Subsection (5) which provides that directors who fail to comply will be guilty of an offence, but it is not clear what would give rise to the offence.

CLRG Review and Cost Issues

The CLRG was asked to carry out a review of the Directors Compliance Statement under specific terms of reference that included a review of the potential cost issues. In this context, Revenue has made the point from the outset that any costs attributed to the Compliance Statement regime as originally proposed should include only incremental costs.

It would be expected that responsible companies of the scale covered by the Compliance Statement would of necessity already have rigorous procedures in place to ensure compliance. The Turnbull Report highlighted the need for financial, operational and compliance controls in PLCs and for their continuous monitoring. Irish registered companies that are connected with U.S. companies have to put financial controls in place to satisfy the requirements of U.S. Sarbanes-Oxley legislation. Companies will already, therefore, be bearing significant compliance costs irrespective of the Directors Compliance Statement.

This report suggests that Section 45 gives rise to additional costs over and above existing compliance costs because it "was seen to require additional certification procedures, documentation of policies and extensive and formal ongoing monitoring". External legal costs were identified as the largest cost element. The Report does not give any insights into why these additional costly procedures are necessary or whether they relate to a particular category of obligation. It would be surprising if substantial costs of this nature would arise in relation to taxation given that compliance with tax law is inextricably linked to the financial statements.

Revenue is concerned that the new and weaker provisions are proposed, primarily for cost reasons, on the basis of cost figures and analysis that was not made available to Group members (for reasons of confidentiality) and which it has not been possible to evaluate.[127] In particular, the absence of analysis precluded discussion of options to enable companies which already met international standards to comply with the Compliance Statement with the minimum of effort and incremental cost.

Conclusion

Systems should provide for intervention by the regulatory authorities only in exceptional circumstances. Under the original proposals, the fact that directors have to sign off on compliance provides a form of ongoing self-regulation that minimises the need for regulatory intervention, and the costs that this entails. It also ensures a level playing field on an ongoing basis that makes it more difficult for companies to gain a competitive advantage from non-compliance.

The solution now proposed considerably weakens the potential for the director's compliance statement as a compliance tool. It is vague, difficult to implement and missing the assurance of the external auditor's evaluation.

The analysis underpinning the review of costs was not made available in a manner which might have enabled appropriate solutions to emerge for consideration. In the circumstances Revenue is unable to agree with the CLRG proposals.

19 July 2005

127 Note of Secretariat to the Review Group: in seeking companies and their advisors to provide costings on the additional costs of compliance with 45/2003 to the Review Group, assurances as to confidentiality had to be given because of concerns as to their sensitivity for individual companies and concerns that their disclosure on a company-specific basis could harm their competitiveness. To honour this undertaking as to confidentiality, costings were directed to Goodbody Economic Consultants, who reviewed and synthesised the cost submissions and provided the Review Group with an aggregated table.

Appendix D

D

Companies (Auditing and Accounting) Act 2003

45.-The Act of 1990 is amended by inserting the following in Part X:

205E.-(1) In this section-
'amount of turnover' and 'balance sheet total' have the same meanings as in section 8 of Companies (Amendment) Act 1986;

'relevant obligations', in relation to a company, means the company's obligations under-

(a) the Companies Acts,
(b) tax law, and
(c) any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements;

'tax law' means-

(a) the Customs Acts,
(b) the statutes relating to the duties of excise and to the management of those duties,
(c) the Tax Acts,
(d) the Capital Gains Tax Acts,
(e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,
(f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,
(g) the statutes relating to stamp duty and to the management of that duty, and
(h) any instruments made under an enactment referred to in any of paragraphs
(a) to (g) or made under any other enactment and relating to tax.

(2) This section applies to-

(a) a public limited company (whether listed or unlisted), and
(b) a private company limited by shares, but it does not apply to a company referred to in paragraph *(a)* or *(b)* that is of a class exempted under *section 48(1)(j)* of the *Act of 2003* from this section or to a company referred to in paragraph *(b)* while that company qualifies for an exemption under subsection (9).[128]

(3) The directors of a company to which this section applies shall, as soon as possible after the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:

(a) its policies respecting compliance with its relevant obligations;
(b) its internal financial and other procedures for securing compliance with its relevant obligations;
(c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs *(a)* and *(b)*.

(4) The directors' compliance statement (including any revisions) must-

(a) be in writing,
(b) be submitted for approval by the board of directors,
(c) at least once in every 3 year period following its approval by the board, be reviewed and, if necessary, revised by the directors, and
(d) be included in the directors' report under section 158 of the Principal Act.

(5) The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement-

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations,
(b) confirming that the company has internal financial and other procedures in place that are designed to secure compliance with its relevant obligations, and, if this is not the case, specifying the reasons, and
(c) confirming that the directors have reviewed the effectiveness of the procedures referred to in paragraph (b) during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

128 The companies exempt from application of Section 45 are: all guarantee companies, all unlimited companies, private companies with balancesheet totals and turnover below the thresholds designated at Subsection (9), Investment companies as defined in Part XIII of the Companies Act 1990 and securitisation special purpose vehicles (this latter class of companies will need to be specified by the Minister but the decision to exempt them has been taken in principle).

(6) In addition, the directors of a company to which this section applies shall in the statement required under subsection (5)-

(a) specify whether, based on the procedures referred to in that subsection and their review of those procedures, they are of the opinion that they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year to which the annual report relates, and

(b) if they are not of that opinion, specify the reasons.

(7) For the purposes of this section, a company's internal financial and other procedures are considered to be designed to secure compliance with its relevant obligations and to be effective for that purpose if they provide a reasonable assurance of compliance in all material respects with those obligations.

(8) Where the directors of a company to which this section applies fail-

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by subsections (3) and (4)*(a)* to *(c)*,

(b) to include a directors' compliance statement in the directors' report as required by subsection (4)*(d)*, or

(c) to comply with subsections (5) and (6), each director to whom the failure is attributable is guilty of an offence.

(9) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if-

(a) its balance sheet total for the year does not exceed-

(i) €7,618,428, or

(ii) if an amount is prescribed under section *48(1)(l)* of the *Act of 2003* for the purpose of this provision, the prescribed amount, and

(b) the amount of its turnover for the year does not exceed-

(i) €15,236,856, or

(ii) if an amount is prescribed under section *48(1)(l)* of the *Act of 2003* for the purpose of this provision, the prescribed amount.

205F.-(1) The auditor of a company to which section 205E applies shall undertake an annual statement and review of-

(a) the directors' compliance statement under subsections (3) and (4) of that section, and

(b) the directors' statement under subsections (5) and (6) of that section, to determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor, or by an affiliate of the auditor within the meaning of section 205D, in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

(2) The auditor shall-

(a) include in the auditor's report appended to the company's annual accounts a report on, and the conclusions of, the review undertaken under subsection (1), and

(b) where any statement reviewed under subsection (1) is not, in the auditor's opinion, fair and reasonable-

(i) make a report to that effect to the directors, and

(ii) include that report in the auditor's report appended to the annual accounts.

(3) Where, in the auditor's opinion, the directors have failed-

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by section 205E(3) and (4)*(a)* to *(c),*

(b) to include a directors' compliance statement in the directors' report as required by section 205E(4)*(d)*, or

(c) to comply with section 205E(5) and (6), the auditor shall report that opinion and the reasons for forming that opinion to the Director of Corporate Enforcement.

(4) Section 194(6) applies, with the necessary modifications, in relation to an auditor's compliance with an obligation imposed on him by or under this section as it applies in relation to an obligation imposed by or under section 194.

(5) A person who contravenes this section is guilty of an offence.

Appendix E

E

Minister for Trade and Commerce, Michael Ahern T.D., launches review of Directors' Compliance Statement

The Minister for Trade and Commerce, Michael Ahern, T.D., today announced his decision to refer the requirements set out in the Directors' Compliance Statement to the Company Law Review Group for consideration and review, asking the Review Group to report back to him by 31 July 2005.

The Directors' Compliance Statement is an obligation on company directors to report annually to shareholders on the company's compliance with company law, tax law and on other enactments that materially affect the company's financial statements. It applies to public companies (plcs) and to large private companies whose balance sheet total and turnover exceed specified amounts.

In launching the review Ahern said:
"For some time I have been reflecting on the Directors' Compliance Statement provided for in Section 45 of the Companies (Auditing and Accounting) Act 2003."

"The provenance of the Directors' Compliance Statement is clear. It was introduced to deal with what the Comptroller and Auditor General described in 1999 as a pervasive evasion of DIRT (Deposit Interest Retention Tax). In subsequent investigations a number of company directors pleaded ignorance of what was going on as a mitigating circumstance. It is not responsible or acceptable corporate governance that such a business culture should exist or that ignorance could be used to justify failure in fiduciary duties and the committing of offences under the Companies Acts and the other statutes that regulate business."

"However, as the Companies Acts are the primary means of regulating business activity in the State it is very important that the legal provisions in those Acts are appropriate and proportionate. There has been a significant amount of concern expressed about the potential cost and competitiveness issues which the Directors' Compliance Statement may give rise to. I feel it is an appropriate response to look at these concerns thoroughly so that we get the balance right between the encouragement of business activity and the deterrence of sharp practice and downright illegality."
"I have accordingly asked the Company Law Review Group under the highly esteemed chairmanship of Dr. Tom Courtney to consider the optimal framework for and content of the Directors' Compliance Statement. The Review Group is, I believe, the most suitable body to conduct such a review in the light of its expertise, its representative composition (it is composed of business, regulatory and professional interests) and its statutory advisory role on the reform and modernisation of company law."

Terms of Reference applying to referral of Directors' Compliance Statement to the Company Law Review Group for its consideration

The Company Law Review Group is asked to examine and report to the Minister for Trade and Commerce by end July, 2005 its views on the proportionality, efficacy and appropriateness of the Director's Compliance Statement as set out in section 45 of the Companies (Auditing and Accounting) Act 2003, having regard to the following factors:

* Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.[129]
* The scope of application and the requirements of the Director's Compliance Statement;
* Potential costs issues;
* Potential competitiveness issues; and
* Potential implementation issues.

In making its report the Review Group is requested to ensure that these are consistent with the goal on 'Making markets and regulation work better' set out in the Strategy Statement of the Department of Enterprise, Trade and Employment, i.e. to ensure that regulation is fair, balanced and effectively implemented in order to encourage commerce, ensure competitiveness, secure confidence in business and secure the welfare of citizens.

In addressing this issue the Review Group is asked to conduct its analysis and structure its report consistent with the model of regulatory impact analysis developed by the Working Group on Regulatory Impact Analysis.

129 Principles of Corporate Governance, Principle VI.D.7, OECD, Paris 2004.

F

Screening RIA

A Screening RIA should be included as part of any Memorandum for Government seeking permission to regulate where regulatory proposals do not meet the criteria for a Full RIA (taking account of the issues raised at paragraph 5.7). It should also be used as a framework for analysing draft EU Directives. It should contain the following:

1. Description of policy context, objectives and options (for example different forms of regulation)

(i) A brief description of the policy context.
(ii) An explicit statement of the objectives that are being pursued.
(iii) An identification of the various policy options or choices which are under consideration.

