



Partnership

ARTHUR COX

E X P E C T E X C E L L E N C E

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## Company Compliance and Governance Group Newsletter

# The Company Agenda

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## Companies (Miscellaneous Provisions) Act, 2009

### Introduction

The Companies (Miscellaneous Provisions) Act, 2009 (the “**Act**”) was signed into law by the President on 23 December 2009. Sections 1, 2, 3 (a) to (h) and 4 came into operation on signature by the President; a commencement order is required in respect of the remaining provisions. The primary objective of the Act is to enable the use in Ireland by certain US parent companies incorporated in Ireland of US generally accepted accounting principles (“**US GAAP**”) on a transitional basis. The Act represents a direct legislative response to calls for the introduction of appropriate measures to facilitate, in particular, the migration to Ireland of certain US listed companies previously headquartered in Bermuda and the Cayman Islands. The Act removes what has been perceived to be a significant burden for companies seeking to migrate to Ireland; namely, the Irish company law requirement that each shareholder be provided with an annual report and annual accounts prepared under either Irish GAAP or International Financial Reporting Standards (“**IFRS**”).

### Use of US GAAP in Ireland

The Act provides for the transitional use of US GAAP in Ireland by certain US parent companies incorporated in Ireland in the preparation of their accounts, to the extent that such use does not contravene any of the provisions of the Irish Companies Acts or regulations made thereunder. The transitional concession will apply for a maximum of four financial years after the incorporation of the undertaking in Ireland and will expire on 31 December 2015 at the latest.

The concession will apply exclusively to “relevant parent undertakings” which are defined as parent undertakings:

- » which do not have securities admitted to trading on a regulated market in the EU;
- » whose securities are registered with or are subject to reporting to the US Securities and Exchange Commission (SEC); and
- » which have not already incurred an obligation to file an annual return with the Registrar of Companies in Ireland to which accounts were required to have been annexed.

While the foregoing definition limits significantly the category of qualifying

*This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.*

undertakings, a US holding company which is a public limited company incorporating in Ireland for the first time will derive benefit from the provisions of the Act.

### Recognised Stock Exchange

The Act amends the definition of “recognised stock exchange” for the purposes of the Companies Act, 1990 (the “1990 Act”). The 1990 Act provides for a market purchase regime under which an Irish public company may purchase its own shares on the main market of the ISE or IEX. The Act expands the definition of “recognised stock exchange” to include exchanges and individual markets outside the State in order to enable companies to make market purchase equivalents on such exchanges. Ministerial regulations are, however, required for the purposes of designating particular stock exchanges and markets as “recognised stock exchanges” for the purposes of Irish company law.

### Overseas Market Purchase

The Act introduces the concept of an “overseas market purchase” which will require the same authorisation as a market purchase and will require to be notified to the Companies Registration Office. The Act also introduces an additional notification requirement in respect of a market purchase made on a stock exchange outside the State; the issuing company will be obliged to publish on its website for not less than twenty-eight days the following particulars in respect of the overseas market purchase:

- » the date, in the place outside the State where the recognised stock market concerned is located, of the overseas market purchase;
- » the purchase price at which the shares were purchased, or the highest such price and lowest such price paid by that company or subsidiary;
- » the number of shares which were purchased; and
- » the recognised stock exchange on which the shares were purchased.

### Migration of Foreign Investment Companies

The Act provides for the migration into Ireland of foreign investment companies by way of continuation on application to the Registrar of Companies (the “Registrar”). An application signed by a director must be delivered to the Registrar together with certain registration documents including a directors’ statutory declaration, a directors’ declaration of solvency and a solicitor’s declaration. An application for authorisation must also be made to the Irish Financial Regulator. The migrating foreign investment company will be deemed from the date of registration to be a company formed under the Irish Companies Acts. The Act also facilitates the de-registration of Irish companies when they are continued under the law of a place outside the State.

### Irish Auditing and Accounting Supervisory Authority (“IAASA”) Committees of Enquiry

The Act provides for continuity of membership of committees of enquiry established by IAASA. The Act ensures that due process and fair procedures are observed by providing for the entitlement of a director appointed at the time of constitution of the committee of enquiry to continue on the committee until the completion of such enquiry.

