



May 2016

Directors' Compliance Statement under the Companies Act 2014 – Impact on a UCITS plc and Fund Service Providers

Introduction

The concept of a directors' compliance statement first appeared in section 45 of the Companies (Auditing and Accounting) Act 2003 which required directors of a public limited company and qualifying large private companies to prepare a compliance statement and a directors' annual compliance statement. There was no exemption provided for corporate funds (whether UCITS or non-UCITS funds). However, due to concerns expressed at that time, section 45 was not commenced.

The concept also exists in Part IV of the Central Bank Act 1997 which enables the Central Bank of Ireland (the '**Central Bank**'), whenever it considers appropriate, to serve on a regulated financial service provider a notice requiring the service provider to provide it with a compliance statement. To date the Central Bank has not insisted that funds or fund service providers provide such compliance statements.

The Companies Act 2014 (the '**Act**'), which consolidated existing company law, re-introduced the company law obligation (albeit amended) on directors of certain companies to make an annual compliance statement in their directors' report. The statement must acknowledge that the directors are responsible for securing the company's compliance with its 'relevant obligations' and confirm that certain things have been done, or if they have not been done, explain why they have not been done.

For further information on any of the issues discussed in this article please contact:



Breeda Cunningham

DD: +353 (0)1 673 1846

breeda.cunningham@dilloneustace.ie



Brian Kelliher

DD: +353 (0)1 673 1721

brian.kelliher@dilloneustace.ie

Directors' Compliance Statement

Companies to which the requirement applies

Directors of the following companies will be obliged to sign a compliance statement and include this in their directors' report **for years ending on or after 31 May 2016**:

1. Public limited companies ('plc');
2. 'Large' private companies limited by shares, designated activity companies and guarantee companies which have a balance sheet total exceeding €12.5 million and a turnover exceeding €25 million. The prescribed thresholds are applied on an individual company basis as opposed to a group basis.

While section 1387(3) of the Act serves to exempt funds structured as investment companies that are incorporated under Part 24 of the Act from the requirement to provide a directors' compliance statement, it should be noted that the expression investment company is defined in Part 24 as meaning inter alia a plc not being a company to which the UCITS Regulations apply.

Consequently the Act does not exempt a UCITS plc from the requirement to prepare a directors' compliance statement. Initially it had been anticipated that the Minister for Jobs, Enterprise and Innovation (the '**Minister**') would exempt corporate UCITS from the requirement by virtue of the powers entrusted in him pursuant to section 943(1)(g) of the Act. However, notwithstanding ongoing discussions with the Department for Jobs, Enterprise and Innovation, it is not certain at this time whether the Minister will grant such an exemption.

Separately it should be noted that where a corporate fund has established a wholly owned Irish subsidiary that is a qualifying company within the meaning of Section 110 of the Taxes Consolidation Act 1997 (as amended) (an '**SPV**'), the SPV may be obliged to prepare a directors' compliance statement where it meets the threshold of a 'large private company'. Although the Minister also has the power under Section 943(1)(g) of the Act to exempt an SPV from the requirement to produce a directors' compliance statement, no exemption has been granted to date.

In light of the fact that the requirement to prepare a directors' compliance statement will apply to years ending on or after 31 May 2016, we recommend that the directors of a UCITS plc and an SPV (where such an SPV meets the threshold of a 'large private company') take the necessary steps to comply with the requirement to produce a directors' compliance statement.

Directors of an Irish fund service provider company, such as an administrator, a depositary, an alternative fund manager or a fund management company, which meets the threshold of a 'large private company' will also be required to prepare a directors' compliance statement in accordance with the Act.

‘Relevant Obligations’

Relevant obligations under the Act refer to an obligation of the company under:

- (i) Tax law; or
- (ii) The Act where failure to comply would constitute a Category 1 or Category 2 offence (i.e. the most serious offences under the Act) or a ‘serious market abuse offence’ or ‘serious prospectus offence’ (as such terms are defined in the Act).

It is important for directors to understand which of the ‘relevant obligations’ pertain to their company.

Contents of the Compliance Statement

A directors’ compliance statement must acknowledge that the directors of the company are responsible for securing the company’s compliance with its ‘relevant obligations’ and with respect to each of the following matters, confirm that it has been done, or explain why not:

- (i) Drawing up of a compliance policy statement which sets out the company’s policies to ensure compliance by it with its ‘relevant obligations’;
- (ii) Putting in place appropriate arrangements or structures that are, in the directors’ opinion, designed to secure material compliance with the ‘relevant obligations’; and
- (iii) Conducting of a review, during the financial year to which the directors’ report relates, of any arrangements or structures that have been put in place.

The arrangements or structures mentioned in (ii) above are regarded as being designed to secure material compliance by the company if they provide reasonable assurance of compliance in all material respects with those obligations. The terms ‘reasonable assurance’ and ‘material compliance’ are not defined in the Act, therefore directors of the company will need to apply their own judgement based on the circumstances for their company.

In relation to the annual review to be performed during the financial year as detailed in (iii) above, again it is a matter for the directors to determine as to who should perform the review however the directors should ensure that the ‘reviewer’ is sufficiently objective and competent.

How Dillon Eustace may help

Dillon Eustace may assist those companies subject to the requirement to prepare a directors’ compliance statement in the following manner:

-  Identifying the ‘relevant obligations’ as they pertain to your company;

- ▣ Developing appropriate compliance procedures and arrangements to secure material compliance with the 'relevant obligations' or assessing the effectiveness of existing procedures in place;
- ▣ Preparation of a monitoring programme to assess if the compliance control procedures operated in the manner intended during the year to enable material compliance with the 'relevant obligations'; and
- ▣ Having regard to the above steps, developing a compliance policy statement for inclusion in the directors' report.

For further information on any of the issues discussed in this briefing note, please contact Breeda Cunningham or Brian Kelliher or your usual contact in Dillon Eustace.

Dillon Eustace

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DILLON EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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