2. Identification of costs, benefits and other impacts of any options which are being considered

(i) Identification of likely costs, an estimation of their magnitude and to whom they fall.
(ii) A description of expected benefits and where these will fall.
(iii) Verification that there will not be disproportionately negative impacts on
- (a) national competitiveness
- (b) the socially excluded or vulnerable groups
- (c) the environment and that the regulations do not
- (e) involve a significant policy change in an economic market
- (e) impinge disproportionately on the rights of citizens
- (f) impose a disproportionate compliance burden on third parties and other criteria to be decided from time to time by Government

(iv) Summary of costs, benefits and impacts of each option identified in 1 identifying preferred option where appropriate.

3. Consultation
Summary of the views of any key stakeholders consulted - which must include any relevant consumer interests and other Government Departments.

4. Enforcement and compliance
Brief description of how enforcement and compliance will be achieved.

5. Review
Identify mechanisms for review and specify indicators which would demonstrate the success of the policy proposal.

Source: Report on the Introduction of Regulatory Impact Analysis, Department of the Taoiseach p. 20

COMPANIES REGISTRATION OFFICE
AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ

Notice of change in directors or secretaries or in their particulars

S195 Companies Act 1963 (inserted by s51 Companies Act 1990, and amended by s47 Companies (Amendment)(No. 2) Act 1999 and by s91 Company Law Enforcement Act 2001)
S249A Companies Act 1990 (inserted by s107 Company Law Enforcement Act 2001)
S43, s44 (other than subsection (2)) and s45 (other than subsections (3)(b) and (5)) Companies (Amendment)(No. 2) Act 1999
Companies Act 1990 (Form and Content of Documents Delivered to Registrar) Regulations 2002

CRO receipt date stamp

Companies Acts 1963 to 2003

B10

Tick box if bond is attached ☐
note six

Company number ☐☐☐☐☐☐

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

Company name
in full

Limited

Change(s)
note one

Date change(s) take(s) effect Day ☐☐ Month ☐☐ Year ☐☐☐☐

New secretary/director
including shadow/ alternate director

Please give details below of the person who has consented in writing to become secretary and/or director. ***(continued overleaf)*** *note two*

Surname
Forename
note three

Former surname
Former forename
note four

Date of birth *note five* Day ☐☐ Month ☐☐ Year ☐☐☐☐

Irish resident *note six* ☐

Alternate director *note seven* ☐

Residential address
note three

Business occupation
note five

Nationality
note five

Other directorships

Company *note eight*	Place of incorporation *note nine*	Company number

Consent
note ten

I hereby consent to act as:

☐ director of the aforementioned company and I acknowledge that as director I have legal duties and obligations imposed by the Companies Acts, other enactments and at common law.

☐ secretary of the aforementioned company and I acknowledge that as secretary I have legal duties and obligations imposed by the Companies Acts.

Signature

Date

Continue overleaf for certification

Presenter details

Name
Address

DX number | DX exchange
Telephone number | Fax number
E-mail | Reference number

Form effective date: 15 February 2005

New secretary/director
including shadow/alternate director

Surname
Forename *note three*

Former surname
Former forename *note four*

Date of birth *note five* — Day | Month | Year

Irish resident *note six* ☐ Alternate director *note seven* ☐

Residential address *note three*

Business occupation *note five*

Nationality *note five*

Other directorships

Company *note eight*	Place of incorporation *note nine*	Company number

Consent *note ten*

I hereby consent to act as:

☐ director of the aforementioned company and I acknowledge that as director I have legal duties and obligations imposed by the Companies Acts, other enactments and at common law.

☐ secretary of the aforementioned company and I acknowledge that as secretary I have legal duties and obligations imposed by the Companies Acts.

Signature

Date

Surname
Forename *note three*

Former surname
Former forename *note four*

Date of birth *note five* — Day | Month | Year

Irish resident *note six* ☐ Alternate director *note seven* ☐

Residential address *note three*

Business occupation *note five*

Nationality *note five*

Other directorships

Company *note eight*	Place of incorporation *note nine*	Company number

Consent *note ten*

I hereby consent to act as:

☐ director of the aforementioned company and I acknowledge that as director I have legal duties and obligations imposed by the Companies Acts, other enactments and at common law.

☐ secretary of the aforementioned company and I acknowledge that as secretary I have legal duties and obligations imposed by the Companies Acts.

Signature

Date

Certification

I hereby certify that the particulars contained in this form are correct and have been given in accordance with the Notes on Completion of Form B10.

Signature

Name *in bold capitals or typescript*

☐ Director ☐ Secretary *note eleven*

Date

NOTES ON COMPLETION OF FORM B10

These notes should be read in conjunction with the relevant legislation.

General This form must be completed correctly, in full and in accordance with the following notes.
Every section of the form must be completed. Where "not applicable", "nil" or "none" is appropriate, please state.
Where the space provided on Form B10 is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section. Where another Form B10 is used as a continuation sheet, it ought not to be completed in full and certified as to do so will result in it being treated as a separate form and incurring a separate filing fee. It should be headed “Continuation Sheet”.

note one Give details of change(s) eg appointment/resignation of a company officer, and specify date when same took effect. Only changes which occur on the same date may be registered by this notification. Otherwise, separate notifications should be made. Where the space provided here is considered inadequate a contination sheet(s) should be attached. If a new director/secretary has been appointed, also complete the **New secretary/director** section.

note two Where a director being appointed is disqualified under the law of another state (whether pursuant to an order of a judge, or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking, Form B10 **must** be accompanied by Form B74 (Statement of Director’s Disqualifications). Failure to file Form B74 where one is required results in the automatic disqualification of the person concerned from acting as a company officer in Ireland for the balance remaining of his/her foreign disqualification.

note three Insert the full name (initials will not suffice) and usual residential address. Where the secretary is a firm, the corporate name and registered address of the firm must be stated.

note four Any former forename and surname must also be stated. However, it does not include the following: (a) In the case of a person usually known by a title different from his/her surname, the name by which he/she is known previous to the adoption of a succession to the title; (b) in the case of any person, a former forename or surname where the forename or surname was changed or disused before the person bearing the name attained the age of 18 years or has been changed or disused for a period of not less than 20 years; (c) in the case of a married woman, the name or surname by which she was known previous to her marriage.

note five Applicable to directors only.

note six Applicable to directors only. Every company must have at least one Irish resident full director **or** a bond or certificate in place pursuant to s43(3) and s44 Companies (Amendment)(No.2) Act 1999. Note that an Irish resident alternate director is not sufficent for the purposes of s43 of that Act. Place a tick in the “Irish resident” box if the director is resident in the State in accordance with s43 of the 1999 Act as defined by s44(8) and (9). If no full director is so resident and no certificate has been granted, a valid bond must be furnished with Form B10, unless same has already been delivered to the CRO on behalf of the company. (Please note that "Irish resident" means resident in the Republic of Ireland.) For further information see CRO Information Leaflet No. 17.

note seven Applicable to directors only. If the company’s articles so permit, and subject to compliance with those articles, a full director may appoint a person to be an alternate or substitute director on his/her behalf. The appointment of any person to act as director is notifiable by a company to the CRO, regardless of how the appointment is described. The company is statutorily obliged to notify the CRO of the addition to and removal of each person from its register. In the event that a full director who has appointed an alternate director ceases to act as director, the company is required to notify the CRO of the termination of appointment of the full director **and** of his/her alternate. Note: CRO accepts no responsibility for maintaining the link between a full director and his/her alternate.

note eight Applicable to directors only. State the company name and number of other bodies corporate, whether incorporated in the State or elsewhere, of which the person is or has been director. Exceptions to this rule are made for bodies (a) of which the person has not been a director at any time during the past 10 years; (b) which the company is (or was at the relevant time) a wholly owned subsidiary; (c) which are (or were at the relevant time) wholly owned subsidiaries of the company.
Pursuant to s45(1) Companies (Amendment)(No.2) Act 1999, a person shall not at a particular time be a director of more than 25 Irish-registered companies. However, under s45(3) of the Act, certain directorships are not reckoned for the purposes of s45(1). For further information, see CRO Information Leaflet No.1.

note nine Place of incorporation if outside the State.

note ten Tick the relevant box(es).

note eleven Tick the relevant box(es). This form **must** be certified by a current officer of the company. Where another Form B10 is used as a continuation sheet, it ought not to be completed in full and certified as to do so will result in it being treated as a separate form and incurring a separate filing fee. It should be headed “Continuation Sheet”.

Further information

CRO address When you have completed and signed the form, please send with the accompanying fee to the Registrar of Companies at:

Parnell House, 14 Parnell Square, Dublin 1
DX 145001 Parnell House

Payment If paying by cheque, postal order or bank draft, please make the fee payable to the Companies Registration Office. Cheques or bankdrafts must be drawn on a bank in the Republic of Ireland.

Please *carefully* study the explanatory notes above. A Form B10 that is not completed correctly or is not accompanied by the correct documents or fee is liable to be rejected and returned to the presenter by the CRO pursuant to section 249A Companies Act 1990 (inserted by section 107 Company Law Enforcement Act 2001). Unless the document, duly corrected, is relodged in the CRO within 14 days, it will be deemed to have never been delivered to the CRO.

FURTHER INFORMATION ON COMPLETION OF FORM B10, INCLUDING THE PRESCRIBED FEE, IS AVAILABLE FROM www.cro.ie OR BY E-MAIL info@cro.ie

Produced by Legato Design | www.legatodesign.net

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www.clrg.org

Appendix 2 Section 225 Companies Act 2014

Directors' compliance statement and related statement

225. (1) In this section—

"amount of turnover" and "balance sheet total" have the same meanings as they have in F73**[***section 275***]**;

"relevant obligations", in relation to a company, means the company's obligations under—

(a) this Act, where a failure to comply with any such obligation would (were it to occur) be—

(i) a category 1 offence or a category 2 offence; or

(ii) a serious Market Abuse offence or a serious Prospectus offence;

and

(b) tax law;

"serious Market Abuse offence" means an offence referred to in ***section 1368***;

"serious Prospectus offence" means an offence referred to in ***section 1356***;

"tax law" means—

(a) the Customs Acts;

(b) the statutes relating to the duties of excise and to the management of those duties;

(c) the Tax Acts;

(d) the Capital Gains Tax Acts;

(e) the Value-Added Tax Acts;

(f) the **Capital Acquisitions Tax Consolidation Act 2003** and the enactments amending or extending that Act;

(g) the **Stamp Duties Consolidation Act 1999** and the enactments amending or extending that Act; and

(h) any instruments made under an enactment referred to in any of *paragraphs (a)* to *(g)* or made under any other enactment and relating to tax.

(2) The directors of a company to which this section applies shall also include in their report under ***section 325*** a statement—

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations; and

(b) with respect to each of the things specified in *subsection (3)*, confirming that the thing has been done or, if it has not been done, specifying the reasons why it has not been done.

(3) The things mentioned in *subsection (2)(b)* are—

(a) the drawing up of a statement (to be known, and in this Act referred to as, a "compliance policy statement") setting out the company's policies (that, in the directors' opinion, are appropriate to the company) respecting compliance by the company with its relevant obligations;

(b) the putting in place of appropriate arrangements or structures that are, in the directors' opinion, designed to secure material compliance with the company's relevant obligations; and

(c) the conducting of a review, during the financial year to which the report referred to in *subsection (2)* relates, of any arrangements or structures referred to in *paragraph (b)* that have been put in place.

(4) The arrangements or structures referred to in *subsection (3)(b)* may, if the directors of the company in their discretion so decide, include reliance on the advice of one or more than one person employed by the company or retained by it under a contract for services, being a person who appears to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations.

