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THE COMPANIES ACT 2014

Some immediate implications for Irish (re)insurance groups from 1 June 2015

The Companies Act 2014 (the "**Act**") is now on the statute book but awaits commencement. The Act reforms, consolidates and amends the company law statutes applicable to Irish companies, repealing the existing Companies Acts 1963 to 2013 and thirty two pieces of law in total. It is not dissimilar (but not identical) to the overhaul of UK legislation in the Companies Act 2006.

The Act is expected to be commenced on 1 June 2015 and it will start the clock ticking on changes affecting all Irish (re)insurance companies. There will be a transitional period of eighteen months from the commencement of the Act concluding on 30 November 2016, although companies should ideally have taken action within fifteen months.

What needs to be done and when to start? This briefing addresses key issues for (re)insurers and other companies within their groups. Note – the briefing addresses specific immediate concerns in the (re)insurance area and, for a broader overview, the attention of readers is addressed to the William Fry publications:

- "Companies Act 2014 - What to do next?" http://www.williamfry.ie/Libraries/Publications/The_Companies_Act_-_the_new_forms_of_limited_company_and_what_to_do_now-2.sflb.ashx
- "Companies Act 2014 - Directors' & Secretaries' Duties" http://www.williamfry.ie/Libraries/Publications/Companies_Act_2014_-_Directors__Duties-10575236_2-3.sflb.ashx

What are the Headline Points?

In-house counsel and compliance teams, with board and shareholder involvement, need to be aware of the following key points:

- The changes affect all Irish incorporated companies (note: branches of non-Irish incorporated companies carrying on business in Ireland on a freedom of establishment basis are not the main subject to the Act, nor are entities which are only Irish tax resident but not Irish incorporated; therefore, these entities are generally outside scope).
- The Act creates two forms of private company limited by shares. The first form is a simplified model of the existing private company limited by shares (referred to as a "**LTD**" for the purposes of this note). The second form provided for in the Act is called a "designated activity company" ("**DAC**"). The Act prohibits (re)insurance undertakings and some, but not all, other types of financial services regulated entity from converting to a LTD.

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- Irish authorised (re)insurance companies have traditionally been private limited companies, with a few which are public limited companies ("**PLC**") or Societas Europaeas ("**SE**"). Under the Act, any existing (re)insurer which is a private limited company must change its corporate status, to most likely become the new form of company which is a DAC. The other types of authorised (re)insurers (PLCs and SEs) will stay generally in the same form although the Act contains changes which will have application to them.

- If there are other Irish group companies (e.g. Insurance Mediation Directive (re)insurance intermediaries or unregulated holding companies or services companies), the default position is they will become LTDs. Such companies can also opt to become DACs, but are not obliged to do so.

- The changes under the Act, meaning in most cases conversion to a DAC, will apply equally to captive (re)insurers. The Act does not affect the continued application of the Central Bank of Ireland's Corporate Governance Codes (the general code or the code specifically for captives).

- Upon conversion to a DAC, there is a need to change the end of the registered name (to "DAC", or a permitted variation). This may mean logistical issues and there may be a need for communication with, for example, policyholders or reinsurance counterparties. It means changes to letterhead, the company seal and (subject to local law requirements) policy documents. For life assurance companies writing Irish business, the Life Assurance (Provision of Information) Regulations 2001 may require a written communication with individual policyholders confirming the change in the name and the change in the legal form of the company.

- The changes may mean submissions or notifications to (re)insurance competent authorities or other authorities in countries, such as for admission / licensing to write business in non-EEA countries, or in relation to branches of Irish companies in those countries.

- For (re)insurers, whilst the form of the company changes (and, save for PLCs and SEs, also its name), it should be stressed it does not vary the legal validity of existing contracts nor, necessarily, does it mean existing contracts must be amended or restated to reflect the change to DAC.

- Most (re)insurance undertakings have a condition attaching to their authorisations requiring a notification or the consent / non-objection from the Central Bank of Ireland ("**Central Bank**") to changes in their constitutional documents. It means changes to constitutional documents arising from the new Act will need discussion in advance with the Central Bank.

