COMPANIES ACT 2014

With the new Companies Act 2014 expected to be commenced in June 2015, it is vital that company directors, company secretaries and finance teams understand the implications which the Act will have for them and their businesses. Ruairí Cosgrave explains how the legislation will affect Irish companies and their officers.

The new Companies Act 2014 ("the Act") is split into two: Parts 1–15 cover the new model private company limited by shares (LTD) and Parts 16–24 cover all other types of company including designated activity companies (DACs) – other private limited companies not covered by parts 1–15, PLCs, guarantee companies, unlimited companies and external companies.

The new model private company limited by shares (LTD) will:

- have a one document constitution;
- have the suffix Limited or Ltd;
- not be required to have an objects clause and the concept of ultra vires will no longer exist;
- have a minimum of one director but must have a company secretary; and
- a multi-member LTD may dispense with the requirement to hold AGMs.

A Designated Activity Company (DAC) will have:

- a two document constitution similar to the current Memorandum & Articles of Association;
- the suffix Designated Activity Company or DAC;
- an objects clause;
- a minimum of two directors and a company secretary; and
- a DAC cannot dispense with the requirement to hold an AGM if it has more than one shareholder.

CONVERSION OF EXISTING COMPANIES

Most Irish companies registered with the Companies Registration Office (CRO) are private limited companies and they will need to decide which type of entity under the new legislation they should convert to. There is the option to convert to a new model Private Limited Company (LTD) or a Designated Activity Company (DAC).

On the commencement of the Act, all private limited companies will be treated as DACs for a transition period of 18 months. Existing private limited companies which do not elect to convert to a DAC will be deemed to have become new model private limited companies at the end of the transition period.

An existing private limited company can elect to become a DAC by passing an ordinary resolution and making the necessary filings to the CRO three months prior to the end of the transition period. Where a company is deemed a DAC but has not converted before the end of the transition period, the members may apply to the court for an order to convert.

A company may elect to convert to a new model private limited company during the transition period by passing a special resolution and making the necessary filings with the CRO.

It is important for directors to be aware of the new types of company which will be introduced by the Act in order to make an informed and timely decision as to which of the new company types would be most appropriate. Factors to consider when deciding what type of company to convert to include:

- the current legal form of the company;
- the requirement to retain an objects clause;
- the future plans of the company.

It should be noted that the CRO will not update the existing Memorandum and Articles of Association for those companies
which elect to convert to an LTD by the default option. Companies electing for this default option will have a constitution filed with the CRO that does not match their actual constitution. For the avoidance of confusion, a new one document constitution should be prepared and filed with the CRO.

**OTHER COMPANY TYPES**

Companies Limited by Guarantee will change their suffix under the Act from ‘Limited’ to ‘Companies Limited by Guarantee’ (CLG) or the Irish equivalent. The suffix for Unlimited Companies will change to ‘Unlimited Company’ (UC) or its Irish equivalent. Public Limited Companies will not be affected by a name change under the Act.

Directors will need to review the Articles of Association of these companies to ensure they are not inconsistent with the provisions in keeping companies compliant.

Companies which currently have a second director who has been appointed solely to fulfil the two director minimum requirement have an opportunity for the second director to resign but it is important to note that a person other than the remaining director must act as the company secretary.

**Rationalisation opportunities pre-enactment**

In advance of the commencement of the Act, businesses with a number of companies in their group should review their structure and identify any companies which no longer have a purpose. All companies identified should consider applying to be removed from the register by means of a voluntary strike off or liquidation as this will avoid any costs associated with the conversion to an LTD or a DAC.

> Variation of capital in reorganisation;
> Treatment of pre-acquisition profits;
> Loans etc. to directors and connected persons;
> Mergers;
> Members’ Voluntary Liquidations.

Where a reorganisation is currently contemplated it is worth considering delaying the transaction until after June 2015 when the new Summary Approval Process could be used resulting in reduced time and costs being incurred.

**DIRECTORS’ COMPLIANCE STATEMENTS**

For companies with a balance sheet total exceeding €12.5m and turnover exceeding €25m, there is an obligation to include a directors’ compliance statement in the Directors’ Report in the company’s financial statements. The three measures identified in

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set out in the Act. New constitutions should be prepared, circulated to members and filed with the CRO.

**ITEMS TO BE ADDRESSED POST-CONVERSION**

Where companies experience a name change, items including company stationery, the company’s website and any name plates should be amended once the company has been re-registered. In addition, a new company seal should be ordered and used when sealing any documentation post-registration.

**Opportunities to reduce administration post-enactment**

Once commenced, the Act will allow multi-member LTDs dispense with the requirement to hold AGMs which will reduce the amount of paperwork involved Changes enabling and facilitating reorganisations

Currently, activities that might prejudice shareholders and/or creditors require documentation to be sworn and/or Court approval. Certain other transactions can only be completed if the company’s auditors provide very broad certifications which, in practice, are difficult to obtain. The Act introduces a Summary Approval Procedure, which in brief, requires a special resolution of the members and a statutory declaration of solvency made by the directors in some cases supported by the report of an independent person.

The Summary Approval Process will streamline the execution of the following transactions:

> Financial assistance;
> Reduction of share capital;
> the Act as necessary to demonstrate compliance are as follows:

> Preparation of a Compliance Policy Statement;
> Implementation of a structure which in the directors’ opinion is designed to secure material compliance;
> Conducting a review of the structures put in place during the relevant financial year.

It should be noted that Investment Companies and Unlimited Companies are excluded from the requirement to prepare a Directors’ Compliance Statement.

**CODIFICATION OF DIRECTORS’ DUTIES**

In the past, determining directors’ duties and responsibilities was not always clear and practitioners looked to the courts for
guidance. The Act sets out eight fiduciary duties that will apply to directors, shadow directors and *de facto* directors as follows:

1. To act in good faith;
2. To act honestly and responsibly in the company’s affairs;
3. To act in accordance with the company’s constitution;
4. Not to use company property for own or other’s use unless permitted by the constitution/approved by members;
5. Not to fetter discretion unless permitted by constitution;
6. To avoid conflicts of interest unless released by the constitution/members;
7. To exercise care, skill and diligence;
8. To have regard to the interests of employees and members of the company.

**EXTENSION OF AUDIT EXEMPTION**

Under current legislation parent and subsidiary companies, regardless of size, are not exempt from the requirement to have an audit. Under the new legislation, audit exemption has been extended to groups where the holding company and all of its subsidiary companies taken together meet the criteria to avail of the audit exemption. In addition, companies limited by guarantee have the opportunity to avail of the exemption from audit providing the required criteria are met.

Audit exemption has also been extended to dormant companies. Under the Act, a company is deemed dormant if it has no significant accounting transactions and its assets and liabilities comprise only permitted assets and liabilities. Permitted assets and liabilities are investments in shares of, and amounts due to or from, other group undertakings.

Audit exemption is not available to certain types of company including credit institutions and insurance companies. It should also be noted that members holding 10% or more of the share capital can oblige the company to have an audit completed.

It is important to ensure that companies availing of audit exemption file their financial statements on time with the CRO as failure to do this will result in audit exemption being lost for two years.

**CONCLUSION**

The Act is welcome as it makes Irish company law requirements easier to understand, clarifies the duties of directors and introduces innovations through the new Summary Approval Procedure that facilitate the execution of a number of different transaction types.

As a first step, company directors and secretaries who have not already done so should review the status of their existing companies and make an informed decision as to which new company type is most appropriate.

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