(5) For the purposes of this section, the arrangements or structures referred to in *subsection (3)(b)* shall be regarded as being designed to secure material compliance by the company concerned with its relevant obligations if they provide a reasonable assurance of compliance in all material respects with those obligations.

(6) If default is made in complying with *subsection (2)*, each director to whom the default is attributable shall be guilty of a category 3 offence.

(7) Subject to *subsection (8)*, this section shall apply to a company if, in respect of the financial year of the company to which the report referred to in *subsection (2)* relates—

(a) its balance sheet total for the year exceeds—

(i) subject to *subparagraph (ii)*, €12,500,000; or

(ii) if an amount is prescribed under ***section 943****(1)(i)*, the prescribed amount;

and

(b) the amount of its turnover for the year exceeds—

(i) subject to *subparagraph (ii)*, €25,000,000; or

(ii) if an amount is prescribed under ***section 943****(1)(i)*, the prescribed amount.

(8) This section does not apply to any company that is of a class exempted under ***section 943****(1)(g)* from this section.

Appendix 3 Corporate Governance Reporting in other jurisdictions

MEMORANDUM

To: Corporate Governance Committee, Company Law Review Group

From: Katie Nagle BL

Re: Corporate Governance Reporting: an overview

INTRODUCTION

1. Section 225 of the Companies Act 2014 ("**the 2014 Act**") provides that the directors of a company shall include in their report under s 325, a statement acknowledging that they are responsible for securing the company's compliance with its relevant obligations and with respect to the matters in s 225(3), confirming that the thing has been done or, if it has not been done, specifying the reasons why it has not been done.

2. The matters listed in s 225(3) are:

   - The drawing up of a compliance policy statement setting out the company's policies that in the director's opinions are appropriate to the company, respecting compliance by the company with its relevant obligations;

   - The putting in place of appropriate arrangements or structures that are, in the director's opinion, designed to secure material compliance with the company's relevant obligations; and

   - The conducting of a review during the financial year to which the report relates of any arrangements or structures, referred to in the foregoing paragraph, that have been put in place.

3. This memorandum will explore the position of various European countries and other common law jurisdictions to ascertain the position taken in respect of the directors' compliance statement, general corporate government and other issues which may be of interest.

4. For the purposes of this memorandum, I have not provided detailed information on the position in Ireland.

THE UNITED KINGDOM

5. Corporate governance in the United Kingdom is covered by the Companies Act 2006 ("**the UK Companies Act**") which sets out the requirements for corporate decision making and the consequences of getting it wrong.

6. The UK have also implemented the Corporate Governance Code ("**the Code**"); an updated set of Principles that emphasise the value of good corporate governance for long-term sustainable success. The introduction to the Code helpfully sets out how, through effective use of the Code, good governance of the company can contribute to its long- term sustainable success and achieves wider objectives.

7. The Code does not set out a rigid set of rules; instead, it offers flexibility through the application of the Principles through "*comply or explain*" provisions and supporting guidance.

8. The effective application of the Provisions in the Code should be supported by high quality reporting on the Provisions. The Code encourages companies to avoid a 'tick box' approach in their compliance.

9. An alternative to complying with a Provision may be justified in particular circumstances based on a range of factors, including the size, complexity, history and ownership structure of a company.

10. Explanations should set out the background, provide a clear rationale for the action the company is taking, and explain the impact that the action has had. Where a departure from a Provision is intended to be limited in time, the explanation should indicate when the company expects to conform to the Provision. Explanations are a positive opportunity to communicate, not an onerous obligation.

11. Corporate governance reporting should also relate coherently to other parts of the annual report – particularly the Strategic Report and other complementary information – so that shareholders can effectively assess the quality of the company's governance arrangements, and the board's activities and contributions. This should include providing information that enables shareholders to assess how the directors have performed their duty under s 172 of the UK Companies Act to promote the success of the company.

12. The Code is monitored by the Financial Reporting Council who publishes an annual report on its impact and implementation.

Application of the Code

13. The Code is applicable to all companies with a premium listing, whether incorporated in the UK or elsewhere. The new Code applies to accounting periods beginning on or after 1 January 2019.

14. For parent companies with a premium listing, the board should ensure that there is adequate co-operation within the group to enable it to discharge its governance responsibilities under the Code effectively. This includes the communication of the parent company's purpose, values and strategy.

15. Externally managed investment companies (which typically have a different board and company structure that may affect the relevance of particular Principles) may wish to use the Association of Investment Companies' Corporate Governance Code to meet their obligations under the Code.

16. A Premium Listing means that a company must meet standards that are over and above (often described as 'super-equivalent') those set forth in the EU legislation, including the Code. Investors trust the super-equivalent standards as they provide them with additional protections. By virtue of these higher standards, companies may have access to a broader range of investors and may enjoy a lower cost of capital owing to heightened shareholder confidence. A Premium Listing is only available to equity shares issued by commercial trading companies.[1]

AUSTRALIA

17. Corporate governance in Australia is shaped by a framework of legal rules, soft law and market expectations. It does not have a general corporate governance code that all companies must comply with.

18. The Corporations Act 2001 ("**Corporations Act**") regulates the affairs of the internal companies which includes, as one would expect, the nature and form of a company's constituent document, the roles and powers of the board of directors and the shareholder, shareholder meetings and shareholder remedies.

19. Section 180 deals with the general duties in civil proceedings (and are fully detailed therein). The duties which apply to a company director are those which are generally provided by company directors; a duty to act with care and diligence[2]; make business judgment decisions in good faith and for a proper purpose, ensuring they do not have a material personal interest in the subject matter of the judgment, and to inform themselves about the subject matter of the judgment and to the extent they reasonably believe to be appropriate and rationally believe that the judgment is in the best interests of the judgment[3]; a general duty to act in good faith is also contained therein.[4]

The Directors report

20. Section 298 deals with the annual directors' report. Section 299 provides some general information which ought to be contained in the Annual directors' report; s 299A provides the additional requirements for listed entities; the specific information is contained in s 300.

21. Section 302 deals with the directors' report and the half year financial report. The contents of the half year report are dealt with in section 303 generally and interestingly, at section 303(4) entitled "*Director's declaration*" provides:

> *(4) The directors' declaration is a declaration by the directors:*
>
> > *(c) whether, in the directors' opinion, there are reasonable grounds to believe that the disclosing entity will be able to pay its debts as and when they become due and payable; and*

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[1] A Guide to Listing on the London Stock Exchange (London Stock Exchange, November 2010) https://docs.londonstockexchange.com/sites/default/files/documents/guide-main-market-pdf.pdf p 8
[2] Corporations Act 2001, Section 180(1)
[3] Corporations Act 2001, Section 180(2)(a) – (d)
[4] Corporations Act 2001, Section 181

(d) whether, in the directors' opinion, the financial statement and notes are in accordance with this Act, including:

(i) section 304 (compliance with accounting standards); and
(ii) section 305 (true and fair view).

(5) The declaration must:

(a) be made in accordance with a resolution of the directors; and
(b) specify the day on which the declaration is made; and
(c) be signed by a director.

22. In particular, the requirements with which the director must declare compliance are ss 304 and 305, which provide:

304 Compliance with accounting standards and regulations

The financial report for a half-year must comply with the accounting standards and any further requirements in the regulations.

305 True and fair view

The financial statements and notes for a half-year must give a true and fair view of:

(a) the financial position and performance of the disclosing entity; or
(b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 304 for financial reports to comply with accounting standards.

23. One will note that the requirements of a director in his/her declaration is not as onerous as the Irish provisions, and a director must only declare that the report is in compliance with the aforementioned sections of the Corporation Act. Moreover, the requirement for a directors' declaration would appear to only apply to the half year financial report.

Corporate governance generally

24. The Australian Securities Exchange ("**ASX**") is the principal securities exchange for listed equities in Australia. Companies listed on the ASX must comply with the listing rules ("**the Rules**"). These are similar in nature to the Code in the United Kingdom. The Rules supplements the Corporation Act.

25. Similar to the Code, it operates on an "*if not, why not*" basis. Essentially, the Rules require listed entities to report annually on the extent to which they follow the recommendation in

the code. If a listed entity does not follow a recommendation, it must identify that fact in its report and explain why.

26. The corporate governance environment in Australia is currently going through a period of significant transformation raising the question of whether in this fluid and shifting environment company and board performance can still be assessed largely on the basis of profit, share price and dividends generated over the short term.[5]

BELGIUM

27. In Belgium, the main principles of corporate governance are enshrined in the Belgian Companies and Associations Code ("**CAC**"). Listed companies are subject to the Belgian Corporate Governance Code ("**the Belgian Code**"). The EU requirements are also applicable and are discussed hereunder.

28. The Belgian Code supplements the CAC and operates on the same "*comply or explain*" basis, as we have previously seen. The Belgian Code, however, acknowledges that compliance with a number of the provisions, provided that there is justification for same. The introduction to the Belgian Code notes:

> *This requires board members to reflect on the objective of the provision and the underlying idea.* ***A deviation is not a problem as such, provided that the reasons are adequately motivated and reported****. The 2020 Code provides guidance on how to do this. The Committee will continue to monitor the quality of the reported explanations on an annual basis.* ***Where explanations are given that are insufficiently convincing, the Committee will take this up directly with the company in question.*** (emphasis added)

29. The CAC sets out some of the requirements of directors' duties, although it should be noted that there is no exhaustive list laid down in Belgian law of the key duties of directors.[6] The duties are those we commonly see including a duty of care and the duty of loyalty; decision making with respect to the general strategy of the company and acting as a reasonable, prudent and diligent person; and the convening of and reporting to the general shareholders' meeting, amongst others.

30. I have not found any similar provisions to the directors' compliance statement, or any requirement of a company director of a similar nature to the Irish legislation. Although I am confident that no such provision exists in Belgian Law, I have had to use online translations tools to translate the matters to English and there is a possibility that some of the translations are not accurate. All efforts have been made to ensure accuracy.

[5] Rix, *The new Australian system of corporate governance: Board governance and company performance in a changing corporate governance environment*, January 2019

[6] Global Guide to Directors' Duties, Belgium, (DLA Piper, 31 January 2022) <https://www.dlapiperintelligence.com/directorsduties/countries/index.html?t=duties-and-obligations&s=03-transactions&c=BE>

SINGAPORE

31. Singapore is an oft forgotten common law jurisdiction which models its law on the Common Law system of the United Kingdom. Company Law is governed by the Companies Act 1967, as amended ("**the Singapore Companies Act**"). The Act largely resembles the UK Companies Act in form and substance.

32. Part 5 'Management and Administration', Division 2 deals with directors. The normal provisions applicable to directors are contained therein; who can act as a director[7]; resignation of a director[8]; and the qualifications of a director.[9]

33. Directors' declarations (where a company has only one director), are provided for in s 157B:

> *157B. Where a company only has one director, that director may make a declaration required or authorised to be made under this Act by recording the declaration and signing the record; and such recording and signing of the declaration satisfies any requirement in this Act that the declaration be made at a meeting of the directors.*

34. Directors' duties in relation to financial reporting are provided for in ss201(2) and 201(5) of the Singapore Companies Act. Essentially, the directors are responsible to lay before the company at the annual general meeting, financial statements that "**must comply with**"[10] the applicable accounting standards and which give a true and fair view of the financial position and performance of the company. Non-compliance with the standards is dealt with in ss 201(12) and (15), and notes that if a company has obtained the approval of the Registrar to such non-compliance or the Minister may by order in the Gazette, substitute other accounting standards for applicable companies.[11]

35. One will note the mandatory requirements imposed on a director to comply with the applicable accounting standards, however I am of the view that this mandatory duty falls short of the rigorous compliance statement as is required in this jurisdiction.

