



## **COMPANY LAW**

### **COMPANIES (AUDIT, INVESTIGATIONS AND COMMUNITY ENTERPRISE) ACT 2004**

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### **A GUIDE TO THE NEW INVESTIGATIONS PROVISIONS INTRODUCED BY THE ACT**

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### **A GUIDANCE DOCUMENT**

**JANUARY 2005**



The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

## Overview

The Companies (Audit, Investigations and Community Enterprise) Act 2004 amends the current regime for investigating companies. It contains provisions designed to improve investigators' access to information, reduce the possibility of delay or obstruction by companies under investigation and remove a possible deterrent to individuals volunteering information.

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**This booklet provides general guidance on the Companies (Audit, Investigations and Community Enterprise) Act 2004 and should not be regarded as a complete or authoritative statement of the law.**

## 1 Introduction

- 1.1 The Companies (Audit, Investigations and Community Enterprise) Act 2004 received Royal Assent on 28 October 2004. The Act amends the Companies Act 1985 by, among other things, introducing:
- New Section 447 – Power to require documents and information
  - New Section 448A – Protection in relation to certain disclosures
  - New Section 453A – Power to enter and remain on premises
  - New Section 453B – Power to enter and remain on premises: procedural
  - New Section 453C – Consequences of failure to comply with certain requirements
- 1.2 The above new provisions were introduced to strengthen the company investigations regime and will come into force on 6 April 2005. They will not alter the basis for inspections nor make any change of substance to the grounds for an investigation. Any investigation conducted by the DTI will have to be in the public interest, that is to say, for instance, it cannot be with a view to helping resolve a private civil dispute. The new provisions are designed to improve investigators' access to information, reduce the possibility of delay or obstruction by companies under investigation and remove a possible deterrent to individuals volunteering information. The Act also introduces more effective sanctions where people fail to comply.

## The Company Investigations Regime

- 1.3 There is a range of powers in Part 14 of the Companies Act 1985 which allows the Secretary of State for Trade and Industry, or someone authorised by her, to inquire into the affairs of a company and related matters. In most instances, these inquiries are carried out in one of two ways:
- By appointing **inspectors** to investigate and report; or
  - By authorising an **investigator**– usually one of DTI’s own staff– to require a company to produce documents.
- 1.4 **Inspectors** can only be appointed in specific circumstances and such appointments are now relatively rare. In almost all cases, investigation into a company will be conducted, on a confidential basis, in most cases by an **investigator** authorised by the Secretary of State under section 447 of the Companies Act 1985 using powers under that section to require the company and other persons to produce documents and provide explanations of documents produced.
- 1.5 The Secretary of State may authorise an investigation where she thinks there is a sound basis for doing so. This means, for instance, that the DTI does not randomly select companies to investigate. An investigation will usually follow a complaint received from a member of the public or from information received from another regulator. The complaint or referral is then considered thoroughly to establish whether a formal investigation is warranted.
- 1.6 Only some 5% of the total number of complaints and referrals result in an investigation. Of over 5,000 complaints and referrals received in 2002/03, around 250

were ultimately accepted for investigation. Less than 0.04% of registered companies face investigation by DTI investigators.

## 2 New Section 447 – Power to require documents and information

- 2.1 Previously **investigators** were only allowed to require the production of documents, which they were then allowed to copy and ask questions. New Section 447 expands investigators' powers by authorising them to require companies and their officers to provide **information** and/or documents. Accordingly, **investigators** can now speak to any individual who they consider may have information relevant to the investigation.
- 2.2 Documents include information recorded in any form, for example, on paper or electronically. If there is a *lien* over the document, the lien will not be affected if the document is produced to comply with a requirement. Generally speaking, a *lien* is a legal right to keep possession of a document belonging to someone else until a claim is satisfied, for example, a claim for payment of professional fees.
- 2.3 There is no requirement, however, to hand over documents which would be protected from disclosure in civil court proceedings on the grounds of legal professional privilege. There is also a measure of protection for documents held by banks which relate to the affairs of their customers.
- 2.4 Although the legislation no longer specifically requires the Secretary of State to have 'good reason' to investigate a

company, there will still need to be a sound and defensible basis for doing so.

### 3 New Section 448A – Protection in relation to certain disclosures

3.1 Subject to the conditions explained below, new section 448 provides immunity to anyone volunteering information to the DTI Companies Investigations Branch from legal liability for breach of a contractual or other duty of confidence. Immunity from such liability will only arise if the disclosure is:

- volunteered and not made in compliance with a requirement imposed under the Companies Act;
- be relevant to the investigation;
- made in good faith and in the reasonable belief that it will assist the investigation (i.e. it must not be a malicious complaint);
- not more than is reasonably necessary for the purpose of assisting the investigation; and
- not in breach of a statutory duty of confidence (e.g. the Data Protection Act 1998). Not in breach of a duty of confidence owed by a lawyer or banker.

