

Proposal to issue Companies Act 2014 (Procedures Governing the Conduct of Section 933 Enquiries) Regulations

A consultation issued by the Irish Auditing and Accounting Supervisory Authority (IAASA)

Comments from ACCA
27 September 2019
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ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of consistent global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We work to open up the profession to people of all backgrounds and remove artificial barriers to entry, ensuring that our qualifications and their delivery meet the diverse needs of trainee professionals and their employers.

We support our **219,000** members and **527,000** students in **179** countries, helping them to develop successful careers in accounting and business, with the skills required by employers. We work through a network of **110** offices and centres and more than **7,571** Approved Employers worldwide, who provide high standards of employee learning and development. Through our public interest remit, we promote appropriate regulation of accounting, and conduct relevant research to ensure accountancy continues to grow in reputation and influence.

Further information about ACCA's comments on the matters discussed here can be requested from:

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GENERAL COMMENTS

ACCA welcomes the opportunity to comment on the proposal to issue Companies Act 2014 (Procedures Governing the Conduct of Section 933 Enquiries) Regulations 2019 ('S933 Regulations').

AREAS FOR SPECIFIC COMMENT

Question 1: Do you agree that SI 96 of 2012 should be replaced with a new statutory instrument setting out IAASA's S933 enquiry procedures? If not, please give your reasons and explain what action(s), if any, you believe should be taken to update the S933 enquiry process.

ACCA welcomes and acknowledges the steps IAASA is taking to provide clarity to this process. However, it is not absolutely clear at this juncture the precise reason why IAASA has chosen to replace the whole statutory instrument (SI). If the amendments are extensive then we believe wholesale replacement would be a better option. However, we were not provided with a tracked change document, or a comparative table, where we could assess the extent of the changes. That said, if the intention is to achieve a more proportionate and streamlined approach, then we would support such action. Unfortunately, we are not entirely clear how this has been achieved under the 2019 draft of the SI.

Question 2: Do you consider that the Regulations as drafted achieve an appropriate balance between (i) protecting and promoting the public interest; (ii) ensuring that affected parties are fully afforded their rights as regards procedural fairness; and (iii) sanctioning non-compliance by the PABs and RABs?

If not please identify which aspect(s) of the draft Regulations you consider to be inconsistent with these objectives. Please provide the reason(s) for your opinion and state how you propose that the issue(s) identified could be addressed.

It is accepted that the role IAASA holds in particular in relation to Section 933 Enquiries is to promote and protect the public interest. However, and notwithstanding that some of the provisions may have been set out in the 2012 SI, it is our view that the following concerns arise:

Procedural Fairness

- (i) There is a lack of arm's length decision making, particularly with regard to the appointment of IAASA staff in relation to the actual decision making process of a complaint.



- (ii) The qualification and expertise of relevant staff to make decisions based on a legal test is not clarified. For example, we are not clear as to the seniority and qualifications of the Head of Conduct.

Lack of streamlining and proportionality

- (iii) The process seems to be adding additional hand off points before it reaches the Enquiry Committee (EC). Furthermore, it does not set out the test upon which such decisions are predicated.
- (iv) As the EC has to make a decision whether there is a *prima facie* case, the purpose of the two previous decision making points is unclear. If these relate to triaging/filtering, we believe that this needs to be clearly stated. Moreover, a *prima facie* test is very wide ranging and relatively low bar.
- (v) Given this provision is dealing with cases that may have been closed, the member has a legitimate expectation that the matter is *functus*. We have concerns that, without further clarity on the additional layers suggested, the process may elongate the period of time post decision so as to give rise to an abuse of process and would be unfair generally.
- (vi) The wide ranging powers to notify '*whoever it thinks fit*' seem unfair, particularly in light of the fact that allegations have not been drafted and that a *prima facie* test is relatively easily met. Furthermore, any publicity should only pertain until at least the *prima facie* test is met and allegations or the case against the Recognised Accountancy Body (RAB) are perfected.
- (vii) In regulation 5(1) of the SI, the test in relation to breach of procedure should have a gateway test to the effect that the breach was significant and/or could have impacted on the overall outcome, and/or would have a bearing on other cases. Otherwise minor technical breaches could lead to a full enquiry, as the potentially contingent regulation 5(1)(b) is ambiguous and is not a recognised test, such as reasonable prospect and/or in the public interest.
- (viii) Preliminary enquiry powers appear to be all encompassing by referring to '*any other decision of a prescribed body*'. If this includes disciplinary proceedings and/or consent orders then the issue of finality, double jeopardy and legitimate expectation could give rise to abuse argument, particularly as there are no time lines set out. Even in Judicial Review proceedings which look at 'process' type cases, a complaint must be brought in a timely manner.
- (ix) In relation to sanction powers at regulation 11(6)(f) of the SI, we query how this would apply to final decisions such as consent orders or final tribunal decisions. We also question how a RAB would be able to explain how an independent decision maker came to a decision.



- (x) The constitution of the EC lacks any of the factors of independence, in that they shall be directors of the Authority and any other person the Authority considers appropriate. We are also unclear if the constitution of the EC will distinguish between lay and non lay. The latter is also a nebulous concept and lacks transparency, and is readily open to abuse.
- (xi) With regard to regulation 6(5), we question why the constitution of the EC is not limited to three members, or if this refers to the actual cohort from which you can chose an EC. If the constitution of the EC is restricted to three members, or at least an odd number, this would avoid split voting (which we don't consider ideal and can more readily lead to delayed decision making).
- (xii) As this is a SI, we consider that time lines should be added, either to bring a complaint and/or the length of time to consider, certainly with regard to any preliminary/triaging decisions.
- (xiii) We consider that the test and ultimate decision should take into account whether or not any technical breach had the potential to alter the final decision in the case, and/or how significant the breach was and any remedial steps taken. Minor breaches could be dealt by way of an informal process to the relevant body with guidance and/or directions to improve.
- (xiv) We do not consider it is proportionate to adopt a 'one size fits all' approach and the SI should be clear that it is there to deal with serious and significant breaches.

Question 3: Do you believe that the proposed changes as outlined in section 3 above will lead to a more efficient and robust S933 enquiry process? If not, please give your reasons and explain what changes, if any, you believe should be made to the draft Regulations, including your rationale for those changes.

No, for the reasons articulated in our responses to Questions 1 and 2 above. In particular, we believe the proposed changes are not proportionate, could add further time to the decisions and, depending how long the process takes, could give rise to legal challenge on the grounds of legitimate expectation and finality. Given that these matters are covered by the SI, it would seem appropriate to include timescales, both in relation the point a complaint is received and/or time to complete.

Question 4: Do you consider that the draft Regulations set out and facilitate the implementation of a fair and robust enforcement procedure? If not, please give your reasons and explain what changes, if any, you believe should be made to the draft Regulations, including your rationale for those changes.

See responses to Questions 1, 2 and 3 above.

