

Company Secretarial

Update

Key legal updates



Introduction

Welcome to our Company Secretarial Update November 2021.

We are delighted to share with you our first quarterly Company Secretarial newsletter with updates from Liam Boyle, our Head of Company Secretarial and his team.

If you would like to discuss any aspect of this newsletter in further detail, we would be delighted to speak with you.

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Statutory filings deadline, is your company prepared?

Deadlines for statutory filings are again upon us, therefore, in light of recent legislative updates and changes to the filing system introduced by the Companies Registration Office (CRO), we thought it useful to highlight some key areas for consideration in order to reduce the risk of a missed, incomplete or late filing.

The vast majority of companies registered in Ireland have a financial year end of 31 December and as such will likely have an annual return date of 30 September. Historically this time of year has been the busiest for the CRO, sometimes referred to as "annual compliance season".

This year marks the first annual compliance season within which both the CRO's new electronic filing system has been in operation and the Companies (Amendment) Act 2019 has been in force. By way of background, historically the filing of an annual return was a "2 step process" whereby the annual return was required to be filed within 28 days of the annual return date, with the statutory financial statements following no more than 28 days after that. Helpfully, companies now are afforded a straightforward 56 day period following their annual return date to file their financial statements. For example, if the company's annual return date is 30 September, they have until 25 November to complete the filing with the CRO.

Review your financial statements

It is of the utmost importance to ensure the financial statements are complete, fully signed and free from errors as erroneous financial statements may be rejected by the CRO resulting in unintentional late filing and penalties arising. A common issue which can often arise occurs where a company is entitled to file abridged financial statements but unintentionally files full financial statements and once the CRO registers these, they cannot be taken off the public register without obtaining an order from the High Court.

Penalties

Several consequences can arise by virtue of a failure to make your statutory filings on time including;

- **Late filing fee:** A late filing fee of €100 in respect of an annual return on the day after the filing deadline, with a daily late fee amount of €3 accruing thereafter, up to a maximum late fee of €1,200 per return;
- **Loss of audit exemption:** Failure to file on time in the current year will result in the company losing any entitlement to audit exemption for the next two years;
- **Prosecution:** An on-the-spot fine of up to €5,000 can be imposed by the CRO where the company has a record of persistent late filing; and
- **Strike-off:** A company can be involuntarily struck off the register and dissolved for failure to file an annual return. Any person, who was a Director of a company at the time of an involuntary strike off could be held to be personally liable without limitation for the debts of the company and could be restricted or disqualified from acting as Director.

We can help!

If your company or its officers require assistance with statutory filings or indeed with any of their statutory obligations, our experienced company secretarial team is on hand and would be delighted to assist.

Disclosing your beneficial owners: Is your company compliant?

It has been more than two years since The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (the "**2019 Regulations**") came into force, requiring all relevant entities incorporated in Ireland to (i) maintain information on their beneficial owners on an internal beneficial ownership register ("**RBO**") and (ii) provide this information to the Central Register of Beneficial Ownership (the "**CRBO**").

Existing relevant entities were required to disclose their beneficial ownership information to the CRBO by 22 November 2019. Newly incorporated companies have five months from the date of their incorporation to make their disclosures and if a change occurs in any information pertaining to a beneficial owner or the beneficial ownership of a relevant entity, this must be disclosed to the CRBO within 14 days of the change taking place.

The 2019 Regulations and CRBO were introduced as part of the transposition of the Fourth Anti-Money Laundering Directive ("**4AMLD**"), the purpose of which was to improve corporate trust and transparency in Ireland and the European Union. Notwithstanding this, there are still companies and relevant entities in Ireland that have failed to comply with the 2019 Regulations and, according to the 2020 annual report for the CRBO, only 81% of companies are in compliance. This equates to approximately 44,000 companies in Ireland that are in default of their obligations

What is a beneficial owner?

A "beneficial owner" is defined in Article 3(6) of 4AMLD as a natural person who ultimately owns or controls a legal entity, either through direct or indirect ownership of at least 25% of the voting rights, shares or ownership interest in the entity or through control via other means. Control via other means can arise when an individual does not necessarily retain ownership of more than 25% of an entity but still exercises significant control or influence over the entity, for example:

- Control via a shareholders' agreement;
- Control via exercising dominant influence; and/or
- Control by having power to appoint the Board or senior management of the entity.