ESG (Singapore)

36. Directors of companies in Singapore as under a general duty to act in the best interests of the company, which could possibly extend to ESG related matters.

37. Corporate governance is provided for in the Code of Corporate Governance ("**the Singapore Code")** which is applicable to listed companies. Similar to other jurisdictions, the Singapore Code operates on a "*comply or explain basis*" and aims to promote high levels of corporate governance. The emphasis of the Code is for companies to provide thoughtful and meaningful explanations around their practices, and for investors to carefully consider these discussions as part of their engagements with companies.

[7] Section 145(1), Companies Act 1967
[8] Section 145(4A), Companies Act 1967
[9] Section 147, Companies Act 1967
[10] Section 201(2), Companies Act 1967
[11] The Minister is not defined in the Singapore Companies Act generally, nor specifically as it relates to this section. One would assume this is reference to the Minister for Finance.

38. I have reviewed the Singapore Code and there is no analogous provision to that contained in the Irish legislation. The closest to this, which one will note does not place the same task on a director as in this jurisdiction, is Principle 9 and the accompanying Provisions, which provide:

> ***<u>Principle:</u>***
>
> *9 The Board is responsible for the governance of risk and ensures that Management maintains a sound system of risk management and internal controls, to safeguard the interests of the company and its shareholders17.*
>
> ***<u>Provisions:</u>***
>
> *9.1 The Board determines the nature and extent of the significant risks which the company is willing to take in achieving its strategic objectives and value creation. The Board sets up a Board Risk Committee to specifically address this, if appropriate.*
>
> *9.2* ***<u>The Board requires and discloses</u>*** *in the company's annual report* ***<u>that it has received assurance from</u>****:*
>
> > *(a) the CEO and the Chief Financial Officer ("CFO") that the financial records have been properly maintained and the financial statements give a true and fair view of the company's operations and finances; and*
> >
> > *(b) the CEO and other key management personnel who are responsible, regarding the adequacy and effectiveness of the company's risk management and internal control systems.* (emphasis added)

39. Following a public consultation in 2021 by Task Force on Climate-related Financial Disclosures, mandatory climate reporting on a comply or explain basis is being introduced on a phased basis set to commence in 2023.[12] It would appear that some form of board statement is required, although the text of this is not available, however a guidance note prepared by SGX[13] records:

> *The sustainability report should contain a statement of the Board that it has considered sustainability issues in the issuer's business and strategy, determined the material ESG factors and overseen the management and monitoring of the material ESG factors. In addition, the sustainability report should describe the roles of the Board and the management in the governance of sustainability issues.*

EUROPEAN UNION REQUIREMENTS

40. I have also considered other European countries individually which operate a civil law system, but to little avail e.g. Germany and The Netherlands. Most civil countries operate

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[12] Consultation Paper on Climate and Diversity, 26 August 2021, <https://www.sgx.com/regulation/public-consultations/20210826-consultation-paper-climate-and-diversity>

[13] Sustainability Reporting, <https://www.sgx.com/regulation/sustainability-reporting>

in a manner similar to Belgium, i.e. listed companies are required to comply with a given code or set of standards on a comply or explain basis.

41. It is not proposed to examine other civil law jurisdictions in detail during this memorandum.

42. EU countries are, of course, subject to Directive 2014/95/EU[14] as it amended Directive 2013/34/EU ("**the Accounting Directive**"). This provides for a "*comply or explain*" approach in relation to non-financial statements of large companies.

43. In the wake of calls for greater transparency and consistency in sustainability reporting, on 21 April 2021, the European Commission adopted a proposal for a Corporate Sustainability Reporting Directive ("**CRSD**").

44. The European Parliament formally adopted the CSRD on 10 November 2022 and the Council is expected to adopt the proposal on 28 November 2022, after which it will be signed and published in the EU Official Journal. It will enter into source 20 days after publication. EU Member States will have 18 months to transpose the CSRD into national law, including Ireland.

45. We await the final text of the CSRD, but the proposed text can be considered at present.

46. CSRD changes will mean that large companies must publicly disclose information on how they engage with environmental and social issues, human rights and governance facts and under a new concept "*double materiality*", will also have to disclose how those issues impact the company.

47. The CSRD mainstreams sustainability reporting and puts it on equal footing to traditional financial reporting and based non common EU standards. It amends a number of existing directives, the Accounting Directive, Directive 2006/43/EU[15] and Directive 2004/109/EC[16].

48. It will apply to all large companies[17] with some exemptions to subsidiaries if the parent company's consolidated management report complies with EU reporting standards. The SCRD will also apply to listed Small and Medium Enterprises ("**SMEs**"), but with an opt out provision during the transitional period (meaning they will be exempted from the CSRD until 2028.)

49. It will require more detailed reporting requirements than those provided for in the Accounting Directives. Such reporting must be certified by an accredited independent

[14] Directive 2014/95/EE of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups
[15] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC
[16] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC
[17] A large company is one which meets two out of the three criteria, as follows:
1) At least 250 employees;
2) annual turnover exceeds €40m;
3) assets in excess of €20m.

auditor and certifier, who must ensure that the sustainability information complies with the certification standards that have been adopted by the EU.

50. It also introduces the "*double materiality*" concept which means Companies must not only disclose how sustainability issues impact the company (impacts inward), but also how the company impacts society and the environment (impacts outward).

51. Companies will be obliged to report on issues such as sustainability targets and the progress made to achieve those targets; roles and responsibility of management and adverse impacts connected with the company's value chain.

52. Once the final text is published, this issue can be re-examined further. It would appear that this will be a helpful comparator as it will impose strict obligations on a company which ought to be complied with and could be of relevance to the obligations imposed on a company director in his/her compliance statement.

CONCLUSION

53. As has been outlined herein, there is no comparative provisions to s 225 of the Companies Act 2014. While other jurisdictions are of relevance and bear some similarity, the obligation imposed on directors in, for example Singapore and the United Kingdom, is not as onerous as the obligation imposed in this jurisdiction.

54. It was also useful to look at the Directors report in other jurisdictions, namely Australia and Singapore, to compare their requirements to this jurisdiction. One notes the absence of any director compliance statement as known here.

55. This memorandum has also focused on corporate governance and in particular, a focus on corporate sustainability reporting. Most countries have an applicable code which operates on a "*comply or explain basis*" which applies to listed companies only.

56. The CSRD, once adopted, may prove a helpful comparator as it proposes requirements on companies in their sustainability reporting requirements which ought to be complied with. The CSRD will ensure good corporate governance on sustainability reporting once adopted and transposed.

57. Further review may be required on particular issues herein, namely the CSRD.

58. Nothing further occurs.

Appendix 4 Analysis of the common themes drawn from the surveys

Draft Working Paper on Common Themes drawn from the Results of the CLRG Surveys on the effectiveness and usability of the Directors' Compliance Statement (DCS)

August 2023

CONTEXT FOR THIS PAPER

The Corporate Governance Committee ("**the Committee**") of the Company Law Review Group ("**CLRG**") produced two surveys to assist in its review of the Directors' Compliance Statement ("**DCS**"). The Committee sought responses on the effectiveness and usability of the DCS.

Two surveys were created, similar in nature, with one issued to practitioners via members of the Committee, and the second to directors through the Institute of Directors' monthly ezine. Both surveys were also advertised on the websites of the Department of Enterprise, Trade and Employment and the Corporate Enforcement Authority and their respective social media platforms.

This paper looks at the issues that emerge from the results of both practitioners and directors. In so doing, reference is made to the "*practitioners' survey*" and the "*directors' survey*" respectively.

A separate document provides the breakdown of the responses to all questions in both surveys. There were 31 responses to each of the surveys. For ease of reference a table setting out the responses from both groups to the common questions in both surveys is included at Appendix 1.

EXECUTIVE SUMMARY

As will be seen herein, the results varied greatly between both surveys. Overall, the results suggest that the practitioners support the DCS, while the directors display a lack of understanding of the DCS. 52% of practitioners and 45% of directors agreed that the DCS should continue to apply to all companies to which it currently applies. Of all participants, 48% voted for the option to retain the DCS as it currently applies, which means 52% voted to reduce the scope in some way.

When asked if the DCS was worthwhile, the results were varied. 45% of practitioners agreed while 26% did not agree. The directors on the other hand had the largest percentage of "don't know" and "undecided" at 52%. Only 32% of participants in the Directors' survey agreed the DCS was worthwhile.

The majority of the practitioners (65%) agreed the DCS was relevant with 19% disputing its relevance. Just under half the directors accepted the DCS was relevant but nearly the same number again voted "don't know" or "undecided". It is promising that only 3 of 31 directors thought it not relevant.

The following table highlights the top positive and negative results from both surveys:

Top Positives	1) Compliance has a tangible value (37/62) 2) The DCS is relevant (34/62) 3) Biggest perceived benefits are wider/greater awareness of legal obligations within the company (31/62) and contributes to a planned and systematic approach to compliance (27/62)
Top Negatives	1) 38/62 respondents voted No/Don't know/Undecided on whether the DCS is worthwhile 2) 33/62 respondents voted No/Don't know/Undecided on whether the DCS contributes towards a company's compliance structures 3) The biggest perceived challenges are disproportionate costs to the company as compared with perceived benefits and unnecessary duplication of existing corporate governance standards which together accounted for 44 out of 61 votes

SUMMARY OF THE PRINCIPAL THEMES THAT EMERGE FROM THE SURVEYS

A number of issues that featured in respondents' answers to survey questions are summarised in the table below, with greater detail provided (where possible) thereafter. Some of the main issues that emerge from respondents' survey responses include:

for potential improvements	of concern	ɪstions
1. Scope for providing additional guidance to directors	1. Seen by some as a "*tick box*" exercise	1. Expand the current definition of "*relevant obligations*"
	2. Concerns as to the perceived costs of implementation and compliance	2. Mirror the SAO regime in the UK, i.e., appoint a Compliance Officer
	3. Perceptions as to duplication, through the DCS process, of existing corporate governance measures	3. Consider a role for the auditor in opining in some form on the DCS
		4. Increase current penalties for non-compliance

1. Knowledge levels, enhanced guidance and practical advice

It is apparent, from both surveys, that some respondents – both company directors and, somewhat surprisingly, professional advisors – do not understand what is required by s 225 or what is, and what is not, a criminal offence under the provision.

Some respondents suggested that additional information and guidance should be provided regarding directors' obligations.

2. Potential for success but is now a "*tick box*" exercise

The results of the survey highlighted that when the DCS was first introduced, there was a flurry of activity to implement processes and protocols. Now, however, some respondents are of the view that the DCS is a "*tick box*" exercise. It was suggested that the level of scrutiny afforded to the DCS by directors appears to be "*light touch*" in nature. There is an apparent correlation between the size (turnover) of the company and the level of engagement by, and/or knowledge of, the director of the DCS – which is perhaps unsurprising.

3. Costs to the smaller company

Concern was expressed by directors of, and advisors to, smaller companies about the perceived costs associated with the DCS. Concerns were expressed about both the establishment and implementation of the DCS system (which is optional under the provision, a point that is expanded on below in section entitled The Legislative Framework – Section 225) and the annual cost of maintenance of that system. Concerns were also raised about any potential requirement for a compliance director (see below).

