Companies Act 2014 – Time for Action

The Companies Act 2014 (the **Act**) was enacted on 23 December 2014 and the majority of it commenced and was brought into force on 1 June 2015 (**Commencement**). While many of the provisions of the Act are merely a restatement of the current law and the impact for the Irish investment funds industry is limited, there are also a number of changes and some new provisions which will have an effect and these are set out below. These principally impact private limited companies but as there will be an effect on public limited companies too, each Irish company needs to examine its own structure and documentation to identify what action it should take in advance of the relevant deadlines.

1. Irish UCITS and AIFs established as an investment company (a variable capital company (VCC)) or an Irish collective asset-management vehicle (ICAV)

A VCC is in the form of a public limited company (**PLC**). The Act provides that existing PLCs will continue in existence and are deemed to be public limited companies under the Act. Accordingly VCCs do not need to convert to a new form of company or alter their name.

It should be noted that VCCs established under the Act which were not in existence prior to Commencement will have a one document constitution from incorporation which will be a combined memorandum and articles of association (**M&A**). The same does not apply for existing VCCs.

While not a requirement, VCCs should consider taking the opportunity to update its M&A to take account of the Act. The M&A of a VCC will continue to apply, except to the extent that any provisions of the M&A are incompatible with mandatory provisions of the Act applicable to VCCs. Any changes will also depend on the provisions of the existing M&A, when they were last updated and for what purpose. The changes introduced by the Act which impact on VCCs are limited in number and many apply "save to the extent that the company's constitution provides otherwise". Accordingly, there will generally be no need to make significant amendments to the M&A to deal with these rules, but the decision may be made to make changes to avail of the optional flexibilities permitted by the Act and to reflect its provisions.

It is also an opportune time to consider whether it would be of benefit to convert the VCC to the new form of Irish corporate vehicle specifically tailored for the funds industry, the ICAV. The ICAV is not subject to the Act and will not therefore be impacted by it.

2. Irish UCITS management companies, AIFMs and AIF management companies (Managers)

The Act impacts Irish Managers that are private limited companies as they will need to become either a company limited by shares (**CLS**) or a designated activity company (**DAC**).

Options

In terms of which structure to opt for, the Central Bank of Ireland (the **Central Bank**) has confirmed that it does not require Managers which are private limited companies to convert to DACs as it is of the view that corporate structuring is a matter for each entity.

The Central Bank also made the point that, notwithstanding the corporate structure chosen, regulated financial service providers such as Managers must comply with all regulatory requirements applicable to them. It is worth bearing in mind that the extent to which Managers could avail of the unlimited corporate capacity provided by the CLS structure may in practical terms be limited, given their specific role in relation to investment funds and under regulation.

The Act prohibits private companies limited by shares from carrying on the activity of a credit institution or insurance undertaking. Accordingly, existing credit institutions (which include a company or undertaking engaged in the business of accepting deposits or other repayable funds or granting credit for its own account) and insurance undertakings must re-register with the Irish Companies Registration Office (the **CRO**) as a DAC unless they are public limited companies.

3. Subsidiaries

Where there is a wholly-owned subsidiary in the investment fund structure that is an Irish private limited company then it will need to convert to a DAC or CLS. Typically, this will be relevant for alternative investment funds. As set out above, the Act prohibits private companies limited by shares from carrying on the activity of a credit institution. Therefore, where that entity seeks to accept repayable funds (or may intend to do so in the future) for example, by originating loans, we would advise such companies to opt to convert to a DAC. Although the Central Bank currently applies restrictive rules in relation to loan origination funds, if that position were to change, a fund with a wholly-owned subsidiary which had converted to a CLS would be restricted from originating loans whereas this would not be the case where the option to convert to a DAC was taken under the provisions of the Act.

Procedure for Conversion

CLS

- If a Manager is converting to a CLS, its shareholder(s) must pass a special resolution to adopt a new constitution. Both the new constitution and the special resolution together with the requisite forms and a list of original subscribers as submitted on incorporation must be filed with the CRO within the 18 month transition period from Commencement.
- The special resolution required to convert to a CLS, passed in accordance with the existing M&A of the company will state that the company is to be registered as a CLS in accordance with the Act. The same resolution must also provide for the alteration of the M&A so that it is a single document constitution which states that: "*The Company is a company limited by shares to which parts 1 to 15 of the Companies Act 2014 apply*".