In cases where a beneficial owner does not exist or cannot be identified, the details of the "senior managing officials" of the entity must be recorded instead both on the internal RBO and on the CRBO.

Penalties

Consequences of non-compliance could be severe. A relevant entity that fails to comply with the 2019 Regulations commits an offence and could be liable to conviction on indictment, which carries a fine up to €500,000. Custodial sentences can be imposed for up to 12 months on any person who knowingly or recklessly makes a materially false statement to the CRBO.

We can help!

The CRBO is commencing action against companies for non-compliance and those that are in default are advised to act now to avoid prosecution. Our highly skilled company secretarial team can provide assistance and advice on everything your company needs to be compliant and remain compliant with the 2019 Regulations.

Private Members' Bill on gender quotas for company Boards moves into Dáil second stage

The Irish Government has been called on to support a new gender quotas bill which proposes to establish a 40 percent quota for female representation on company boards.

The Irish Corporate Governance (Gender Balance) Bill 2021 (the "Bill") moved forward to second stage in the Dáil (Irish Parliament) after being submitted in September 2021.

If eventually enacted, the Bill mandates a stipulation whereby certain companies would need to have a minimum 33 percent female representation on their boards following the first year of its enactment which would rise to 40 percent after three years.

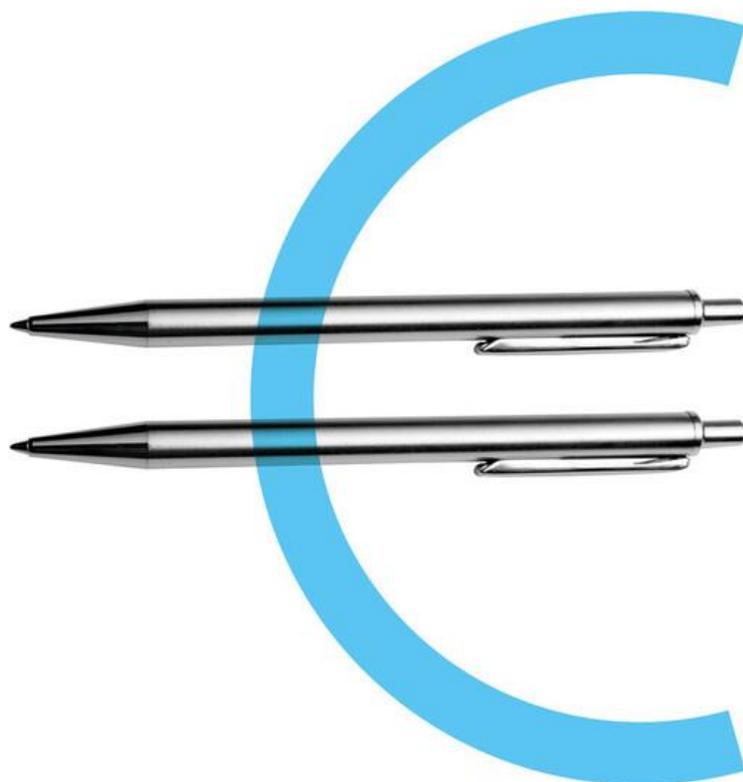
The Bill also proposes that companies would need to submit a report on their gender balance for the year within their annual reports and failing to meet such a gender balance quota without credible explanation could result in that company being liable to a High Court action directing them to comply.

While the Bill in its current form recommends that the 40 percent quota applies to boards and governing councils of designated companies, undertakings, charities and bodies in the State,

there would be certain exemptions such as companies with fewer than 20 employees.

We will keep you updated on the progress of the bill as it moves through the various stages. We will also continue to keep you abreast of changes and updates in company law that may affect your company.

If your company or its officers require assistance with any of their statutory obligations, our experienced company secretarial team is on hand to assist.



Directors' residency requirements, is your company compliant?

Every Irish company is required to have at least one director who is resident in the European Economic Area ("EEA"). If a company defaults on this requirement, they could be liable to fines under company and tax legislation. In addition to fines, the Registrar of Companies has power to strike a company from the register if there is reasonable cause to believe that section 137 of the Companies Act 2014 is not being complied with

Prior to December 2020, for a significant number of companies, this requirement was satisfied by having a UK resident director appointed to the Board. However, as the UK have now left the European Union, this solution is no longer available, therefore these and other companies without an EEA resident director must explore alternative options.