One suggestion put forward was the introduction of a '*slimmed down*' version of the DCS for smaller companies (within scope) to reduce the associated impact. In circumstances where compliance is, at present, optional, what 'slimmed down' would look like would require further consideration.

4. Complements the current focus on ESG and Tax governance but is duplicate of existing compliance measures

There was positive feedback that the DCS complements the current focus across the EU on ESG and tax compliance. However, a significant minority of respondents expressed the view that the DCS is an unnecessary duplication of existing compliance measures with which a company ought to comply. This, of course, does not take into account the fact that, as above, the DCS is optional and directors are free to explain why they have elected not to comply with certain measures, as set out in s 225(3).

5. Expansion of the current definition of "*relevant obligations*"

The view was expressed by 26% (16/62) of all participants that the current definition of "*relevant obligations*" should be expanded. However, 42% (26/62) voted to continue the existing definition of relevant obligations.

6. Delegation of the DCS and the potential involvement of a compliance officer

The results of the directors' survey indicate that compilation of the DCS is often delegated by the directors. However, that is both unsurprising and consistent with the approach usually adopted by directors as regards the preparation of a company's financial statements. Clearly, however, in both cases, responsibility for approval resides with the directors.

The surveys also asked about the potential involvement of a compliance officer (similar to the SAO regime in the UK). While some participants noted the effectiveness of the SAO regime, the results showed a slight apprehension about the introduction or involvement of a compliance officer.

7. The Role of Auditor

Introducing a role for the auditor in the DCS process was perceived as favourable to a certain extent, with half of the practitioners who responded voting to introduce a requirement for the auditors to declare 'inconsistencies' as well as a large minority voting to introduce a verification role for the auditors.

8. Non-Compliance, Penalties and Enforcement

From the responses received, it is clear that there is a significant lack of understanding/clarity as to what does, and does not, constitute an offence under the provision. Against that backdrop, a number of respondents called for increased penalties for non-compliance. However, there is no evidence available to suggest that the provision is not being complied with, and none was proffered by any of the respondents.

THE CONTEXT WITHIN WHICH THE DIRECTORS' COMPLIANCE STATEMENT WAS ORIGINALLY INTRODUCED

The directors' compliance statement was first introduced by Section 45 of the 2003 Act, although this section was never commenced. Its introduction was set against the backdrop of the 1998 McDowell Working Group on Company Law Compliance and Enforcement which identified a "culture of non-compliance" in Irish Company law[1], and also the Review Group on Auditing's 2000 DIRT report[2], which recommended the introduction of the directors' compliance statement owing to its finding that non-compliance by Irish companies was more widespread than had been thought.

The objective of the directors' compliance statement was to foster a culture of compliance within Irish companies by ensuring appropriate procedures were in place and to emphasise to directors their responsibility in ensuring the company's compliance with its statutory obligations. Under section 45 of the 2003 Act, directors of qualifying companies would have been required to prepare a compliance statement setting out the company's policies for ensuring compliance with its statutory obligations, its internal control procedures for securing compliance and the arrangements for implementing and reviewing the effectiveness of its policies. They would also have been required to include an annual compliance statement in their annual report to the shareholders in which they were to acknowledge that they were responsible for securing the company's compliance with its relevant obligations and confirm the necessary procedures were in place to ensure such compliance. If this was not done, they would be required to explain why not – "comply or explain".

Failing to prepare a compliance statement under the Act was a criminal offence carrying up to a 12-month sentence on summary conviction or up to 5 years on indictment. Making a false statement was also an offence under the Act.

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[1] *Parliamentary Inquiry into DIRT*, First Report by the Committee of Public Accounts (Stationery Office, Pn 7963, 1999)

[2] See *The Report of the Review Group on Auditing* (Stationery Office Pn 8683, 2000)

Section 45 was to apply to all public companies and to private limited companies with a turnover exceeding €15,236,853 and a balance sheet exceeding €7,618,428.

The relevant obligations under section 45 were to include any obligations under the Companies Acts, Tax Acts, and any other enactments that may materially affect the company's financial statements.

The Act also created a role for audit committees who would have been required to review the compliance statement and make a recommendation to the board prior to its approval. Auditors would have also been required to state in the auditor's report whether the assertions in the directors' compliance statement were fair and reasonable in their opinion and to report any deficiencies to the Director of Corporate Enforcement. It would also be a criminal offence under the Act if an auditor failed to comply with these obligations.
Following opposition from the business community[3], the compliance statement was referred to the CLRG for its views on the proportionality, efficacy and appropriateness as set out in section 45. The CLRG recommended against commencing the provision and instead proposed a compromise text, known as *Section X,* which sought to minimise the burden to businesses while achieving the same aims as the original section 45. The CLRG's draft text was ultimately adopted, almost verbatim, as section 225 of the Companies Act 2014.

THE LEGISLATIVE FRAMEWORK – SECTION 225

Section 225 of the Companies Act 2014 requires directors of in-scope companies to complete an annual Directors' Compliance Statement ("DCS"), which requires to be set out within the Directors' Report. The DCS requires the directors to:

i. acknowledge their responsibility for securing the company's compliance with its relevant obligations, and

ii. either confirm that certain measures, as set out in s 225(3), have been complied with, or, if those measures have not been complied with, to explain why not.

There is, therefore, no legal obligation to comply with the measures set out in s 225(3). Rather, it is permissible to elect not to comply with those measures provided that the directors explain their rationale. This is often referred to as a "*comply or explain*" provision.

Section 225(6) provides that (i) failure to include a DCS in the Directors' Report, or (ii) to comply with the comply or explain requirement referenced above constitutes an offence. These are the only DCS-related offences provided for under company law.

The penalty for failure to comply with the requirements of s 225(2) is provided for in s 225(6) as a category 3 offence.[4] A person found guilty of a category 3 offence shall be liable, on summary conviction, to a class A fine (not exceeding €5,000) or imprisonment for a term not exceeding 6 months, or both. Such alleged offences are prosecuted in the District Court only.

CONSIDERATION OF COMMON THEMES

[3] Deirdre Ahern *Directors' Compliance Statements under the microscope* Commercial Law Practitioner 2006, 13(5), 137-145
[4] All categories of offences are set out in the Appendix hereto.

1. Knowledge levels, enhanced guidance and practical advice

Despite the fact that section 225 was commenced in 2015 and that there is a wealth of information available on the subject of the DCS, including:

⇒ a plain reading of s 225 itself,

⇒ guidance notes (published free of charge) from many different professional services firms including Deloitte; Grant Thornton; McCann Fitzgerald; and William Fry amongst many others,

⇒ a detailed practice note published by the Law Society, and

⇒ the CRO and CEA websites, both of which contain information on the DCS and on directors' duties more generally,

it is apparent, from both surveys, that some respondents – both company directors and, somewhat surprisingly, professional advisors – do not understand what is required by s 225 or what is, and what is not, a criminal offence under the provision.

There also appears to be a misunderstanding by some survey respondents as to which companies fall under the remit of the DCS; one will recall the caveats of s 225(7). It is not clear what participants understood as the definition of "small company".[5]

Some respondents suggested that additional information or guidance should be provided regarding directors' obligations. While there may be merit to that suggestion, at a practical level, the question arises as to what additional guidance/advice could be provided that is not already available on a statutory provision that is far from complex in its construction.

2. Potential for success but is now a "*tick box*" exercise

The results of the survey highlighted that when the DCS was first introduced, there was a flurry of activity to implement processes and protocols. Now, however, some respondents are of the view that the DCS is a "*tick box*" exercise. It was suggested that the level of scrutiny afforded to the DCS by directors appears to be "*light touch*" in nature. There is an apparent correlation between the size (in turnover terms) of the company and the level of engagement by, and/or knowledge of, the director of the DCS – which is perhaps unsurprising.

The results of the directors' survey indicate that drafting of the DCS is often delegated by the directors. However, this is unsurprising in that it is consistent with the approach that, for example, is usually adopted by company directors as regards the preparation of a company's financial statements. Clearly, however, in both cases, ultimate responsibility for review and approval resides with the directors.

[5] The definition of an SME is anchored in sections 280A-G of the 2014 Act and is linked to staff headcount, turnover or balance sheet total.
A medium sized company has <250 staff headcount, turnover ≤ € 50 m or balance sheet total ≤ € 43 m.
A small company has <50 staff headcount, turnover ≤ € 10 m or balance sheet total ≤ €10 m.
A micro company has <10 staff headcount, turnover ≤ € 2 m or balance sheet total ≤ € 2 m.

Points made by respondents included the following:

⇒ the DCS has become generic, i.e., it does not actually detail the work which is being done by the directors to ensure compliance. While this may be true, it is also the case that s 225 does not currently require such information to be provided in the DCS. Any such criticism is, therefore, a criticism of the provision itself as opposed to the practical operation of same.

⇒ the DCS has potential, but the true potential is underutilised,

⇒ it was suggested that there is a difference in approach to compliance with the DCS, depending upon the size of the company involved. It was suggested that, whereas larger companies have incorporated the DCS process into their corporate governance structures and arrangements, this is much less so amongst smaller companies. This could not, however, be described as a revelation.

⇒ many companies see the cost of implementation and maintenance of procedures as a hinderance. Many companies do not wish to spend the money required to set it up.

⇒ a number of solicitors stated that they have a template in being which is used for the DCS; they will prepare the wording and it will be subsequently adopted and approved by the Board. Again, this couldn't be described as surprising; company directors pay professional service firms to assist them with such matters.

From the responses to the directors' survey, a correlation can be drawn between the size (turnover) of the company and the level of engagement by a director and/or knowledge of the director of the DCS. In companies with higher turnover, the DCS has, according to some respondents, become formulaic and, it is suggested, a statement is presented to directors who sign on the dotted line. There is a perception that directors do not themselves engage with the DCS and that it is the practitioners who are actually engaging with the DCS and presenting it for sign off.[6] While that may well be true in some instances, there is no evidence, and none was proffered, that company directors in general do nothing more than sign a document that is placed in front of them.

On the other hand, 67% (21 of 31) of practitioners agreed that the DCS promoted awareness of directors' responsibility for securing the company's compliance with its obligations. There is a disconnect between the surveys on this point.

3. **Costs to the smaller company**

Concern was expressed by directors of, and advisors to, smaller companies about the perceived costs associated with the DCS. Concerns were expressed about both the establishment and implementation of the DCS system (which, as above, is optional under the provision) and the annual cost of maintenance of that system. One company secretary suggested that the initial cost of implementation was €10,001- 50,000 and the ongoing costs are between €0 – 10,000.

One suggestion put forward was the introduction of a '*slimmed down*' version of the DCS for smaller companies (within scope) to reduce the associated impact. As s 225 does not require information on the internal control procedures for securing compliance, what '*slimmed down*' would look like would require further consideration.

[6] There is further discussion of delegation at subheading number 5.

4. **Complements the current focus on ESG and Tax governance but is duplicate of existing compliance measures**

There is a push at present for enhanced ESG and tax governance; in some companies the DCS has complemented these issues.

In July 2021, the European Commission announced a renewed Sustainable Finance Strategy which aimed to direct greater investment towards environmentally sustainable activities. This included a number of measures including EU Regulation 2021/1119, Climate Action and Low Carbon Development (Amendment) Act 2021, Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) and the EU Taxonomy Climate Complementary Delegated Act.[7]

There is a suggestion in some of the responses that this is important to various stakeholders, e.g., investors. It is also suggested by a professional adviser that "*some large institutional investors are divesting from companies where they have concerns over tax governance*."