### Cost of Company Investigations

The Act addresses the unrelated area of investigations into companies by court-appointed inspectors under sections 7 to 13 of the 1990 Act. The Act removes the upper limit on the amount of costs and expenses incurred in company investigations towards which applicants under these sections (and/or companies under investigation) may be asked to contribute.

Specifically, by deleting the upper limit in each case, the Act amends:

- » section 7(3) of the 1990 Act, which allows the court to require an applicant to provide security for the costs of an investigation under section 7(1) of the 1990 Act; and
- » section 13(1) of the 1990 Act, which allows the court to require an applicant, or any company which is the subject of the investigation, to reimburse the relevant Government Minister who is responsible at first instance to defray the expenses of an investigation under section 7 of the 1990 Act and subsequent sections.

The Act puts applicants applying to court under sections 7 to 13 of the 1990 Act on an equal footing with other parties initiating court proceedings in that such applicants may be held liable for all costs if the court in its discretion so decides.

### Conclusion

The significance of the Act is that relevant parent undertakings will be relieved for a period of time from incurring the considerable time and expense associated with the preparation of two sets of accounts. Although no similar concession has been proposed in respect of enterprises subject to accounting standards applicable in jurisdictions other than the US, the Minister for Enterprise, Trade and Employment has reserved the right to issue regulations approving the use of other internationally recognised accounting standards under similar arrangements.

#### *For further information contact:*

**Brian O’Gorman**, Partner ([brian.ogorman@arthurcox.com](mailto:brian.ogorman@arthurcox.com))

**Fintan Clancy**, Partner ([fintan.clancy@arthurcox.com](mailto:fintan.clancy@arthurcox.com))

**Thomas Courtney**, Partner ([tom.courtney@arthurcox.com](mailto:tom.courtney@arthurcox.com))

## European Communities (Directive 2006/46) Regulations 2009

### Introduction

The European Communities (Directive 2006/46/EC) Regulations 2009 (the “**Regulations**”) were signed into law on 18 November 2009 for the purpose of giving effect to the European Communities Directive 2006/46/EC on corporate reporting (the “**Directive**”).

The Directive amends four other Directives; namely, the Fourth Company Law Directive (Directive 78/660/EEC), the Seventh Company Law Directive (Directive 83/349/EEC), the Credit Institutions Directive (Directive 86/635/EEC) and the Insurance Undertakings Directive (Directive 91/674/EEC).

The objectives of the Directive are:

- » to update certain aspects of company law;
- » to enhance corporate governance;
- » to promote confidence in the financial statements and annual reports published by companies incorporated within the European Union (the “**EU**”); and
- » to limit the disclosure obligations of small and medium sized companies, by providing for an increase in the thresholds used to define same as cited in Directive 78/660/EEC.

### Corporate Governance Statement

One of the most significant provisions of the Directive is the requirement that an annual corporate governance statement be produced by directors of companies whose securities are admitted to trading on a regulated market within the EU. While much of the information required to be published in the corporate governance statement is currently disclosed by Irish public limited companies in accordance with the Combined Code attached to the Listing Rules, directors are henceforth obliged to collate the information in one single statement within the annual directors’ report. The Directive places on a statutory footing the collective responsibility of directors to ensure that the annual accounts and annual directors’ report are prepared and published in accordance with the provisions thereof.

The corporate governance statement must include:

- » a reference to the corporate governance code to which the company is subject;

- » the extent to which the company complies with the appropriate corporate governance code and an explanation as to the reasons for any departure(s) therefrom;
- » description of the main features of the company’s internal control and risk management systems in respect of the financial reporting process;
- » the information required by Article 10(1)(c), (d), (f), (h) and (i) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, where the company is subject to that Directive;
- » where such information is not already fully provided for in national laws or regulations, the operation of the shareholder meeting and its key powers;
- » where such information is not already fully provided for in national laws or regulations, a description of shareholders’ rights and how they may be exercised; and
- » the composition and operation of the administrative, management and supervisory bodies and their respective committees.

### Use of Fair Value Accounting

The Directive extends Member State options to permit or require fair value accounting for financial instruments in local generally accepted accounting principles (“**GAAP**”) to all instruments permitted to be fair valued in accordance with IAS 39.