1. Appoint an EEA-resident director

A relatively simple solution, but one that may not be a viable option for some companies due to the economic costs involved or other requirements as set out within their constitutions.

2. Put a Non-EEA Resident Bond in Place

Perhaps the most straightforward solution for companies that, for whatever reason, cannot appoint an EEA resident director is to put in place a non-EEA resident director bond, to the value of €25,000.

The bond provides that in the event of a failure by a company to pay the whole or part of a fine imposed in respect of an offence under company or tax legislation, there shall become payable, under the bond, a sum of money to discharge the whole or part of the liability in respect of such a fine. The bond is effective for 2 years and can be renewed thereafter if required.

3. Proving a 'real and continuous link' with Ireland

To obtain a certificate confirming this link, an application can be made to the CRO accompanied by a statement from the Irish Revenue Commissioners that the company has a real and continuous link with an economic activity within the state. For so long as the certificate is in force, the company will be exempt from having an EEA resident director. It should however be borne in mind that the certificate is granted based on retrospective activity and therefore is an unsuitable solution for a newly incorporated company. For a large number of companies, this requirement remains outstanding and they are advised to act now to remedy the situation, and until such time, it is likely that companies in default will not be permitted to make their statutory filings. Each Company must determine the solution that is most suitable for its particular circumstances and ensure compliance sooner rather than later. Our highly skilled Company Secretarial team can advise your company on these and all other statutory requirements.

The Charities Governance Code, how this will affect your charity going forward

The Charities Governance Code (the “**Code**”) was introduced by the Charities Regulator in Ireland in November 2018 and came into force on 1 January 2020. The objective of the Code is to ensure that all registered charities in Ireland achieve their charitable objectives with integrity and that charities are managed effectively and efficiently with accountability and transparency at the forefront.

2020 was the first year that charities were expected to comply with the Code and 2021 will be the first year that charities are required to report on their compliance with the Code within their annual reports.

Like most other corporate governance codes, the Code operates on a “comply or explain” basis meaning that charities must comply with the requirements as set out in the Code. However, if for any reason a charity has not complied with any such requirement(s), they must set out cogent explanations as to why they have not done so.

The Six Principles of the Code

1. **Advancing Charitable Purpose**
2. **Behaving with Integrity**
3. **Leading People**
4. **Exercising Control**
5. **Working Effectively**
6. **Being Transparent and Accountable**

Standards in the Code

Each of the six principles contains an accompanying set of core standards with some additional standards for more complex charities (the “**Standards**”). The Trustees of each charity are responsible for determining whether or not it falls within the definition of a complex charity and in doing so, the Trustees must give consideration to the income generated by the charity, the number of employees and the complexity of its operations.

Reporting

In order to demonstrate compliance with the Code, a charity’s Trustees needs to identify, record and evidence the actions it takes to meet each of the Standards applicable to it. This is

done via a compliance record form (available from the Charities Regulator website). As the Code operates on a comply or explain basis, this form can also be used to note and explain any non-compliance with a particular standard(s) of the Code. The particulars of compliance will not only be declared in the charity’s annual report but, depending on a charity’s compliance status, may also be disclosed on the Register of Charities. These declarations are split into 3 categories;

- **Declaration A:** Full compliance with the Code, this status will be publicly disclosed on the Register of Charities as and from the date the annual report is filed;
- **Declaration B:** Partial compliance with the Code, this status will not be publicly disclosed on the Register of Charities unless a charity specifically mandates that it be disclosed. This affords charities the opportunity to explain any non-compliance with the Code and, where applicable, the steps (if any) they are taking to rectify the non-compliance;
- **Declaration C:** A charity has not commenced implementation of the Code. An explanation as to why implementation has not commenced can be declared. This status will not be disclosed on the Register of Charities.

Monitoring

The Charities Regulator will be monitoring compliance with the Code and any explanations for non-compliance with a view to determining if there are any common reasons for charities not achieving compliance with the Code. The compliance record forms completed by charities may also be requested and reviewed to check the actual standards of compliance against the level of compliance the charity has declared. The purpose of this monitoring is to highlight any issues charities are encountering in ensuring compliance with the Code so that further guidance can be issued by the Charities Regulator where appropriate.