There was positive feedback that the DCS complements the current focus across the EU on ESG and tax compliance. However, a significant minority of respondents expressed the view that the DCS is an unnecessary duplication of existing compliance measures with which a company ought to comply. This, of course, does not take into account the fact that, as above, the DCS is optional and directors are free to explain why they have elected not to comply with certain measures, as set out in s 225(3).

When questioned about any additional measure for the DCS, adding further tax requirements did not prove popular. Of the practitioners' responses, only 10% of the votes cast voted to introduce a materiality requirement for tax law by specifying a mandatory percentage or amount while 14% of the votes cast by the directors voted for this requirement.

One director of a DAC suggested that compliance with the DCS forces the establishment of appropriate controls and policies, particularly on tax. The results of the survey varied depending on whether or not a company invested in compliance with the DCS or whether a "tick box" approach was used.

Complementarity is one of the perceived benefits but when asked what challenges participants perceived from the DCS, the biggest perceived challenge at 40% of the total participants (25 of 62) agreed that it was unnecessary duplication of existing corporate governance standards.

5. **Delegation of the DCS and the potential involvement of a compliance officer**

The results of the directors' survey indicate that compilation of the DCS is often delegated by the directors (the person to whom this task is delegated varied in the responses and included accountant, secretary director, auditors and audit teams, and legal teams. However, that is both unsurprising and consistent with the approach usually adopted by directors as regards the preparation of a company's financial statements. Clearly, however, in both cases, responsibility for approval resides with the directors.

[7] This is not an exhaustive list but serves to highlight the steps being taken to promote enhanced ESG and tax governance measures within the EU.

From the responses, two large companies (€10million to €50 million turnover) delegated the task. The first company completed all requirements at their annual financial audit tests of transactions and review of the systems. They have implemented ISO systems which allow for ongoing monitoring of various systems to ensure compliance with relevant legislation. The second company noted the DCS was prepared by internal management, then it was reviewed by the external auditors to ensure accuracy and overall consistency with the annual Audited Financial Statements.

Twelve companies completed the survey with a turnover greater than €50million. Based on the comments of the foregoing two companies, one would expect that these companies also would have systems in place or clear lines of delegation. The results varied. The majority however had systems in place to ensure compliance, although one director stated that the level of "*stress test from directors is light touch*".

The surveys also asked about the potential involvement of a compliance officer (similar to the SAO regime in the UK). While some participants noted the effectiveness of the SAO regime, the results showed a slight apprehension about the introduction or involvement of a compliance officer. 58% (7 of 12) voted no to having a compliance director, 16% (2 of 12) voted yes and 16% (2 of 11) voted for implementation of the same regime as the UK (single accountable person).[8]

Bearing this is mind, when asked whether there should be a requirement for a compliance officer, over both surveys there were 28 votes for no, 23 for yes and 10 don't know/other. This would indicate a slight apprehension (28 no versus 23 yes) for the introduction or involvement of a compliance officer.

6. Expansion of the current definition of "*relevant obligations*"

Of the 62 participants across both groups, 26 voted to continue existing definition of "relevant obligations" while 16 voted to expand the scope to include more relevant obligations. Fewer still voted to introduce materiality requirements relating to tax law, or additional requirements in relation to loans to directors or dividends from distributable profits.

7. The Role of the Auditor

As mentioned above, against a backdrop of non-compliance section 45 of the Companies (Auditing and Accounting) Act 2003 proposed an amendment to the Companies Act 1990 to insert two sections, i.e., ss 205E and 205F. An extensive DCS was proposed which impacted both the company directors and the auditor. Following opposition from the business community, many of whom believed the requirement for a directors' compliance statement would create a significant burden for companies, the CLRG reviewed the section. This review produced a lengthy and considered Report on Directors' Compliance Statement, (Company Law Review Group, 2005) ("**the 2005 Report**").

For the purposes of this note on the role of the auditor, only s 205F will be discussed. Section 205F sought to impose strict requirements on the auditor (or any affiliate of the auditor) to undertake an annual review of the DCS by virtue of carrying out audit work or audit related work for the company. Subsection 2 provided that the auditor's report, appended to the company's annual financial statements, would include the conclusions of the review of the DCS which the auditor undertook. Where the auditor was of the opinion that the DCS was not fair and reasonable, the auditor would be required to make a report to the directors and include that report in the auditor's report. Section

[8] An overview of the SAO regime can be found in the Appendix to this report.

205F(3) mandated that where, in the opinion of the auditor, a director failed to prepare a DCS, or failed to include the matters listed in s 204E(4)(d) or sufficiently explain non-compliance, the auditor would be required to report that opinion and the reasons for forming that opinion to the (then) Office of the Director of Corporate Enforcement.

For the reasons outlined in the 2005 Report, a mitigated DCS was proposed and was referred to as Section X.

Section X proposed the removal of the requirement that a company's auditors must specifically opine on the reasonableness or otherwise of the proposed revised Annual Statement on Compliance in Directors' Reports. The underlying rationale was the additional compliance costs, described in the report as the "*chief factor*", which a company would expend to ensure compliance.[9] At p 132, the Committee noted that even if s 205F was not commenced, auditors would continue to have responsibility to consider the Annual Compliance Statement under both company law and auditing standards, at that time.

Submissions, which included arguments for and against the commencement of s 45, were outlined in the 2005 Report.[10] Common issues with regard to auditors, which were considered by the CLRG in its 2005 Report, included the suggestions that:

- auditors do not have the expertise to perform the functions that it was proposed would be required of them under s 45,

- auditors would be cautious about confirming a compliance statement as being fair and reasonable due to insufficient knowledge of enactments that provide the legal framework within which companies operate,

- the legislation potentially extended the responsibilities of auditors beyond those of directors (by requiring auditors to make an assessment of what is fair and reasonable),

- the legislation risked making auditors perform a 'policing' role which was inconsistent with their primary responsibility of reporting to shareholders on companies' financial statements

As already outlined, the mitigated DCS, Section X, was accepted by the Oireachtas and the role of the auditor was removed.

Participants of the survey were asked two questions in relation to the role of auditors in the verification of the DCS. First, participants were asked whether a requirement should be introduced for the auditors to say whether the DCS was inconsistent with matters that have come to the auditor's attention during the course of an audit of the company. Second, participants were asked whether a more general verification role should be introduced for the auditors in relation to the DCS.

In the participants survey, 13 of 39 (33%) participants answered yes to the first question and 10 of 39 (25%) answered yes to the second question. Introducing a role for the auditor in the DCS process was perceived as favourable to a certain extent, with half of the practitioners who responded voting to introduce a requirement for the auditors to declare 'inconsistencies' as well as a large minority voting to introduce a verification role for the auditors.

One auditor suggested that clients will simply not pay the added costs which would be incurred by an

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[9] A detailed cost benefit analysis can be found in Chapters 5 and 9 of the 2005 Report.
[10] Chapter 6, 2005 Report

auditor. Of course, was the Oireachtas to introduce such a role, it would become a mandatory cost of compliance.

A company secretary noted that further verification might add value to the DCS process but would only serve to increase company spending on further resources. A cost benefit analysis was considered in the 2005 Report[11] by the CLRG and may be worth further discussion.

8. **Compliance, Enforcement, and Penalties**

Offence provisions, compliance, and enforcement

As detailed earlier herein, there is no legal obligation to comply with the measures set out in s 225(3). Rather, it is permissible to elect not to comply with those measures provided that the directors explain their rationale.

Section 225(6) provides that (i) failure to include a DCS in the Directors' Report, or (ii) to comply with the comply or explain requirement referenced above constitutes an offence. These are, therefore, the only DCS-related offences provided for under company law.

Participants were asked about amending the content of the DCS, which included an option to retain or remove the comply or explain format. 8 of the 27 directors who responded voted to retain the comply or explain format, while only one voted to remove it. Similarly with the 30 practitioners who responded, 13 voted to retain it while 4 voted to remove it.

Courtney[12] explains the consequences for directors where there is a breach of their relevant obligations at para 15.023:

> *It is important to note that the only criminal dimension to the directors' compliance statement regime is where the directors of a company in scope fail to either comply or explain. So, if a default is made in complying with s 225(2) of the Act, each director to whom the default is attributable will be guilty of a category 3 offence. It follows that there is no offence created by s 225 where, for example, it transpires that the arrangements or structures were put in place but were inadequate and did not operate to prevent the company from breaching one of its relevant obligations. Of course, where the breach results in the company or its officers in default committing an offence, the company and its officers will be open to prosecution for that breach but not under s 225.*
>
> *It is also important to note that s 225 creates no civil liability for directors. So, where it transpires that the policies adopted or arrangements or structures put in place were inadequate, neither the company nor any other person is conferred by s 225 with any right to sue the directors. This is, of course, without prejudice to any other remedies that company may have against its directors, e.g., for breach of their fiduciary duty.*

This aspect of both surveys highlighted the greatest lack of knowledge and understanding of the requirements of s45. While only one respondent (who is a professional advisor) engaged with the issue of compliance and enforcement, that respondent did so in somewhat colourful terms, i.e.,

> "*Enforce it. At the moment there is little or no visible enforcement in the private sector and auditors are unsure of their responsibilities as they are not clearly stated. Therefore, the current DCS regime is broken and some large privates that should follow it just don't bother.*"

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[11] Report on Directors' Compliance Statement 2005, pg53

[12] Thomas B Courtney, *The Law of Companies*, (4th ed., Bloomsbury, 2016)

However, as detailed above, there is currently no role for the auditor is reviewing, or opining upon, the DCS. Despite the assertion that there is little or no visible enforcement, there is no evidence of non-compliance with s45. In that regard, the Corporate Enforcement Authority has confirmed that, since s45 came into operation, neither it, nor its predecessor body, have received any complaints regarding, or other indications of, non-compliance with those of the DCS provisions non-compliance with which could constitute a criminal offence. Similarly, none of the respondents to either survey proffered any evidence to suggest or evidence non-compliance with s225.

Put simply, there is no enforcement of s225 (i.e., prosecutions) because there is no evidence of non-compliance with the provision. The lack of evidence of non-compliance is unsurprising given that, to remain compliant with the provision, all that is required is for the directors to explain why they have elected not to implement certain measures, as set out in s 225(3).

If there is anything to be taken from this contribution it is, perhaps, the perception that, while companies are complying with the legal requirements (i.e., to publish a DCS and to comply or explain), there are not engaging with it in a meaningful sense. That, of course, is an entirely different matter; one that goes to whether the DCS, as currently constituted, needs to be fundamentally revisited.

Penalties for criminal non-compliance
As above, the only offences provided for under section 225 are a failure to:

- include a DCS in the Directors' Report, or
- comply with the comply or explain requirement.

Criminal non-compliance is a category 3 offence, i.e., the Oireachtas has determined it appropriate that such an alleged offence is capable of being tried summarily only.

This contrasts with the considerably more onerous obligations that were provided for under the original s45, non-compliance with which was an indictable offence (i.e., capable of being tried in the Circuit Court before a jury).

Participants were asked if the consequence of non-compliance should be more or less severe than the current penalty – 50% of the total participants (29 of 57) answered that they did not know. Of the remaining practitioners, 9 said more severe and 5 said less severe. A solicitor suggested that the penalties for non-compliance should be linked to turnover, while a company secretary said the penalty for non-compliance should not involve imprisonment.

