



## **Information Note**

### **Financial reporting considerations relevant to the making of distributions**

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## Financial reporting considerations relevant to the making of distributions

### 1. Context for, and purpose of, this Information Note

Company law requires that before a company can make a distribution (such as, for example, paying a dividend) certain criteria, including criteria relating directly to financial reporting, must be satisfied.

During the course of its financial reporting review activity, the Irish Auditing & Accounting Supervisory Authority ('IAASA') has identified a number of instances in which certain financial reporting related criteria have not been met in advance of the making of distributions.

The purpose of this Information Note is, therefore, to draw to the attention of those companies coming within IAASA's financial reporting review remit the relevant legislative provisions applying in this area, thereby assisting them to ensure compliance with their obligations in advance of the making of distributions.

### 2. Relevant legislative provisions<sup>1</sup>

Section 49(1) of the Companies (Amendment) Act 1983 ('the 1983 Act') provides that the question of

- whether a distribution can be made without contravening sections 45 to 47 of the same Act ; and
- the amount of any distribution that may be so made,

shall be determined by reference to '*relevant accounts*'.

A company's '*relevant accounts*' are:

- (a) except in a case falling within (b) or (c) below, the last annual financial statements which were laid in respect of the last preceding financial year in respect of which financial statements so prepared were laid;
- (b) if a distribution would be found to be a contravention if reference was made only to the last annual financial statements, such interim financial statements as are necessary to enable a reasonable judgement to be made as to any of the relevant items<sup>2</sup>;
- (c) if the distribution is proposed to be declared during the company's first financial year or before any financial statements are laid in respect of that financial year, such initial accounts as are necessary to enable a reasonable judgement to be made as to any of the relevant items<sup>2</sup>.

In the case of interim accounts prepared for a proposed distribution by a public limited company, section 49(5) provides that the following additional requirements apply:

- (i) the interim financial statements must have been properly prepared (as defined by section 49(9)) or have been so prepared subject only to matters which are not material for the purpose of determining, by reference to the relevant items<sup>2</sup> as stated in those interim financial statements, whether the distribution would be a contravention; and
- (ii) a copy of the interim financial statements must have been delivered to the Registrar of Companies.

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<sup>1</sup> The text of section 49 of the Companies (Amendment) Act, 1983 (as amended and substituted by Regulation 9 and the Schedule to the European Communities (International Financial Reporting and Miscellaneous Amendments) Regulations 2005 (S. I. 116 of 2005)) is set out in the Appendix to this Information Note for ease of reference.

<sup>2</sup> The '*relevant items*', as defined in section 49(9), include profits, losses, assets and liabilities, provisions of any kind, share capital and reserves.

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#### **3. Remediating action taken on foot of IAASA's findings in this area**

Consequent upon correspondence between IAASA and the relevant companies' directors, the companies concerned have prepared and/or filed interim financial statements with the Registrar of Companies as required by the 1983 Act.

**IRISH AUDITING & ACCOUNTING SUPERVISORY AUTHORITY**  
**14 JUNE, 2011**

**Text of section 49 of the Companies (Amendment) Act, 1983 (as amended and substituted by Regulation 9 and the Schedule to the European Communities (International Financial Reporting and Miscellaneous Amendments) Regulations 2005 (S. I. 116 of 2005))**

- 49** (1) Subject to the following provisions of this section, the question whether a distribution may be made by a company without contravening section 45, 46 or 47 (the relevant section) and the amount of any distribution which may be so made shall be determined by reference to the relevant items as stated in the relevant accounts, and the relevant section shall be treated as contravened in the case of a distribution unless the requirements of this section about those accounts are complied with in the case of that distribution.
- (2) The relevant accounts for any company in the case of any particular distribution are –
- (a) except in a case falling within paragraph (b) or (c), the last annual accounts that is to say, the accounts prepared in accordance with the requirements of the Principal Act (and, where applicable, in accordance with the requirements of Article 4 of the IAS Regulation) which were laid in respect of the last preceding financial year in respect of which accounts so prepared were laid;
  - (b) if that distribution would be found to contravene the relevant section if reference were made only to the last annual accounts, such accounts (interim accounts) as are necessary to enable a reasonable judgment to be made as to the amounts of any of the relevant items;
  - (c) if that distribution is proposed to be declared during the company's first financial year or before any accounts are laid in respect of that financial year, such accounts (initial accounts) as are necessary as aforesaid.
- (3) The following requirements apply where the last annual accounts of a company constitute the only relevant accounts in the case of any distribution, that is to say –
- (a) those accounts must have been properly prepared or have been so prepared subject only to matters which are not material for the purpose of determining, by reference to the relevant items as stated in those accounts, whether that distribution would be in contravention of the relevant section;
  - (b) the auditors of the company must have made a report under section 163 of the Principal Act in respect of those accounts;
  - (c) if, by virtue of anything referred to in that report, the report is not an unqualified report, the auditors must also have stated in writing (either at the time the report was made or subsequently) whether, in their opinion, that thing is material for the purpose of determining, by reference to the relevant items as stated in those accounts, whether that distribution would be in contravention of the relevant section; and
  - (d) a copy of any such statement must have been laid before the company in general meeting.
- (4) A statement under subsection (3) (c) suffices for the purposes of a particular distribution not only if it relates to a distribution which has been proposed but also if it relates to distributions of any description which include that particular distribution, notwithstanding that at the time of the statement it has not been proposed.
- (5) The following requirements apply to interim accounts prepared for a proposed distribution by a public limited company, that is to say –
- (a) the accounts must have been properly prepared or have been so prepared subject only to matters which are not material for the purpose of determining, by reference to the relevant items as stated in those accounts, whether that distribution would be in contravention of the relevant section;
  - (b) a copy of those accounts must have been delivered to the registrar of companies;
  - (c) if the accounts are in a language other than the English or Irish language, a translation into English or Irish of the accounts which has been certified in the prescribed manner to be a correct translation must also have been delivered to the registrar.