Recording decisions of the Board and Trustees

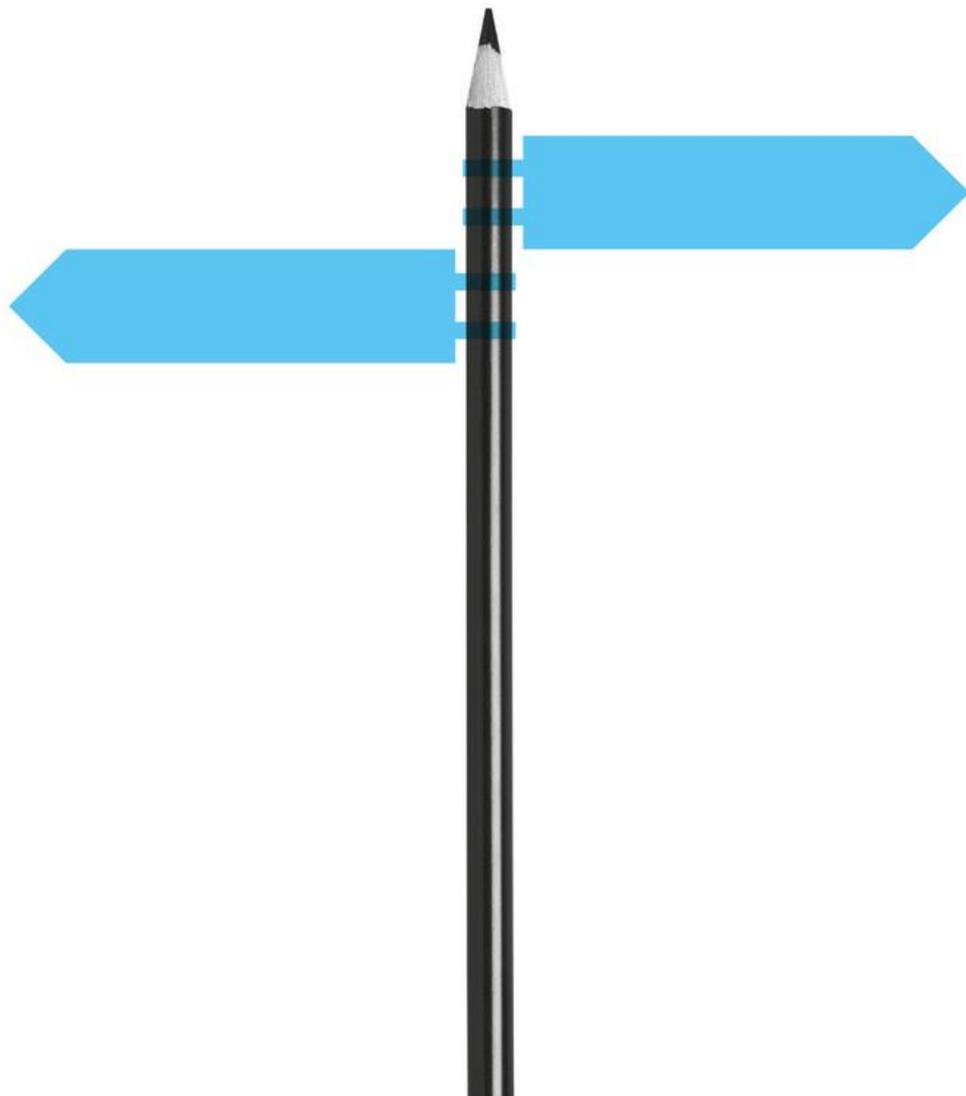
It is vitally important that a record of all discussions and decisions of the Board and Trustees at meetings are documented in a detailed set of minutes. A clear set of minutes will also support and record discussions and actions taken by a charity in meeting compliance with the Code.

It is equally important that the secretary of a charity has the requisite knowledge, skills, experience and resources to accurately capture these decisions, maintain records appropriately and provide support to the Board and Trustees as required.

We can help

If not done so already charities should take action now to ensure their compliance with the requirements of the Code.

At Eversheds Sutherland we have a highly skilled and experienced company secretarial team with expertise in all areas of governance including charity governance. We also have a dedicated charities group who can advise on all legal aspects of your charity.



Changes to the filing rules for Unlimited Companies in 2022

What changes are coming?