APPENDIX 1 Responses to Questions Common to Both Surveys

Q2/5 - Is it worthwhile?

	Practitioners(31)	Directors (31)	Total of 62 responses
Yes	14	10	24
No	8	5	13
Don't know	0	12	12
Undecided	9	4	13
Total	31	31	61

Q3/6 - Is it relevant?

	Practitioners	Directors	Total
Yes	20	14	34
No	6	3	9
Don't know	0	12	12
Undecided	4	1	5
Total	30	30	60

Q4/7 - Does Compliance have a tangible value?

	Practitioners	Directors	Total
Yes	19	18	37
No	4	7	12
Don't know	0	4	4
Undecided	4	2	6
Other	3	0	3
Total	30	31	61

Q5/8 - Does the DCS contribute towards a company's compliance structures?

	Practitioners	Directors	Total
Yes	18	11	29
No	6	6	12
Don't know	0	7	7
Undecided	7	7	14
Total	31	31	62

Q6/9 - Does the DCS promote awareness of directors' responsibility for securing the company's compliance with its obligations?

	Practitioners	Directors	Total
Yes	20	11	31
No	7	11	18
Don't know	2	5	7
Undecided	2	4	6
Total	31	31	62

Q7/10 - To your knowledge, are systems in place to enable directors to meet their DCS obligations?

	Practitioners	Directors	Total
Yes	17	11	28
No	4	9	13
Don’t know	3	6	9
Undecided	7	5	12
Total	31	31	62

Q13/12 - Tick the benefits (if any) you perceive the DCS achieves:

	Practitioners	Directors	Total
Contributes to a planned and systematic approach to compliance	17	10	27
Greater assurance on the standard of management of the company	14	7	21
Reputational advantages – international and/or domestic	12	12	24
Greater shareholder engagement and/or investment	8	5	13
Wider/greater awareness of legal obligations within the company	22	9	31
Other	5	6	11
Don’t agree	2	4	6

Q14/13 - Tick the challenges (if any) you perceive the DCS achieves:

	Practitioners	Directors	Total
Disproportionate costs to the company as compared with perceived benefits	14	5	19
Unnecessary duplication of existing corporate governance standards	12	13	25
Dissuading potential candidates for non-executive directorship roles	2	7	9
Other – none of the above	1	2	3
Other	2	3	5

Q15/19 - The DCS should (tick all that you agree with):

	Practitioners	Directors	Total
Continue to apply to all companies to which it currently applies	16	14	30
Be limited in application to listed PLCs	4	8	12
Be limited in application to PLCs - listed and unlisted	3	8	11
Have increased thresholds for application to private companies	12	7	19
Exempt companies already subject to other corporate governance requirements (e.g. the UK Corporate Governance Code and the Irish Corporate Governance Annex)	5	5	10

Q 16/20 - The DCS should (tick all that you agree with):

	Practitioners	Directors	Total
Continue existing definition of "relevant obligations"	12	14	26
Expand its scope to include more relevant obligations	9	7	16
Introduce an additional requirement in relation to loans to directors	5	9	14
Introduce an additional requirement in relation to financial assistance for the acquisition by a company of its shares or shares in its holding company	3	5	8
Introduce an additional requirement in relation to dividends from distributable profits	5	4	9
Introduce a materiality requirement for tax law by providing that the provisions in question must materially affect the company's financial statements	9	6	15
Introduce a materiality requirement for tax law by specifying a monetary amount or percentage	6	5	11
Permit composite Directors' Compliance Statements to be prepared for corporate groups	14	11	25
Retain the "comply or explain" format of the section	13	8	21
Remove the "comply or explain" option and simply require compliance	4	1	5
Other	5	4	9

Q18/23 - In relation to the persons required to make the statement, should there be a Compliance Director responsible for the DCS?

	Practitioners	Directors	Total
Yes	10	10	20
No	15	12	27
Don't know	1	5	6
Other	2 (SAO)	2 (SAO)	4
Other	3	1	4

APPENDIX 2 Section 871, Companies Act 2014

Section 871 of the Companies Act 2014 provides:

Categories 1 to 4 offences — penalties

871. (1) A person guilty of an offence under this Act that is stated to be a category 1 offence shall be liable—

(a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.

(2) A person guilty of an offence under this Act that is stated to be a category 2 offence shall be liable—

(a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

(3) A person guilty of an offence under this Act that is stated to be a category 3 offence shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both.

(4) A person guilty of an offence under this Act that is stated to be a category 4 offence shall be liable, on summary conviction, to a class A fine.

A "Class A fine" is a fine within the meaning of the Fines Act 2010 i.e. a fine not exceeding €5,000.

APPENDIX 3 Section 45, Companies (Auditing and Accounting) Act 2003

Section 45 provides an amendment to the Companies Act 1990 which would insert ss 205E and 205F:

Directors' compliance statement and related statement.

205E.—(1) In this section—

… 'relevant obligations', in relation to a company, means the company's obligations under—

(a) the Companies Acts,

(b) tax law, and

(c) any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements;

'tax law' means—

(a) the Customs Acts,

(b) the statutes relating to the duties of excise and to the management of those duties,

(c) the Tax Acts,

(d) the Capital Gains Tax Acts,

(e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,

(f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,

(g) the statutes relating to stamp duty and to the management of that duty, and

(h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.

(2) This section applies to—

(a) a public limited company (whether listed or unlisted), and

(b) a private company limited by shares,

…

(3) The directors of a company to which this section applies shall, as soon as possible after the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:

(a) its policies respecting compliance with its relevant obligations;

(b) its internal financial and other procedures for securing compliance with its relevant obligations;

(c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs (a) and (b).

(4) The directors' compliance statement (including any revisions) must—

(a) be in writing,

(b) be submitted for approval by the board of directors,

(c) at least once in every 3 year period following its approval by the board, be reviewed and, if necessary, revised by the directors, and

(d) be included in the directors' report under section 158 of the Principal Act.

(5) The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement—

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations,

(b) confirming that the company has internal financial and other procedures in place that are designed to secure compliance with its relevant obligations, and, if this is not the case, specifying the reasons, and

(c) confirming that the directors have reviewed the effectiveness of the procedures referred to in paragraph (b) during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

(6) In addition, the directors of a company to which this section applies shall in the statement required under subsection (5)—

(a) specify whether, based on the procedures referred to in that subsection and their review of those procedures, they are of the opinion that they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year to which the annual report relates, and

(b) if they are not of that opinion, specify the reasons.

(7) For the purposes of this section, a company's internal financial and other procedures are considered to be designed to secure compliance with its relevant obligations and to be effective for that purpose if they provide a reasonable assurance of compliance in all material respects with those obligations.
(8) Where the directors of a company to which this section applies fail—

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required

by subsections (3) and (4)(a) to (c),

(b) to include a directors' compliance statement in the directors' report as required by subsection (4)(d), or

(c) to comply with subsections (5) and (6),

each director to whom the failure is attributable is guilty of an offence.

(9) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if—

(a) its balance sheet total for the year does not exceed—

(i) €7,618,428, or

(ii) if an amount is prescribed under section 48 (1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount,

and

(b) the amount of its turnover for the year does not exceed—

(i) €15,236,856, or

(ii) if an amount is prescribed under section 48 (1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount.

Auditor's review of compliance statement and related statements.

205F.—(1) The auditor of a company to which section 205E applies shall undertake an annual review of—

(a) the directors' compliance statement under subsections (3) and (4) of that section, and

(b) the directors' statement under subsections (5) and (6) of that section,

to determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor, or by an affiliate of the auditor within the meaning of section 205D, in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

(2) The auditor shall—

(a) include in the auditor's report appended to the company's annual accounts a report on, and the conclusions of, the review undertaken under subsection (1), and
(b) where any statement reviewed under subsection (1) is not, in the auditor's opinion, fair and reasonable—

(i) make a report to that effect to the directors, and

(ii) include that report in the auditor's report appended to the annual accounts.

(3) Where, in the auditor's opinion, the directors have failed—

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by section 205E(3) and (4)(a) to (c),

(b) to include a directors' compliance statement in the directors' report as required by section 205E(4)(d), or

(c) to comply with section 205E(5) and (6), the auditor shall report that opinion and the reasons for forming that opinion to the Director of Corporate Enforcement.

(4) Section 194(6) applies, with the necessary modifications, in relation to an auditor's compliance with an obligation imposed on him by or under this section as it applies in relation to an obligation imposed by or under section 194.

(5) A person who contravenes this section is guilty of an offence.”.

APPENDIX 4 The UK Regime – SAO Regime

In order to ensure that companies establish and maintain appropriate tax accounting arrangements, the United Kingdom introduced a Single Accounting Officer ("**SAO**") in 2009. Based on the comments provided in the survey, an overview of the regime is now included. It is somewhat similar to the DCS but the main aim is to secure tax compliance as opposed to a company's compliance with its "*relevant obligations*" and tax law.

First, detailed guidance for compliance is provided by HM Revenue & Customs ("**HMRC**").

Overview and duties of the SAO

Schedule 46 of the Finance Act 2009 contains the SAO provisions, which only apply to a qualifying company.

An SAO of a qualifying company must take reasonable steps to ensure that the company establishes and maintains appropriate tax accounting arrangements. As part of this duty, an SAO must monitor the arrangements and identify any respects in which the arrangements fall short of the requirement. A certificate must be provided by the SAO to the HMRC each financial year. In section 2, it provides:

(2) The certificate must—

(a) state whether the company had appropriate tax accounting arrangements throughout the financial year, and

(b) if it did not, give an explanation of the respects in which the accounting arrangements of the company were not appropriate tax accounting arrangements.

(3) The certificate must be provided—

(a) by such means and in such form as is reasonably specified by an officer of Revenue and Customs, and

(b) not later than the end of the period for filing the company's accounts for the financial year (or such later time as an officer of Revenue and Customs may have allowed).

(4) A certificate may relate to more than one qualifying company.

A company will be a qualifying company, and must appoint an SAO, if it is a company incorporated in the UK for the financial year; and it has a turnover of more than £200 million and/or a relevant balance sheet total of more than £2 billion, either alone or when its results are aggregated with other UK companies in the same group, for the preceding financial year. It applies equally to dormant companies and active companies in a group.

The SAO can be a director or officer of a company, who in the reasonable opinion of the company, has overall responsibility for the company's financial accounting arrangements.

Each qualifying company must identify their SAO; the role of SAO cannot be filled by an agent. There can only be one SAO of a company at any one time. An SAO can act as SAO for more than one company.

In each financial year, a qualifying company must notify the name of its SAO to HMRC (only one per financial year).

Tax accounting arrangements must allow for the tax liabilities of the company to be calculated accurately. Section 14 defines *appropriate tax accounting arrangements"* as:

(1) "Appropriate tax accounting arrangements" means accounting arrangements that enable the company's relevant liabilities to be calculated accurately in all material respects.
(2) "Accounting arrangements" includes arrangements for keeping accounting records.
(3) "Relevant liabilities", in relation to a company, means liabilities in respect of—

(a) corporation tax (including any amount assessable or chargeable as if it were corporation tax),
(b) value added tax,
(c) amounts for which the company is accountable under PAYE regulations,
(d) insurance premium tax,
(e) stamp duty land tax,
(f) stamp duty reserve tax,
(g) petroleum revenue tax,
(h) customs duties, and
(i) excise duties

"Reasonable step"

Reasonable steps are required to be taken which would normally be expected to take to ensure awareness of all taxes and duties for which the company is liable. The steps that are reasonable will depend on the particular circumstances. Reasonable steps might include establishing and maintaining processes to ensure compliance with legal requirements and periodically checking and testing systems, controls, process flows and transactions. Reasonable steps for the SAO would include ensuring the maintenance and retention of records. An SAO would also be expected to ensure staff and any third party to whom responsibilities are delegated are appropriately trained, have the necessary guidance, qualifications, knowledge and experience needed to carry out their functions

The SAO must perform the duties throughout the period of their responsibilities and it is not possible to only deal with responsibilities towards the end of the financial year.

