



Partnership

ARTHUR COX

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

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## Corporate Brief

# Companies (Miscellaneous Provisions) Act 2009

On 23 December 2009, the Companies (Miscellaneous Provisions) Act 2009 (the “Act”) was signed into law by the President of Ireland, Mary McAleese. As indicated by its title, the Act addresses a number of miscellaneous company law issues. It includes, however, a couple of principal issues for Irish registered companies who have their securities listed on a stock exchange outside of Ireland.

These are:

- (i) the ability for Irish incorporated entities whose securities are registered with the Securities and Exchange Commission (the “SEC”), or which are otherwise subject to reporting to the SEC, to be able to produce their statutory individual and/or group accounts for Irish company law purposes under a modified US GAAP for a limited period of time, in addition to the ability to choose Irish GAAP or International Financial Reporting Standards (“IFRS”) (the “US GAAP Exemption”); and
- (ii) the ability, subject to Ministerial regulation and obtaining a prior general shareholder authority, of Irish incorporated entities to effect buybacks of their shares on stock exchanges other than the Irish Stock Exchange (the “Overseas Market Purchase of Own Shares”).

### US GAAP Exemption

The Act usefully provides that, with immediate effect, certain Irish incorporated entities will be able to prepare and file their statutory accounts (individual and/or group) under a modified US GAAP for a limited period of time so that they are not immediately required to produce their accounts under Irish GAAP or IFRS.

The US GAAP Exemption applies to Irish registered companies which: (a) are Irish incorporated parent undertakings; (b) do not have securities admitted to trading on a regulated market (i.e. effectively a stock exchange in the EU); (c) have securities registered with the SEC, or which are otherwise subject to reporting to the SEC; and, (d) which, on or prior to 23 December, 2009, had not made or were not required to make an annual return to the Irish Registrar of Companies to which accounts were required to have been annexed.

*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.*

On the basis that a company satisfies each of the criteria above, that company will be able to prepare and file its individual and/or group accounts under US GAAP, provided that the use of US GAAP does not contravene any provision of the Irish Companies Acts (or any relevant Irish regulations) and that the use of US GAAP provides a true and fair view of the company's/group's state of affairs and profit and loss. Accordingly, US GAAP may be used but certain computational changes and additional disclosures will be required in order to make financial statements prepared thereunder compliant with the Irish Companies Act.

The US GAAP Exemption will be available to any company satisfying the criteria above in respect of its individual and/or group accounts prepared for such of its first four financial years after it is incorporated in Ireland as end or ends not later than 31 December 2015.

### Overseas Market Purchase of Own Shares

Prior to the introduction of the Act, a listed Irish company and/or its subsidiaries was only able to effect a market purchase of that Irish company's shares if those shares were listed on the Irish Stock Exchange ("ISE"). To date, it has been possible for an Irish registered company to effect such a buyback by way of a redemption, although this has not been possible for that company's subsidiaries.

The Act generally treats shares which are listed on certain stock exchanges (to be) prescribed by the Minister of Enterprise, Trade and Employment (the "**Minister**") on the same basis as if they were listed on the ISE (save with regard to certain disclosure requirements as set out below). Accordingly, provided that a company has sought and obtained the prior authority of its shareholders (which requires a simple majority of those voting as an ordinary resolution) in general meeting, it/or its subsidiaries will be permitted to effect a buyback of its own shares on the NYSE or NASDAQ, as soon as those markets are prescribed by the Minister. It is expected that the Minister will prescribe the NYSE and NASDAQ for these purposes in the first quarter of 2010. Many Irish companies with shares not listed on the ISE will therefore want to seek a general authority from their shareholders at their 2010 (and subsequent AGMs) permitting market buybacks of shares by the company and/or its subsidiaries. Whether or not this authority is obtained, a company should not be prevented from carrying out redemptions of its shares in the manner effected to date, in accordance with its articles of association and the Irish Companies Acts.

Unlike where a buyback is effected by the company or any of its subsidiaries on the ISE, where it is carried out on a prescribed overseas market, the Act requires that the company shall, within 3 working days of being delivered the shares, file and return the prescribed form (with respect to the number and nominal value of shares acquired and date on which those shares were delivered back to the company) to the Irish Registrar of Companies. This obligation is only applicable where there is a change in the holder of record. For example, there will be no obligation to make a filing with the Irish Registrar of Companies where beneficial interests in a company's shares were acquired on an prescribed overseas market and held in treasury if the registered owner never changes.

In addition, the Act requires that certain details relating to the shares that are the subject of a market purchase of own shares (whether by the company itself or by any of its subsidiaries) should be placed on the issuing company's website (the "**Website Disclosure**") on the first day on which the prescribed overseas market is open after the purchase (the "**Disclosure Date**"). The day of purchase is the day on which the purchase is completed (i.e. the shares are paid for and, where appropriate, the Depository Trust & Clearing Corporation's ("**DTC**") records have been updated to reflect the purchase). On our understanding of the DTC settlement procedure, this would be three business days after the date on which a contract for the purchase of those shares would have been entered into.

The Website Disclosure requires details of:

- (i) the date of the overseas market purchase;
- (ii) the purchase price of those shares or the highest and lowest prices paid by the issuing company or its subsidiaries;
- (iii) the number of shares purchased; and
- (iv) the prescribed overseas market on which the shares were acquired.

The Website Disclosure must remain on the issuing company's website for a continuous period of not less than 28 days beginning on the Disclosure Date. If these requirements are not complied with, the company and every officer in default shall be guilty of an offence.

Whilst the Website Disclosure is not required in respect of buybacks effected by a company by way of a redemption, we recommend consideration be given to disclosing voluntarily this information if available.

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For further information, please contact:



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