Despite the Companies (Accounting) Act 2017 (the “**2017 Act**”) being in force for several years, certain aspects of the legislation are yet to be commenced, one of which is a subsection of Section 78 which is to introduce certain changes to the exemptions available to unlimited companies relating to their statutory filings.

Section 78(2)(a)(iii) of the 2017 Act requires that an unlimited company, regardless of where it is domiciled, that is a holding company of a limited liability subsidiary, will fall under the ever expanding classification of a “Designated Unlimited Company” and will be required to file financial statements with the Companies Registration Office (CRO).

Under current legislation, a Designated Unlimited Company is one that is a subsidiary of a limited liability undertaking, or one, all of whose shares are held by a limited liability undertaking.

Under Section 78 of the 2017 Act, a limited liability undertaking includes limited companies and limited partnerships or undertakings which are not governed by the law of the state, but are comparable to a limited company or a limited partnership.

So, what if an Unlimited Company in your group falls under this New Classification?

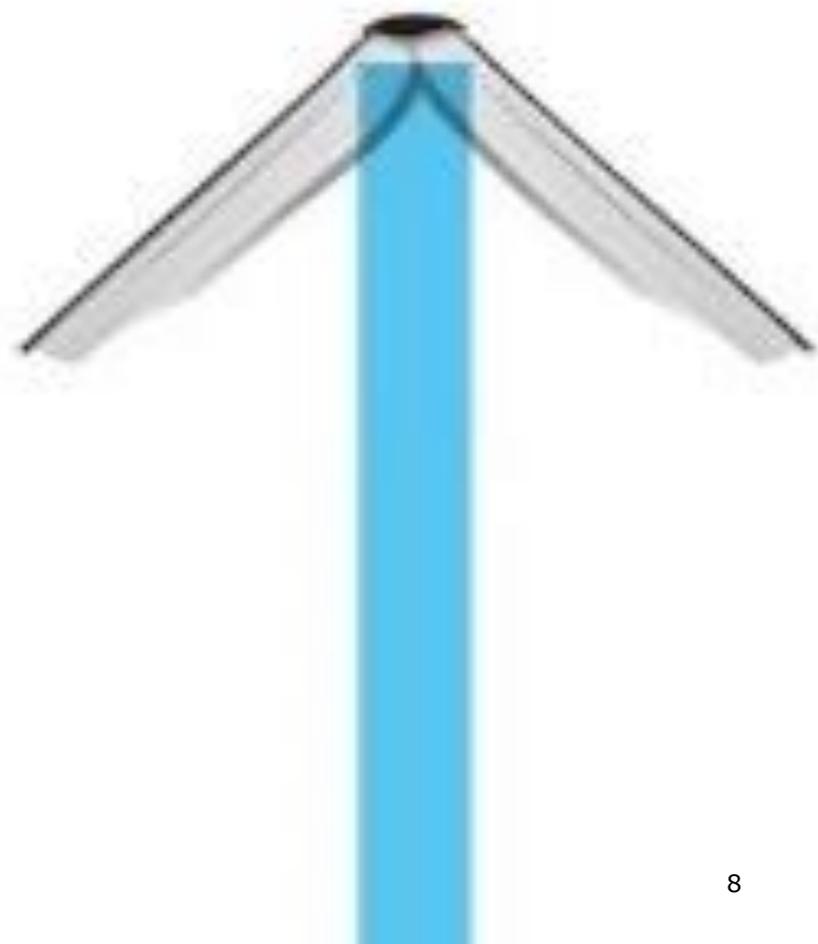
Unlimited companies currently enjoying the advantage of non-designated status should examine their group structures to determine whether they will be subject to the new filing rules. They should also consider the benefits, if any, of retaining unlimited liability status on an ongoing basis.

These new rules will apply to unlimited companies that fall under this new classification for financial years commencing on or after 1 January 2022.

If you have any questions relating to these new rules, Eversheds Sutherland, have a highly skilled company secretarial team who can provide assistance and advice on this and on all aspects of company law and corporate governance.

We will also continue to keep you abreast of changes and updates in company law that may affect your company.

If your company or its officers require assistance with any of their statutory obligations, our experienced company secretarial team is on hand to assist.



Public residential addresses

If I am being appointed as a director of an Irish company, do I really need to make my residential address public?