Penalties

The penalties denote that the SAO will be liable to a penalty of £5,000 for failure to comply with his/her obligations during the financial year. It applies if they fail to comply with their main duty or fail to provide a certificate or provides a certificate which contains careless or deliberate inaccuracies.

Liability to a penalty does not arise where the SOA satisfies HMRC that there is a reasonable excuse for the failure. The Schedule also provides for an appeal of a penalty; enforcement of penalties and the power to change the amount of a penalty.

Summary

It is interesting to note and compare that the SAO regime applies to the Company which must take reasonable steps etc and appoint an SAO whereas the DCS obligations apply to the directors of a company. In both regimes, there is no third party verification.

APPENDIX 5 Processes implemented to ensure compliance with DCS

20 of the responding practitioners described a process which included a review of structures against compliance obligations, with a few referring to the testing of the internal controls and sourcing external advice. 3 of these respondents also commented that it depends on the company, with some companies using a tick box approach.

9 practitioners responded saying it was a more or less a tick box exercise, often amending last year's form with no review or little examination of the controls in place.

The directors' responses were less detailed, but of the 24 responses, 25% (6) showed little or no awareness of the DCS or the process supporting it. 33% (8) either believed it was a tick box exercise or had limited knowledge of the process. 42% were able to describe or refer to a robust process. For the reasons which are explored in this report, many directors have delegated this task and/or due to a lack of understanding on their part.

Responses from Practitioners with processes in place:

⇒ Review of company law and tax structures in place. Ensure DCS documentation is up to date. Obtain external advice every three years (Professional Adviser)
⇒ The board reviews or puts in place policies to enable it to meet its relevant obligations, which it sets out in statement, then meets to resolve to adopt or amend the policies as necessary and to adopt the statement. A review of the policies takes place each year. (Solicitor)
⇒ Meeting with the company; determining what processes and policies are already in place that can be leveraged; determining areas where gaps exist; recommending improvements. Agreeing on policy and risk rating. (Company Secretary)
⇒ Table the matter at the board; Enable Examination of list of compliance obligations and procedures and controls to support adherence to same; Secure statement (Company Secretary)
⇒ Review of compliance with environmental, regulatory standards. (Company Secretary)
⇒ Hire external experts knowledgeable in company law and tax law, independent of the auditors, to prepare a comprehensive checklist for compliance matters and verify that these are fully complied with. (Compliance Officer)
⇒ Various documents in place - an overall compliance policy statement; an accompanying document outlining all the compliance structures, processes and controls; finally, an outline of the steps undertaken by the Audit Committee and Board. The documents are kept up to date and reviewed annually by the Board. This leads to a disclosure in the accounts (Auditor)
⇒ At commencement of obligations, framework identified, ownership amongst management agreed, annual assurance review conducted, Assurance report presented to Board mid-year. (Company Secretary)
⇒ Review and test controls in place and where deficient improve them (Professional Adviser)
⇒ 80-page document prepared each year from Cosec, Finance and tax. Not clear what value that the introduction of the compliance statement has provided other than additional red tape. It is really documentation of what is happening by our impacted companies but not sure what value it has for the directors. (Company Secretary)

⇒ This varies. In some/many cases, this could simply involve confirmation from tax / finance / legal personnel that obligations have been met. Based on experience, the best process adopted by those boards / companies really engaged would involve the following: 1) Year 1: Documentation of key principles in a compliance strategy 2) Year 1: Documentation of all tax and company law risks in a register. This register would map the specific procedures in place to manage these risks, together with the appropriate personnel responsible for managing each risk. 3) Annually: The register is reviewed and updated to reflect any changes to the legislation, obligations or key personnel. 4) Annually: Testing is performed on a sample of the risks to ensure that the relevant procedures have been followed. 5) Annually: The board is briefed by CFO / Head of Tax on the findings of the review undertaken, including any changes to the register. 6) Annually: Any issues identified are remediated through control enhancements (Professional Adviser)
⇒ Process includes: a. Assess company position in terms of qualification for DCS b. Prepare compliance policy statement c. Put in place appropriate arrangements to ensure compliance with the relevant obligations d. Review arrangements on an annual/periodic basis (Company Secretary)
⇒ This varies between organisations. In many cases, it may just be included. In certain cases, there will be a formal process where management have to demonstrate to that board that structures and controls are in place and have to evidence that they have been tested each year (Professional Adviser)
⇒ Once it is anticipated that the company will exceed the relevant thresholds, a DCS is drawn up by the directors setting out the company's policies to comply with its relevant obligations. Appropriate structures are also put in place to secure compliance. A review is conducted each year of these structures. The directors give a statement in their report that accompanies their statutory financial statements that they acknowledge that they are responsible for securing the company's compliance with its relevant obligations and that they have complied with the above three things, or where they have not complied to explain why. Regarding the required review that a given DCS covers, it must have been conducted in the financial year to which the statutory financial statements in which the DCS is included relates. (Solicitor)
⇒ Questionnaire for company to consider and complete around processes, responsibilities; Discussions with relevant parties on responsibilities, processes for compliance; Draft compliance statement and discuss with responsible parties; Present to board for approval with discussion; Review annually (Company Secretary)
⇒ In prior years this involved the initial preparation of a document that comprised: (i) a directors' compliance policy statement and (ii) a statement of the company's compliance structures and arrangements, with a schedule of the offences and penalties associated with relevant obligations. It is intended that the statement of compliance structures and arrangements would be reviewed by the board or a committee in each year before the DCS was included in the annual report.

⇒ However, in our experience we have only been involved in the establishment of such documents/structures in the first year of compliance and the task was assumed by auditors/financial advisers in subsequent years in connection with the giving of the DCS. We have no further visibility as to whether the requirements have been followed in subsequent years. (Solicitor)
⇒ Meeting with Cosec / Legal / Tax function head; Ascertain what existing controls / documentation can be leveraged; Review of systems / procedures re legal and tax obligations; Review of DCS policy; Advise on gaps / make recommendations (Company Secretary)
⇒ Internal controls in place which are tested as part of our Corporate Global SOX testing process, as well as ongoing reviews of our compliance with obligations. We also liaise with external consultants to monitor changes in the Ireland regime and pick up any matters arising that need to be integrated into our processes. (In house tax department)
⇒ Akin to due diligence on the issues raised (Solicitor)

Responses from Practitioners who believed it was a tick box exercise:

⇒ Delegated to executives/advisers and reported on. As long as it looks reasonable and carefully considered, usually adopted without much comment. (Solicitor)
⇒ Disparity in how companies deal with DCS. My experience is that most mainly include the statement in their FS without any other substantive actions. (Solicitor)
⇒ Tick Box accounting software (professional adviser)
⇒ Template matrix prepared with all category 1 and 2 offences. GC or company secretary usually goes through it to identify if there are any particular compliance structures in place for those offences. If not, most firms have a fairly "generic" language template that is used. Template wording is in place for the compliance statement. Board adopts the statement (Solicitor)
⇒ Copy and paste from somewhere else (Auditor)
⇒ From experience, there is no prescribed process on what directors are expected to do. (Compliance officer)
⇒ In reality, in most companies this is copied from the previous year by middle management, updated slightly, tweaked by accountants and solicitors and signed by directors. (Solicitor)
⇒ The company's solicitors work off a template, which is adjusted to the details of management structure in the relevant company. That is then adopted. The annual statement in the company's annual report is generally the accountants' / auditors' responsibility. (Solicitor)
⇒ Generally, boilerplate examples are provided to the company accountants to include in statutory accounts. Companies most often do not have any evidence of compliance and can lead to management letter points or creating the required documentation only when asked by us as auditors. (Auditor)

Responses from Directors displaying a lack of awareness

⇒ Don't know
⇒ Not familiar with the process
⇒ I was not aware of it until I received this form.
⇒ No understanding/awareness.
⇒ I have yet to complete a DCS
⇒ I think our company is too small to come under the remit of DCS and even this questionnaire

Responses from Directors displaying limited knowledge or believing it to be a tick box exercise:

⇒ My accountant looks after this
⇒ Statement on accounts for companies with turnovers over 25m
⇒ From general experience, this involves a high-level attestation from finance / tax / others that controls are in place. Level of stress testing from directors is light touch
⇒ Our company auditors compile the directors' statement which is then signed by the directors, it does make a bit of an awareness of obligations, but it's just signed as a matter of course without much thought put into it
⇒ This form is useless unless it's audited. People just fill it out and with something like a CPD requirement and an audit or some test of their knowledge the form is just an exercise in box ticking.
⇒ The Secretary Director is the responsible person and the directors use this to blackmail them saying they are the most responsible person and they face prison if anything is wrong. It's such a shame the lack of understanding and lack of knowledge to what should and should not be acceptable.
⇒ another layer of red tape upon more red tape

Responses from Directors describing or referring to a robust process

⇒ Documented policies, procedures and controls/checks that feed up from the finance team to the MD and then to the board and audit committee
⇒ This is done mainly at the annual financial audit tests of transactions and review of systems. We have ISO systems which allow for ongoing monitoring of certain systems and also regular checking of legislative requirements relevant to the ISO standard.
⇒ The better processes I have seen involve the following: o Documentation in a register of all compliance obligations and mapping the specific processes and controls to ensure compliance. o On an annual basis, a sample of those obligations are tested to validate compliance o Formal briefing from company management to the board outlining steps taken to manage key risks. This would include reporting back on the findings of control testing performed o In my experience, many boards will sign off on the DCS without going through the above process.

⇒ The process is sponsored by the Internal Audit function and overseen by the Boards Audit & Risk Committee. All the compliance requirements are mapped and are considered in the light of the company's processes to ensure such compliance. The IA group test the systems and controls to give assurance to the Board / ARC that the processes were in place and were working in the year being reported on to ensure that the directors can report substantial compliance with the requirements.
⇒ Review of overall legal and tax compliance matters facing group company and ensure that the structures / controls are in place to adhere to directors' obligations
⇒ Have a policy statement in place confirming the Directors responsibility to comply with relevant obligations, ensure appropriate structures and arrangements are in place in the company and then review these annually to ensure they remain sufficient
⇒ CFO prepares compliance calendar showing all legal, co sec, tax, reporting and other obligations and deadlines during the year. Deadlines, completion dates and personnel involved are filed in during the year on a monthly basis. The calendar is circulated to directors annually at year end to give comfort that all relevant obligations are completed or being managed.
⇒ Prepared by internal management, then external auditors review and ensure accurate, plus consistent with the annual Audited Financial Statements.
⇒ Directors are required to formally acknowledge their roles and responsibilities as regards the compliance of the company to its relevant obligations (Tax & Legal).
⇒ Works in tandem with internal audit function and external audit review
⇒ Annual review of compliance with directors' obligations and completion of internal questionnaire based on internal policy