- (6) The following requirements apply to initial accounts prepared for a proposed distribution by a public limited company, that is to say –
- (a) those accounts must have been properly prepared or have been so prepared subject only to matters which are not material for the purpose of determining, by reference to the relevant items as stated in those accounts, whether that distribution would be in contravention of the relevant section;
  - (b) the auditors of the company must have made a report stating whether in their opinion the accounts have been properly prepared;
  - (c) if, by virtue of anything referred to in that report, the report is not an unqualified report, the auditors must also have stated in writing whether, in their opinion, that thing is material for the purpose of determining, by reference to the relevant items as stated in those accounts, whether that distribution would be in contravention of the relevant section;
  - (d) copy of those accounts, of the report made under paragraph (b) and of any such statement must have been delivered to the registrar of companies; and
  - (e) if the accounts are, or that report or statement is, in a language other than the English or Irish language, a translation into English or Irish of the accounts, the report or statement, as the case may be, which has been certified in the prescribed manner to be a correct translation, must also have been delivered to the registrar.
- (7) For the purpose of determining by reference to particular accounts whether a proposed distribution may be made by a company, this section shall have effect, in any case where one or more distributions have already been made in pursuance of determinations made by reference to those same accounts, as if the amount of the proposed distribution was increased by the amount of the distributions so made.
- (8) Where subsection (3) (a), (5) (a) or (6) (a) applies to the relevant accounts, section 45 (5) shall not apply for the purposes of determining whether any revaluation of the company's fixed assets affecting the amount of the relevant items as stated in those accounts has taken place, unless it is stated in a note to those accounts –
- (a) that the directors have considered the value at any time of any fixed assets of the company without actually revaluing those assets;
  - (b) that they are satisfied that the aggregate value of those assets at the time in question is or was not less than the aggregate amount at which they are or were for the time being stated in the company's accounts; and
  - (c) that the relevant items affected are accordingly stated in the relevant accounts on the basis that a revaluation of the company's fixed assets which by virtue of section 45 (5) included the assets in question took place at that time.
- (9) In this section –
- “properly prepared” means, in relation to any accounts of a company, that the following conditions are satisfied in relation to those accounts, that is to say –
- (a) in the case of annual individual accounts, that they have been properly prepared in accordance with the provisions of the Principal Act;
  - (b) in the case of interim or initial accounts, that they comply with the requirements of section 148 and either section 149 or 149A (inserted by the European Communities (International Financial Reporting and Miscellaneous Amendments) Regulations 2005) of the Principal Act, where applicable, and any balance sheet comprised in those accounts has been signed in accordance with section 156 of the Principal Act; and
  - (c) in either case, without prejudice to the foregoing, that, except where the company is entitled to avail itself, and has availed itself, of any of the provisions of Part III of the Sixth Schedule to the Principal Act –
    - (i) so much of the accounts as consists of a balance sheet gives a true and fair view of the state of the company's affairs as at the balance sheet date; and

- (ii) so much of those accounts as consists of a profit and loss account gives a true and fair view of the company's profit or loss for the period in respect of which the accounts were prepared;

“relevant item” means the following amounts as dealt with in the company’s relevant accounts –

- (a) profits, losses, assets and liabilities,
- (b) where the company prepares Companies Act individual accounts, any provisions mentioned in the Companies (Amendment) Act, 1986 or any provisions mentioned in the Sixth Schedule to the Principal Act (depreciations, diminution in value of assets, retention to meet liabilities, etc.),
- (c) where the company prepares IFRS individual accounts, provisions of any kind, and
- (d) share capital and reserves;

“reserves” includes undistributable reserves within the meaning of section 46 (2);

“unqualified report” in relation to any accounts of a company, means a report, without qualification, to the effect that in the opinion of the person making the report the accounts have been properly prepared;

and for the purposes of this section, accounts are laid if section 148 of the Principal Act has been complied with in relation to those accounts.

- (10) For the purpose of paragraph (b) of the definition of “properly prepared” in subsection (9), section 148 and either section 149 or 149A of the Principal Act, where applicable, of, and the Sixth Schedule to, the Principal Act shall be deemed to have effect in relation to interim and initial accounts with such modifications as are necessary by reason of the fact that the accounts are prepared otherwise than in respect of a financial year.