- The Act requires companies converting to a DAC to have passed an ordinary resolution approving such re-registration not later than three months before the expiry of the transitional period (that is, by 31 August 2016). The new form constitution to be utilised by the DAC to meet the requirements of the Act will need to be filed in the Companies Registration Office ("**CRO**"). Resolutions of the board of directors should be made in advance of taking these steps.

- Directors of (re)insurance companies will be obliged to sign a compliance statement under the Act acknowledging responsibility for compliance with company law obligations. Directors will have to confirm that they have put in place appropriate structures designed to ensure material compliance or explain why they have not done so. We understand that the requirement to include the compliance statement with the directors' report accompanying financial statements is likely to apply for financial years commencing after 1 June 2015 (i.e. for a 31 December year-end company, this should mean the 2016 year) but this is to be confirmed. The process of implementing the new structures will require focus in advance (i.e. during 2015).

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- From 1 June 2015, board minutes will need to change (for example, to reflect the different cross-references to the new Act). There are some helpful changes, such as the need for directors to declare interests in shares or stock options in parent companies now only applying above 1%.

- Existing private companies limited by shares are deemed to operate under the law applicable to DACs in the Act during the transition period. It should be noted that if a private company does not convert to a DAC during the transition period, it is automatically deemed to take the form of a LTD following the conclusion of the transition period on 30 November 2016. Obviously, this should be avoided by (re)insurance undertakings (save for PLCs and SEs) as it will be a breach of the Act if they become LTDs.

- While not generally in scope for the main changes, non-Irish (re)insurers (or other entities, such as Insurance Mediation Directive companies) with branches in the State need to be aware of changes. Existing branches of external companies under the Companies Acts will automatically become either a "branch EEA" or a "branch non-EEA". External companies which had registered as a "place of business" as opposed to a "full" branch under the current regime will be cancelled on commencement of the Act. The legislation regarding having a "place of business in the State" in the current Companies Acts (as distinct from "full" branch) will cease as a concept.

- All the CRO forms and returns will change from 1 June. The new CRO forms, as well as useful info-sheets, can be seen at https://www.cro.ie/New-Act-2014/Overview. The current forms will generally have the same names (e.g. Form B2, B10 etc.) but will be updated, along with the addition of new forms (e.g. lodging a Form N2 to re-register as a designated activity company). The Act itself can be seen at http://www.irishstatutebook.ie/pdf/2014/en.act.2014.0038.pdf.

- When the Act becomes effective, inaction is not going to be an option. For (re)insurers, not making the changes means a breach of the legislation. (Re)insurance undertakings must draft new constitutional documents and pass the resolutions to become DACs from 1 June 2015 onwards (and not later than 31 August 2016, when the resolution approving re-registration as a DAC should have been approved).

The following is a more detailed outline for (re)insurance clients of the immediate implications arising from the new Act. Any of the members of the William Fry team will be very happy to help on specific queries.

Companies Act 2014

The Companies Bill 2012 was signed by President Higgins on 23 December 2014 and enacted as the "Companies Act 2014". The Act does not come into effect until it is formally commenced and this is expected to occur on 1 June 2015. There will be a transitional period of eighteen months following the commencement of the Act, although many of the requirements in the Act will have immediate effect and filings with the CRO are envisaged within the first fifteen months.

Private Company Form - LTD versus DAC

The Act provides that existing private limited companies limited by shares must determine whether to take the form of (i) a LTD or (ii) a DAC. Under the provisions of the Act, LTDs will have no specific objects within the new single document described as the "constitution". In contrast, DACs will retain a main objects clause and will have a "constitution" but comprising: (i) a memorandum of association ("**Memo**") and (ii) an articles of association ("**Articles**").

