Directors’ Duties under the Companies Act 2014

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 applied since 1 June 2015. This note provides some detail on the changes to the law relating to directors’ duties introduced by the Act.

For the most part, the substantive law relating to directors’ duties is unchanged by the Act. However, the Act introduced some important changes such as the codification of directors’ fiduciary duties, the consolidation of pre-existing statutory duties applicable to directors and the introduction of a requirement to provide a directors’ compliance statement that will apply to large management companies and alternative investment fund managers (“AIFMs”).

The Codification of Directors’ Duties

The Act sets out a non-exhaustive list of eight fiduciary duties owed by directors to a company, essentially codifying the duties which apply to directors under common law and equity as well as amending and restating the applicable statutory obligations under existing company legislation.

The eight duties set out in the Act are detailed below.

<table>
<thead>
<tr>
<th>Duty</th>
<th>Description</th>
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<tr>
<td>Act in good faith and in the interests of the company</td>
<td>This imposes a subjective duty on a director to act in what he believes to be in the interests of the company.</td>
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<tr>
<td>Act honestly and responsibly in relation to the conduct of the affairs of the company</td>
<td>This is not a common law duty but was a defence available to directors of insolvent companies in response to an application to have them restricted under the Companies Act 1990 (now repealed).</td>
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<td>Act in accordance with the constitution and exercise powers only for purposes allowed by law</td>
<td>This duty is especially relevant to designated activity companies (“DACs”) and other companies with an objects clause in their constitution. The Act provides that, notwithstanding that the validity of any act done by a DAC may not be called into question on the ground of lack of capacity, “it remains the duty of the directors to observe any limitations on their powers flowing from the DAC’s objects.”</td>
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<td>Not to misuse the company’s property, information or opportunities</td>
<td>A director may be relieved of this duty by means of a provision in the company’s constitution or by resolution in general meeting.</td>
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<tr>
<td>Not to fetter independent judgment</td>
<td>A director may be relieved of the duty not to fetter his independent judgment by means of a provision in the company’s constitution or by resolution in general meeting. There is also express statutory recognition that a director may fetter his independent judgment in certain circumstances where to do so is in the best interests of the company.</td>
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<tr>
<td>Avoid conflicts of interest</td>
<td>A director may be relieved of this duty by means of a provision in the company’s constitution or by resolution in general meeting.</td>
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Directors are required to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having: (1) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and (2) the knowledge and experience that the individual director has.

This equates to a duty to act in the best interests of the company since “company” has been interpreted as meaning the members as a whole.

The Act provides that the codified fiduciary duties are to be interpreted and applied having regard to the corresponding common law rules and equitable principles, meaning that the substantial body of pre-existing case law on directors’ duties continues to be relevant in interpreting those duties.

**Consequences of a Breach of Duty**

The consequences of a breach of duty are the same as those which applied previously, that is, the company may sue for damages, seek an indemnity for losses or seek an account for profits. In addition, the Act places the requirement for a director to indemnify and account in relation to the breach of certain duties on a statutory basis. This applies to all of the fiduciary duties codified in the legislation except the duty to act honestly and responsibly and to have regard to the interests of members. A breach of any of the fiduciary duties will not invalidate any contract or transaction or its enforceability, other than by the director in breach.

**Directors’ General Statutory Duties**

The Act restates the general duties applicable to directors, such as those arising from the prohibition on loans to directors, restrictions on substantial property transactions with directors and the duty to disclose interests in contracts made by the company. The Act introduced changes to the duty to disclose interests in shares of the company, which is now subject to an exemption where the shares held represent less than 1% of the share capital of the company or the shares do not have voting rights. As was previously the case, it is not necessary to disclose holdings in UCITS and there is a new provision exempting holdings in Part 24 investment companies from the disclosure obligation. A separate disclosure obligation with respect to listed funds remains under market abuse legislation. A new summary approval procedure, which is in essence a “whitewash” procedure for what would be otherwise restricted activities, now applies in respect of the provision of loans to directors.

**Directors’ Indemnities**

In relation to directors’ indemnities, it remains the law that a provision will be void where it purports to exempt an officer of a company from, or indemnify an officer against, any liability in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company. As was the case previously, an exemption applies whereby a company may enter into a binding contract to indemnify an officer against any liability incurred in defending proceedings in which judgment is given in the officer’s favour. The Act contains a new provision stating that, where a company migrates to Ireland from a jurisdiction which permitted such indemnities for directors, the Act will not operate to invalidate any such indemnities in respect of any negligence, default, breach of duty or breach of trust occurring before the re-domiciliation of that company.

**Directors’ Compliance Statement**

The Act introduces a new requirement applicable to certain large LTDs, DACs and all public limited companies (with the important exception of Part 24 investment companies) to include a directors’ compliance statement in the annual accounts of the company. The compliance statement acknowledges the directors’ 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 new requirement applies to LTDs and DACs with a balance sheet total of more than €12.5 million and annual turnover of greater than €25 million.
The exemption from the requirement to prepare a directors’ compliance statement for Part 24 investment companies does not currently extend to UCITS investment companies and therefore only applies to alternative investment funds established under the Act. Irish Funds, the Irish funds industry representative body, is currently engaging with relevant government departments to seek to have the exemption extended to UCITS investment companies.

Directors of companies that are within the scope of this requirement must confirm that a “compliance policy statement” setting out the company’s policies respecting compliance by the company with its relevant obligations has been drawn up. It is expected that the compliance policy statement will be a short standard document expressing the company’s commitment to complying with its relevant obligations. The directors must also confirm that there are in place appropriate arrangements and structures that are, in the directors’ opinion, designed to secure material compliance with the company’s relevant obligations. The compliance statement must contain a confirmation that a review has been conducted, during the financial year to which the directors’ report relates, of arrangements or structures that have been put in place. Where the directors decline to provide any or all of these confirmations, they must give reasons as to why the confirmations have not been given.

**Next Steps**

The codification and consolidation of directors’ duties in the Act provides greater clarity and a centralised source for directors of Irish companies. The revised provisions relating to directors’ duties came into effect upon commencement of the Act on 1 June 2015. We will keep our clients updated as to further developments relating to the requirement for UCITS investment companies to include a directors’ compliance statement in their annual accounts.

*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](http://www.matheson.com).*

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