3.2 New section 448 should, in particular, give DTI access to a wider range of information to inform decisions on whether or not to launch a formal investigation. This should make the consideration process more effective.

### 4 New Sections 453A and 453B – Power to enter and remain on premises

4.1 Under the current legislation, **investigators** have no right to require access to premises (except where a search warrant

has been issued, which is quite rare). **Inspectors** currently rely on their power to require *reasonable assistance* in connection with an inspection in order to gain access to premises. Without such a power **investigators** can only enter and remain on premises by agreement with the company. They may be asked to leave the premises at any time and would currently be trespassing if they did not do so.

- 4.2 New section 453A will give both **inspectors** and **investigators** the specific statutory *right* to enter and remain on company premises, if by doing so it will ‘materially assist’ in the investigation. They may bring with them one or more support staff to assist them. To be able to gain access to, and spend time on, company premises during the course of an investigation has significant practical benefits. In particular, it enables **inspectors** or **investigators** to exercise more effectively their powers to require the production of documents and the provision of information.
- 4.3 More generally, access to premises also offers **inspectors** and **investigators** the opportunity to see the company’s operations in practice. Simple observation may provide an indication of the level of the company’s trading activity and its viability, show who controls the operation on a day-to-day basis, and help the **inspector** or **investigator** to understand the nature of the company’s business.
- 4.4 The new power will not allow **inspectors** or **investigators** to gain access to premises through force, nor will they be able to search the premises or seize anything from them.

If it was felt that such action was necessary they would have to ask the Court to issue a search warrant. There will, though, be an internal authorisation procedure. It will only be possible for the power to be used by an **inspector** or **investigator** if they have been authorised to

do so by the Secretary of State and such authorisation will only be granted if the **inspector** or **investigator** thinks it will materially assist the investigation.

- 4.5 This right of entry could apply to domestic premises if they are being used for the company's business. If only part of the building is used for the company's business, the use of this power will only be exercisable in relation to that part. However, the part being used for the company's business may only be accessible via, for instance, the residential part of a building, in which case the right of access would include an implied right to pass through a residentially occupied part of the building.
- 4.6 An **inspector** or **investigator** will be able to require entry to premises at all reasonable times. However, having gained entry, he will not be able to remain on premises indefinitely; he will have to leave when it ceases to be reasonable for the company or other occupier of the premises to have him there. If he does leave the premises, the **inspector** or **investigator** will need to have the necessary grounds to require entry on any subsequent occasion he wishes to gain access.
- 4.7 On seeking to enter premises, an **inspector must** produce evidence of his appointment and an **investigator must** produce evidence of his authorisation to carry out the investigation. They must also produce the Secretary of State's specific authorisation to enter the premises. Evidence of appointment/authorisation will include, for example, a photo identity card. Accompanying persons **must** also produce proof of identity. If any person fails to

do so, the company or other occupier of the premises may refuse access to that person.

- 4.8 If an **inspector** or **investigator** uses the power in new section 453A he must provide a written statement which details the legal provisions of this power and the rights and obligations of the company and individuals affected by its use. This must be given to the company or other occupier of the premises.

#### Company Visit Record

- 4.9 The **inspector** or **investigator** must also provide a written record of the visit and make it available, on request, to the company or any other occupier of the premises.
- 4.10 The content of the written statement and the visit record will be prescribed in the *Companies Act 1985 (Power to Enter and Remain on Premises: Procedural) Regulations 2005* which will also come into force on 6 April 2005.

### **5 New Section 453C– Failure to comply with certain requirements**

- 5.1 New Section 453C introduces more effective sanctions against any person who refuses to co-operate with the legitimate requests or intentionally obstructs an **investigator** or **inspector**.
- 5.2 An **inspector** or **investigator** will be able to certify to the court any failure to comply with a lawful demand to allow access to premises. If the court is satisfied that there

was no reasonable excuse for the failure, the subject of the certification proceedings may face a fine and/or imprisonment. This is a more flexible and effective procedure than the current criminal sanction and offers a better prospect of getting the required information.

### **6 Disclosure Gateways**

- 6.1 Information gathered during the course of an investigation is confidential, and criminal penalties attach to its unlawful disclosure. There are, though, specific statutory “gateways” which allow for disclosure to a specified recipient (e.g. the Director of Public Prosecutions) or for a specified purpose (e.g. instituting disciplinary proceedings against auditors). The gateways ensure that information can be made available to other persons/bodies where it is relevant to their functions. Section 25 and Schedule 2 of this Act makes amendments to existing gateways, as well as adding some new ones this being done through the insertion of a new section 449 and Schedules 15C and 15D in the Companies Act 1985.

## 7 Further information

- 7.1 If you require further information on any aspect of the Companies (Audit, Investigations and Community Enterprise) Act 2004, please contact:

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