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The Act specifically prohibits authorised (re)insurance undertakings (as well as credit institutions) which are private companies limited by shares from being a LTD. Instead such companies must become DACs (or, less likely, PLCs or SEs). The position in relation to other types of financial services regulated activity, such as MiFID companies or UCITS managers, is that they may also have to be DACs although this has yet to be confirmed by the Central Bank. It appears currently that companies like Insurance Mediation Directive or Investment Intermediaries Act entities (e.g. (re)insurance intermediaries and brokers) may at their discretion be LTDs or DACs, as can other unregulated companies in (re)insurance groups such as holding companies or services companies. This would mean such companies could avail of a more streamlined new regime, in which LTDs can, for example, exist with only a single director and with greater administrative flexibility (e.g the ability to dispense with the convening of an AGM each year and instead deal with the requirements by a written procedure).

The requirement that Irish (re)insurers must be DACs (or in limited circumstances, a PLC or SE) is consistent with the concept in the EU Directives and the Irish implementing regulations that (re)insurance undertakings are only permitted to engage in the business of (re)insurance and related operations.

Process of Conversion to a DAC

Following the commencement of the Act (i.e. 1 June 2015), private companies which do not convert to LTDs or DACs shall be deemed to operate under the law applicable to DACs during the transition period. Companies which wish to convert to, or are obliged to convert to, DACs should commence the conversion process before the conclusion of fifteen months from the commencement date of the Act (that is, in advance of 31 August 2016). All private companies which have not converted to a DAC following the conclusion of the transition period shall then be deemed to be LTDs (as opposed to DACs).

On the basis companies are deemed to become LTDs (not DACs) following the conclusion of the transition period, it is important that all Irish authorised (re)insurance undertakings which are currently private companies convert to a DAC following the commencement date. In order to convert to a DAC, a company can pass an ordinary resolution (i.e. a shareholder resolution) before the conclusion of the fifteen month period following the commencement of the Act resolving that it be re-registered as a DAC. Once this is done (i) a copy of the ordinary resolution and (ii) the constitution (consisting of the new Memo and the Articles) should be filed in the CRO accompanied by the new Form N2.

DAC - Memo

The Memo of a DAC must set out that the company is a DAC and detail its objects. A sample constitution for a DAC is set out in Schedule 7 to the Act. It contains one main object and no long list of ancillary objects and powers. This is a departure from the approach under the existing law. The Act states that the capacity of the DAC extends to doing any act or thing that appears to it to be requisite, advantageous, or incidental to, or to facilitate the attainment of an object stated in the DAC's Memo. The inclusion of this language in the Act is intended to do away with the need for long lists of objects and powers in a company's constitutional document and to oust the operation of the doctrine of *ultra vires*. It appears (e.g. from the sample Memo in Schedule 7 to the Act) that DACs should thus only have one main objects clause – e.g. for (re)insurers, it will just be the EU Directive requirement – the activity of (re)insurance and related operations.

While it is a cleaner approach, it is still something on which further clarification may be needed as companies move into the implementation phase. The Act states that the form of constitution of a DAC should adhere to the form set out in Schedule 7 to the Act *"or as near thereto as circumstances permit"*, so there seems to still be scope for lists of objects. The Central Bank may wish to give guidance on these types of areas, or a

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market practice will emerge in any event. The Act includes that the objects clause of a DAC can always be amended by special resolution at a future date.

DAC - Articles

Technically, it will now be possible for the Articles of a DAC to simply state that the provisions of the Act are adopted meaning the document itself can be very short form. The Act lays-out “optional provisions” and “mandatory provisions” which apply to the Articles:

- The ***“optional provisions”*** are much like what was the default set of Articles set out in Table A of the Companies Act 1963. The optional provisions are deemed to apply, unless excluded or modified. Where the short-form approach is taken, the optional provisions contained in Parts 1 to 14 of the Act, which may also be excluded or modified in the Articles, will be applied outright.

- The ***“mandatory provisions”*** cannot be excluded from or modified by the Articles. These are mostly technical, such as (i) the right of the company to grant powers of attorney; (ii) the grounds upon which a poll can be demanded and the demand withdrawn; and (iii) the list of persons entitled to receive notices of meetings.