DAC

- If a Manager is converting to a DAC, its shareholder(s) must pass an ordinary resolution resolving that the company be registered as a DAC within 15 months from Commencement. If nothing is done, it will be "deemed" to have become a CLS after the 18 month period elapses, retaining its M&A, but not its objects clause, as its constitution.
- The ordinary resolution required to convert to a DAC, which can be passed in writing, will simply state that the company is to be registered as a DAC in accordance with the Act. The same resolution must also provide for the alteration of the M&A so that it is a single document constitution comprising two parts, a memorandum of association and articles of association, and states that (a) "*The Company is a Designated Activity Company to which part 16 of the Companies Act 2014 applies*"; and (b) the word 'limited' will be replaced by 'designated activity company' wherever it appears in the name of the Manager. The company must

then submit its new constitution and the ordinary resolution together with the requisite forms and a list of original subscribers as submitted on incorporation to the CRO.

If it hasn't already done so, the Manager could pass the necessary resolution at the next scheduled AGM. If no action is taken by a Manager to convert to a CLS or a DAC, this will lead to the company being "deemed" to become a CLS after 18 months of Commencement. During the transitional period, existing Irish private limited companies will be deemed to be DACs unless and until they take the requisite action.

All DACs must have the words "designated activity company" at the end of their name. The words "designated activity company" may be abbreviated to "d.a.c." or "dac" (including either such abbreviation in capitalised form). Managers should update company stationery, any name plates, company seals, bank accounts, websites, advertisements and provide relevant third party notifications when conversion occurs to reflect the new name.

It is a requirement of the Central Bank that a Manager obtains prior approval for any change of name which would be relevant in the case of conversion to a DAC.

In the absence of a resolution by the shareholder(s), the directors of a Manager will have a duty to take action, if necessary, to prepare a new constitution and deliver it to the shareholder(s) and to the CRO. An existing Manager would lose its objects clause if shareholders take no action and allow a "deemed" conversion to a CLS take place. As a regulated entity, it may be desirable to retain the objects clause to demonstrate compliance with regulatory requirements applicable to Managers.

Fund Documentation Updates/Amendments for a converted Manager

The prospectus for a fund managed by a Manager and material contracts of any fund to which the Manager is a party could be updated to reflect the various minor changes such as the change of name (in the case of conversion to a DAC) or the description of the legal status of the company but it is not a requirement of the Act. One approach would be to update the prospectus and/or material contracts at the next opportunity following conversion.

Similarly for the business plan or programme of activity of a Manager (where applicable), one could take the view that the above changes are not material changes which would require an immediate update and filing with the Central Bank. However it may be a good opportunity to update the business plan or programme of activity and file them with the Central Bank, particularly if there are other general updates which can be undertaken at the same time.

If any material contracts or other fund documents are to be updated to reflect the change of name (in the case of a DAC) and conversion of the Manager to a CLS or DAC, this should be filed with the Central Bank in accordance with the usual procedures for fund documentation updates.

Regulatory Notifications for a converted Manager

Where a Manager converting to a DAC is managing an investment company, unit trust, common contractual fund or ICAV which has its shares or units admitted to listing on the Irish Stock Exchange (**ISE**), the ISE should be advised of any change of name of the Manager. No announcement solely for the change of name to a DAC will be necessary.

There are no Irish tax consequences for a Manager upon becoming a CLS or a DAC. In the case of conversion to a DAC, the Irish Revenue should be notified of the name change.

4. Directors

The Act introduced, for the first time in Irish law, a concise statement of the principal fiduciary duties of the directors of an Irish company, which would include a VCC and Manager. Such duties will be owed not just by directors, but also by "shadow" or "de facto" directors.

The Act introduces a new obligation on all directors to include a statement in their annual directors' report that (1) so far as each director is aware there is no relevant audit information of which the auditors are unaware and (2) he or she has taken all the steps that he or she ought to have taken as a director to make themselves aware of any relevant audit information and to establish that the auditors are aware of that information.

The Act introduces a requirement to include a compliance statement in the directors' report in the annual financial statements for Managers that have a balance sheet of over €12.5m and a turnover in excess of €25m in the year to which the directors' report relates. There is also a requirement for directors of large private companies (balance sheet total in excess of €25m and turnover in excess of €50m) to establish an audit committee or explain in the directors' report why one has not been established. Neither requirement applies to non-UCITS VCCs. Unfortunately, due to a drafting anomaly, UCITS VCCs are caught but the position is under review and may be changed by amending legislation.

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