### Disclosure of Off Balance Sheet Arrangements and Related Party Transactions

The Regulations extend to unlisted companies the requirement that all off-balance sheet arrangements and the financial impact thereof be disclosed in notes to the annual and consolidated accounts. The Regulations also extend to unlisted companies the requirement that related party transactions be disclosed.

### Conclusion

No effective date is contained in the Regulations; it is therefore understood that the provisions thereof have immediate effect. The absence of an effective date represents a departure from the norm; regulations generally apply with prospective effect in respect of future years. It is advised that compliance with the Regulations is henceforth ensured.

## Shareholders' Rights (Directive 2007/36/EC) Regulations 2009

### Introduction

The Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (the "**Regulations**") were signed into law on 10 August 2009 for the purpose of giving effect to the Shareholders' Rights Directive (2007/36/EC). The Regulations are applicable to companies listed on the main market of the Irish Stock Exchange and to companies listed on a regulated market in another member state whose registered office is situated in Ireland ("**Listed Companies**", individually a "**Listed Company**").

The Regulations do not apply to:

- » companies whose shares are traded on AIM or IEX;
- » undertakings for collective investments in transferable securities ("**UCITs**");
- » non-UCITs; or
- » unlisted companies.

In general terms, the Regulations introduce new rights for shareholders and provide for timely access to company information. The Regulations also promote the use of simplified electronic or internet-based means for the exercise of shareholders' voting rights at general meetings of Listed Companies.

### Powers of Shareholders to Requisition an Extraordinary General Meeting ("**EGM**")

The Regulations provide for the requisitioning of an EGM by shareholders of a Listed Company representing not less than five per cent of the paid up voting share capital. Previously, pursuant to the provisions of the Irish Companies Acts, a ten per cent shareholding was required.

### Notice Period for EGMs

Prior to the coming into force of the Regulations, annual general meetings ("**AGMs**") were required to be held on twenty-one days' notice and EGMs (other than meetings held for the purposes of passing special resolutions) were required to be held on fourteen days' notice.

The Regulations provide for the holding of EGMs of Listed Companies (other than meetings held for the purposes of passing a special resolution) on fourteen days' notice where:

- » the company passes a special resolution at the immediately preceding annual general meeting or at a general meeting held since that meeting; and
- » the company offers all shareholders the facility to vote by electronic means.

### Shareholders' Right to Ask Questions at Meetings

The Regulations provide for the right of shareholders of a company to ask questions in respect of items on the agenda of a general meeting and to receive answers to such questions. This right is subject only to standard safeguards, including:

- » measures to ensure the proper identification of shareholders;
- » measures to ensure the good order of the meeting; and
- » measures to preserve the confidentiality and business interests of the Listed Company.

Furthermore, a company is not obliged by law to respond if the required answer has already been published on the company's internet site in the form of an answer to a question. It is important to note, however, that a shareholder's right to ask questions does not apply in respect of EGMs.

### Shareholders' Right to put Items on Agenda and to Table Resolutions

The Regulations afford shareholders the right to put items on the agenda of an AGM and to table draft resolutions for an AGM or an EGM, subject to the shareholder(s) having a minimum shareholding of three per cent. The Regulations require that items be put on the agenda and that draft resolutions be tabled at least forty-two days prior to the convocation of the AGM. The right to include items on the AGM agenda applies only to an AGM and the shareholder must provide written grounds for inclusion of the item. The Regulations do not specify a time period for the tabling of draft resolutions in respect of an EGM; this matter is one for determination by Listed Companies.

### Publication of the Date of the Next AGM

The Regulations provide that, in order to facilitate a shareholder availing of the right to put items on the AGM agenda and to table resolutions, the company must ensure that the date of its next AGM is available on its internet site:

- » before the end of the previous financial year; or
- » not later than seventy days prior to the date of the AGM, whichever is earlier.

### Content and Publication of Notices of General Meetings

In respect of general meetings convened by Listed Companies, the Regulations provide, *inter alia*:

- » that certain minimum information be contained in notices of general meetings;
- » that a specified minimum list of items be published on a company's internet site at least 21 days prior to the

convocation of a general meeting *e.g.* notice of the general meeting, share information and documents to be submitted to the general meeting; and

- » that notices of general meetings be free of charge and issued in such a manner as to ensure prompt access thereto on a non-discriminatory basis.