As well as the “optional” and “mandatory” provisions, there are a number of provisions in the Act which permit companies to do things which they were previously not permitted to do such as (i) providing for an enduring authority to its directors to allot new shares (as opposed to an authority not exceeding five years as currently applies) or (ii) the holding of annual general meetings outside the State.

For regulated companies such as (re)insurers, the Articles are always going to be bespoke to a greater or lesser degree, so the new “short form” approach is of secondary relevance. For example, companies will still wish to include provisions around the ability to remove directors in accordance with the Central Bank Reform Act 2010 fitness and probity regime and in other areas.

Unfortunately, companies will not be able to just use their existing Articles. Given the changes on foot of the Act, it is likely that the former Articles which were suitable under the old regime will, for example, now infringe the “mandatory provisions” set out in the Act. It will mean legal input will usually have to be taken.

Change of Name

DACs will need to include “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) or the Irish language equivalents.

Arising from the change to company name and the Memo and Articles, there may be issues for (re)insurers in dealings with third parties - e.g. policyholders or reinsurance counterparties, as well as regulators and licensing authorities. This could include, subject to local law requirements, a need for direct communications with those with whom business is undertaken. As names are changing, it means changes to letterhead and policy documents, as well as potential submissions or notifications with authorities such as for non-EEA licences where notarised and apostilled certificates of incorporation on a change of name or a key change to constitutional documents are often required. However, it is important to bear in mind the changes do not qualify the legal validity of existing contracts nor, necessarily, does it mean existing contracts should be amended or restated to reflect the change to DAC status.

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For life assurance companies writing Irish business, the Life Assurance (Provision of Information) Regulations 2001 may require a written communication with all individual policyholders confirming the change in the name of the company and the change in the legal form of the company.

Affected companies will need to bear in mind that the change to DAC will necessitate the creation of new company seals.

Public Company Form - PLC and SE

PLCs will also have a one document constitution under the Act which is made up of the Memo and the Articles. A sample constitution of a PLC is set out in Schedule 9 of the Act. The form of constitution contained in Schedule 9 contains one main object in the Memo and the Act states that the form of a constitution of a PLC should adhere to the form set out in the Act *"or as near thereto as circumstances permit"*.

For those (re)insurers which are SEs, the regime applicable to PLCs under the Act is also applied to SEs. This is consistent with the current position. PLCs and SEs will have to make similar, but not identical, changes to those described for DACs above. Usefully, the Act now allows PLCs and SEs to have just one shareholder. This will be helpful for those companies which currently have seven shareholders to comply with existing Irish company law requirements (i.e. one principal shareholder and six nominee shares). These structures can be done away with.

It is not possible for an existing private limited company which is a (re)insurer to opt to become a PLC or a SE under the new regime without also following the additional requirements which fall upon re-registrations for those types of companies. These requirements are especially prescriptive with respect to SEs. Further advice can be given on this if needed.

Matters Requiring Compliance from 1 June 2015 (Commencement Date)

Apart from the need to consider how, and when, an existing private company re-registers, there will be the on-going requirements under the Act which apply from the commencement date. For existing private limited companies, in the period from the commencement of the Act until a company elects to become a DAC, the DAC provisions are automatically applied.

Board Meetings and Written Resolutions

The Act will lead to some changes in how board meetings take place and are minuted. (Re)insurance undertakings should be mindful that the requirements under the Central Bank's Corporate Governance Codes (general and captive) are unaltered and continue to apply fully.

The Act includes an optional provision (i.e. one which (re)insurers may wish to disapply in the new constitution) which states where a board meeting is deemed to occur if not all the directors are present in one place. While generally, given the Central Bank's Corporate Governance Code, physical attendance in the one place is preferred, it is often not logistically possible particularly in groups with foreign ownership. It typically means conference calls and similar arrangements are put in place to allow a director to participate at a meeting.