A question often asked, particularly from individuals who already act as directors of companies in countries where the disclosure rules are not quite as stringent.

Under the Companies Act 2014, (the “**2014 Act**”) there is a requirement for directors appointed to Irish companies to disclose their residential address publicly. Ireland is one of only a scant few countries in the European Union which places an onus on directors to disclose their full residential address in the public domain, but what, if anything, can be done, should an individual who proposes to be appointed to the Board of an Irish company have genuine concerns about having to disclose his/her residential address?

There is a possible remedy under section 150(11) of the 2014 Act which allows directors, under very limited circumstances, to make an application to An Garda Síochána (the Irish police) in respect of a supporting statement that the residential address of the director(s) in question should not be publicly disclosed (the “**Supporting Statement**”). The Supporting Statement must be approved and signed by a member of An Garda Síochána not below the rank of Chief Superintendent and it must accompany a formal application to the Registrar of companies for the non-disclosure of the director’s address.

The actual threshold to be met for the granting of such Supporting Statements is not particularly clear however, and the applications are usually made on the basis of safeguarding the personal safety of the director in question as well as their family. Certain businesses will carry a higher degree of risk for their directors such as cash intensive businesses, like cash in transit companies, bookmakers, pubs and casinos as well as companies that have a poor record on environmental and social issues or engage in what some may view as “morally questionable” activities like animal testing, to which some groups in society may object.

- Separate applications must be made for each company to which the director in question is appointed;
- The Registrar of Companies has no power to remove residential addresses already on the public register;
- The applicant in question is responsible for the non-disclosure of their residential address and must ensure that no subsequent disclosure of their address is made as, once information has been registered with the Companies Registration Office, it cannot be removed.

In instances where the application is successful, the director’s address will be listed as that of the company’s registered office.

All other statutory information in respect of the director in question must be supplied, eg date of birth and details of other directorships, etc. The exemption only applies to their usual residential address.

If you require assistance with such an application, or with any other company secretarial matters, at Eversheds Sutherland, we have a highly skilled company secretarial team who can provide assistance and advice on all aspects of company law and corporate governance.

We will also continue to keep you abreast of changes and updates in company law that may affect your company.

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Approval of the Companies (Corporate Enforcement Authority) Bill 2021. What is expected?

The Government has approved the Companies (Corporate Enforcement Authority) Bill 2021 (the "**Bill**") which proposes to put in place new legislation providing for the establishment of the Corporate Enforcement Authority ("**CEA**").

The objective in establishing the CEA will be to redesignate the Office of the Director of Corporate Enforcement ("**ODCE**") as a stand-alone agency, granting it enhanced powers to enforce company law in Ireland and giving it more independence and control over its resources. The impending establishment of the CEA will certainly come as a welcome development and highlights the Irish Government's increasing focus on tackling white collar crime.

The approval of the Bill flows from the preceding General Scheme of the Companies (Corporate Enforcement Authority) Bill (the "**General Scheme**") which was originally published in late 2018. In addition to the establishment of the CEA, the General Scheme proposed the implementation of a number of recommendations of the Company Law Review Group which are expected to be put in place in the near future.

Function

While the core functions of the CEA will be somewhat similar to that of the ODCE, the Bill proposes to grant additional functions and powers to include investigating instances of suspected company law offences, prosecution of summary offences for non-compliance with the company law, referral of indictable offences to the Director of Public Prosecutions and supervising liquidators and receivers. In that regard, it is anticipated that the additional powers granted will allow for a more forensic and robust approach in tackling serious breaches of company law.

Timing

The Government's approval of the Bill is timely against the backdrop of the aftermath of the Covid-19 pandemic and the possibility of a significant increase in corporate insolvencies resulting from the difficulties faced by companies during the pandemic.

The Bill is expected to be introduced to the Houses of Oireachtas this September.

Our team

At Eversheds Sutherland, we have a highly skilled company secretarial team who can provide assistance and advice on all aspects of company law and corporate governance.

We will continue to keep you abreast of changes and updates in company law that may affect your company including those expected to arise from the implementation of recommendations contained in the General Scheme as mentioned above.

If your company or its officers require assistance with any of their statutory obligations, our experienced company secretarial team is on hand to assist.

Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice. Please refer to the full terms and conditions on our website.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.

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