### Electronic Participation and Voting in Advance

The Regulations provide for electronic participation in general meetings, with particular emphasis on electronic voting. The use of electronic means for the purpose of enabling shareholders to participate in general meetings may be subject only to such requirements and restrictions as are necessary to ensure the identification of those taking part and the security of the electronic communication and only to the extent that they are proportionate to the achievement of those objectives. The Regulations allow companies to use voting methods or methods of transmission of the meeting which do not require the member, or his proxy, to be physically present at the meeting (*e.g.* voting in advance by telephone or *via* the internet or live broadcasts of the meeting *via* the internet); the use of such methods is not mandatory.

### Proxies

The Regulations strengthen shareholders' rights in respect of the appointment of proxies and professional nominees in Listed Companies. Proxy holders are now statutorily obliged to act in accordance with the instructions of the appointing shareholder. Proxies may be appointed, and such appointment revoked, either by written notification to the company or by electronic means. Listed Companies are required to offer shareholders at least one method of appointing a proxy by electronic means.

Prior to the coming into force of the Regulations, shareholders could only appoint more than one proxy to attend on the same occasion where the articles of association of the company so provided. However, the Regulations provide that a shareholder of a Listed Company may appoint more than one proxy in respect of shares held in different securities accounts. Furthermore, a shareholder of a Listed Company acting as an intermediary on behalf of a client is not prohibited from appointing more than one proxy to act on behalf of the various clients of the intermediary.

Provision is also made to ensure that the proxy holder enjoys the same right to ask questions of the company as the appointing shareholder. Companies are prevented from placing restrictions on the appointment of proxies, other than requiring that the person appointed as proxy possess legal capacity.

### Establishment and Publication of Voting Rights

The Regulations provide that, where a shareholder requests a full account of a vote prior to or on the declaration of the result of the vote at a general meeting, the company must establish for each resolution:

- » the number of shares for which votes have been validly cast;
- » the total votes validly cast;
- » the proportion of the share capital represented by the total votes validly cast;
- » the number of votes cast in favour and in opposition; and
- » the number of abstentions.

The Regulations provide that the voting results must be published on the company's internet site not later than 15 days after the meeting.

### Abolition of Share Blocking

The Regulations abolish the concept of "share blocking", which prohibits trading in shares by shareholders intent on participating and voting at a general meeting in the run-up to such meeting. The Regulations replace "share blocking" with a simplified procedure, whereby a shareholder's rights are determined by reference to the shares held on a specified date not more than forty-eight hours prior to the general meeting (the "**Record Date**"). The Regulations permit trading in shares in the run-up to a general meeting *i.e.* after the Record Date.

### Conclusion

The objective of the Regulations, which apply in respect of general meetings of which notice was given or first given on or after 6 August 2009, is to increase the understanding, activism and engagement of shareholders of Listed Companies. In providing for increased transparency and in simplifying shareholder participation, the Regulations purport to enhance the Irish corporate governance regime. The Regulations complement Ireland's implementation of the Market Abuse, Prospectus and Transparency Obligations Directives over the last four years.

## Reservation of a Company Name Prior to Incorporation

### Introduction

As of 1 September 2009, a specified company name may be reserved on application to the Irish Registrar of Companies (the “**Registrar**”) in respect of a company that is to be incorporated by the applicant at a later date. Prior to September 2009, an application to incorporate a company in Ireland was subject to the caveat that the proposed company name would not be guaranteed by the Registrar.

### Reservation Period

Section 59 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 (the “**Act**”) permits the reservation of a specified company name for a period not exceeding twenty-eight days, as determined by the Registrar. Where a specified name is reserved pursuant to section 59 of the Act, a company will not be incorporated using that reserved name save on the application of the applicant in whose favour the company name has been reserved.

### Refusal to Permit Reservation

The Registrar may decline to permit the reservation of a name where it considers such reservation to be undesirable. Furthermore, in accordance with the policies of the Registrar, the proposed company name must not be identical or similar to the name of a company already registered and must not conflict with names on the business names register maintained by the Registrar or the trade marks register maintained by the Irish Patents Office. It is important that such registers be consulted before an application is made pursuant to section 59 of the Act.

