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Matheson Investment Funds Update

The Companies Act 2014: Implications for Investment Companies and Fund Managers

Following a lengthy review and consultation process, the Companies Act 2014 (the "**Act**") was signed into law on 23 December 2014. The Act, which consolidates the Companies Acts 1963 to 2013 into a single statute, has not yet come into force, and it is expected that it will be commenced on 1 June 2015. Irish companies therefore should now start to assess and react to the changes effected by the Act.

The Act is essentially a consolidation of Irish companies' legislation, but does introduce a number of innovations and changes. While these principally affect companies incorporated as private limited companies, there are some changes which will also apply to public limited companies. However, the Act does not change the fundamental nature of any Irish company, which remains a body corporate with separate legal personality, and with a board of directors to which primary responsibility for management of the company is delegated.

For asset managers, there are a number of key components to the Act.

Investment Companies

The position of investment companies under the Act is largely the same as under the Companies Act 1990 ("**CA90**"). Investment companies which were incorporated under Part XIII of CA90 will continue in existence, without any re-registration requirements, and will be deemed to be investment companies to which Part 24 of the Act applies. The existing statutory obligation to spread investment risk and to provide facilities for investment by the public, the ability to have umbrella funds with segregated liability between sub-funds, and the investment fund related share dealing rules will not change.

Some of the more innovative provisions in the Act, such as the collapsing of the memorandum and articles of association ("**M&A**") of a private limited company (or "**LTD**") into a single constitutional document, without an object clause, and the ability to use majority written resolutions, will not apply to investment companies (or other plcs). Accordingly, an investment company's M&A will continue to apply (including the retention of a specific objects clause), except to the extent that the M&A provisions are incompatible with mandatory provisions of the Act applicable to investment companies.

Investment companies should therefore take the opportunity in the period up to commencement of the Act to review their M&A, to identify any incompatible provisions which will be excised from the M&A and / or innovations which might usefully be incorporated into the M&A. In that regard, the changes

introduced by the Act which do impact on investment companies are limited in number, and are largely innovations which are designed to streamline governance processes.

Management Companies and AIFMs

Management companies and alternative investment fund managers ("**AIFMs**") incorporated in Ireland will be impacted by the Act to a greater extent than investment companies. However, none of the changes will impact their fundamental nature as corporate entities or the key role of the board.

The first matter to be considered by management companies and AIFMs is that of re-registration as a designated activity company ("**DAC**"). The key difference between a DAC and the "model" form of limited liability private company under the Act, namely the LTD, is that the LTD will not have an objects clause within its constitutional document. A DAC, however, will be required to have a stated object in its constitution (which will essentially be the same as an M&A). It is expected that management companies and AIFMs, given their very specific role in relation to investment funds and under regulation, will fall within the DAC category. Any company which issues listed debt securities will also be required to re-register as a DAC.

While LTDs will only be required to have a single director, DACs must have a minimum of two directors (reflecting the current position for all companies). LTDs will not be required to hold AGMs, whereas DACs with more than one member will have to hold AGMs (again, this reflects current law).

A new requirement, which applies to LTDs and DACs with a balance sheet total of more than €12.5 million and turnover of greater than €25 million, is the inclusion of a directors' compliance statement in the annual accounts of the company. The compliance statements will acknowledge responsibility for compliance with "relevant obligations" on a comply or explain basis, the "relevant obligations" being the company's obligations under tax law, any provision of the Act the breach of which would result in a category one or category two offence, and obligations the breach of which would result in serious market abuse and / or prospectus offences.

The Act gives a transitional period of eighteen months within which to re-register as a DAC. Any private limited companies which do not re-register as a DAC (or other type of company recognised under the Act), will automatically convert to LTD status at the end of the transitional period. The DAC provisions of the Act will apply to all private companies in the interim period.

In order to re-register as a DAC, management companies and AIFMs can resolve to do so by way of ordinary resolution within fifteen months of commencement of the Act. After this period, a special resolution will be required in order to re-register as a DAC. Furthermore, if persons holding more than 25% of the voting rights of a limited company require it, that company must re-register as a DAC. Re-registration as a DAC will necessitate a change of name, to incorporate a reference to "Designated Activity Company" or the Irish language equivalent, and consequent changes to websites, documentation, etc. Management companies, AIFMs and other regulated entities should therefore give early consideration to re-registration, in order to avoid the risk of an unintended automatic redesignation as a LTD.

Other Considerations

Some of the changes implemented by the Act will apply across all categories of company, including DACs and investment companies. These include a number of innovations in relation to corporate governance, such as a new process under which companies can notify the Companies Registrar of

certain individuals, not being directors, with authority to bind the company, with both the directors and any such registered person then deemed to have authority to bind the company.

The Act consolidates the existing statutory duties applicable to company directors, applying these to executive and non-executive directors, shadow directors, de facto directors (who are persons who occupy the position of director without having been formally appointed) and a wide range of connected persons. The Act also codifies, for the first time, the principal fiduciary duties which have always applied to company directors.

A new summary approval procedure, which is in essence a "whitewash" procedure for what would be otherwise restricted activities, such as the provision of the financial assistance, loans to directors and reductions of the company capital, is set out in the Act. The summary approval procedure also applies to mergers and to members' voluntary liquidations. While the new procedure will be of broader relevance to management companies and AIFMs, the procedure will apply to investment companies with regard to loans to directors and members' voluntary liquidations.

Among the other innovations in the Act which apply to all companies are new rules in relation to registration and priority of charges, provisions streamlining schemes of arrangement, acquisitions, mergers and divisions (with some differences applying to mergers and divisions of plcs and investment companies), and some changes relevant to financial statements.

Next Steps

The actions to be taken by each individual company will depend on its current form ie, whether private limited, plc or an investment company. Investment companies should undertake a detailed M&A review against the Act before the commencement of the Act. For management companies and AIFMs, there will be an 18 month transitional period from commencement of the Act within which to re-register. The existence of the transitional period should not, however, delay consideration by management companies and AIFMs of the implications of, and potentially early re-registration under, the Act, as the DAC provisions will apply to them during the transitional period and until re-registration under the Act.

Please get in touch with your usual Asset Management and Investment Funds Group contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this update.

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at www.matheson.com.

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