### Extension of Reservation Period

Section 60 of the Act provides that an applicant in whose favour a specified name has been reserved may apply to the Registrar, before the expiration of the original reservation period, to reserve the specified company name for a further period of up to twenty-eight days, as determined by the Registrar. Section 60 would appear to suggest that an applicant could submit an application under section 60 of the Act on more than one occasion.

### Fee

Applications under Section 59 and Section 60 will be subject to a prescribed fee of €25.

## Arthur Cox’s company compliance and governance services

The Company Compliance & Governance Group assists companies and their directors, secretaries and managers to comply with their statutory obligations by giving technical and practical support and assistance. We provide the full spectrum of company secretarial services, including annual secretarial services, management of changes in officers and constitution, corporate restructuring, corporate governance and transaction support.

**Company Compliance** - Due to the increasing volume and complexity of company law legislation many companies are using our in house company secretarial company, Bradwell Limited, to act as their company secretary. We also maintain client companies’ statutory registers on our database and provide advice to client companies in relation to Annual Returns and AGMs as well as making all required filings in the Companies Registration Office.

**Corporate Governance** - We also provide corporate governance advice on board practice and procedures, board committees and their terms of reference and tailoring articles of association to meet the requirements of client companies.

## Contacts

If you have any queries about the topics in this publication or would like us to cover a particular subject in a future issue, or if you have any queries of a company compliance or governance nature, please contact:



**Dr Thomas B Courtney** Partner

Tom is head of the Company Compliance & Governance Group and is also a Corporate Partner. He is the author of *The Law of Private Companies* (2nd ed; 2002) one of the leading textbooks on Irish company law. He is also the Chairman of the statutory Company Law Review Group, which advises the Government on company law reform and was one of the 20 non-governmental expert-members of the EU Commission's *Advisory Group on Company Law and Corporate Governance*, established by Commission Decision (2005/380/EC), who advised the EU Commission on company law reform.

+353 (0)1 618 0584 | [tom.courtney@arthurcox.com](mailto:tom.courtney@arthurcox.com)



**Stephen Hegarty** Partner

A Corporate Partner, Stephen has considerable experience in acting for large public companies in stock exchange work and securities. He also advises with respect to share schemes and mergers and acquisitions.

+353 (0)1 618 0513 | [stephen.hegarty@arthurcox.com](mailto:stephen.hegarty@arthurcox.com)



**Jacqueline McGowan-Smyth** Director

Jacqui is a Director in the Company Compliance & Governance Group, a Fellow of the Institute of Chartered Secretaries and Administrators and has been assisting Irish companies comply with their company secretarial obligations for almost 20 years.

+353 (0)1 618 0516 | [jacqueline.mcgowan-smyth@arthurcox.com](mailto:jacqueline.mcgowan-smyth@arthurcox.com)



**James Heary** Manager

James is Manager in the Company Compliance & Governance Group, an affiliate of the Association of Chartered Certified Accountants and a member of the Institute of Chartered Secretaries and Administrators.

+353 (0)1 618 0630 | [james.heary@arthurcox.com](mailto:james.heary@arthurcox.com)

or your usual Arthur Cox contact.

**Dublin**

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Earlsfort Centre, Earlsfort Terrace, Dublin 2, Ireland  
**tel:** +353 (0)1 618 0000 | **fax:** +353 (0)1 618 0618  
**email:** dublin@arthurcox.com

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**London**

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12 Gough Square, London EC4A 3DW, England  
**tel:** +44 (0)20 7832 0200 | **fax:** +44 (0)20 7832 0201  
**email:** london@arthurcox.com

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**Belfast**

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Capital House, 3 Upper Queen Street, Belfast BT1 6PU, Northern Ireland  
**tel:** +44 (0)28 9023 0007 | **fax:** +44 (0)28 9023 3464  
**email:** belfast@arthurcox.com

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**New York**

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300 Park Avenue, 17th Floor, New York NY 10022, USA  
**tel:** +1 (1)212 705 4288 | **fax:** +1 (1)212 572 6499  
**email:** newyork@arthurcox.com

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