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The provision in the Act states that (unless disapplied in the constitution) a board meeting takes place where the largest grouping of the participants is assembled, or if there is no such group, where the chairperson is situated. If neither applies, the board meeting is permitted to determine the location for itself.

This provision of the Act will also be important for tax aspects, such as the place of “management and control” of an Irish company.

Unlike shareholder resolutions (dealt with further below), there is not a general ability in the new Act to pass directors’ business by way of majority written resolutions although it can arise in limited permitted circumstances. Typically, all directors will still need to sign written resolutions.

Board Minutes

The legislative references of commonly used sections of the existing Companies Acts which appear in board minutes will change with the Act. This is due to the new numbering and also amendments to the provisions themselves. Once the Act has commenced, company secretaries will need to pick-up these changes.

To help those drafting minutes, some of the most common cross-references are as follows:

Companies Act 1963 - 2013 Provision	Equivalent Provision Under the Act
Section 194, Companies Act 1963 - Duty of director to disclose an interest in contracts made by the company	Section 231
Section 53, Companies Act 1990 - Obligation of director or secretary to notify interest in shares or debentures of the company	Section 261, Section 262, Section 263
Section 150, Companies Act 1990 - Restriction on person being appointed or acting in any way as a director or secretary or being concerned or take part in the promotion or formation of any company	Section 819
Section 160, Companies Act 1990 - Disqualification from person being appointed or acting as a director or other officer of a company or being concerned or taking part in the promotion, formation or management of any company	Section 839, Section 840, Section 841, Section 842, Section 848
Section 43, Companies (Amendment) (No.2) Act 1999 - Company to have at least one director resident in a member state of the EEA	Section 137

As stated above, it will be necessary to make sure the place where the board meeting occurred that is identified in the minutes follows the new approach unless the relevant provisions of the Act are disapplied in the constitution.

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Shareholder Meetings and Written Resolutions

Based on a (re)insurance undertaking with a 31 December year-end, the first AGMs to be held that are required to comply with the new Act will be in March / April 2016. All AGMs may now be held inside or outside the State.

A LTD need not hold an AGM in any year where all the members entitled to attend and vote at such meeting sign a written resolution in the format specified in the Act. DACs which have a single shareholder only (i.e. most, but not all, (re)insurers) may also dispense with the need to hold an AGM each year. Where a DAC has two or more members it cannot dispense with the requirement to hold an AGM.

The process for written resolutions of shareholders has been simplified. The new concept of a majority written resolution is provided for in the Act, where a time period is then waited after which it has effect. A majority written resolution described as an ordinary resolution signed by shareholders representing more than 50% of the total voting rights of all shareholders entitled to attend and vote at a general meeting will be valid and effective as an ordinary resolution passed at a general meeting of that company seven days after it was signed by the last shareholder. Similarly, a majority written resolution described as a special resolution signed by shareholders representing more than 75% of the voting rights will be valid and effective as a special resolution twenty one days after it was signed by the last shareholder. It should be noted that the provisions in the Act relating to majority written resolutions may be set aside in the constitution of a company if desired.

In practical terms, the additional provisions in the Act relating to majority written resolutions and the setting aside of the requirement to hold an AGM may not be relevant to (re)insurance undertakings as they are mostly wholly owned. However, they will be relevant in (re)insurance undertakings which are joint ventures or in which minority stakes are held.

Audit Committee and Exemption for Captives

The Act includes a requirement that "large companies" should establish audit committees and confirm that this has been done in the directors' report which accompanies the audited financial statements. Where a large company does not create an audit committee it must confirm in the directors' report the reasons for that decision (i.e. a "comply or explain" regime).

The majority of (re)insurance undertakings are likely to meet the thresholds applicable to constitute "large companies". The Act requires the appointment of at least one independent non-executive director to the audit committee. Notwithstanding the provisions of the Act, (re)insurance undertakings are required to meet the requirements of the Central Bank's Corporate Governance Code regarding audit committees in any event and there are also existing obligations in the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (the "**Statutory Audit Regulations**"). The responsibilities of the audit committee under the Act do not appear to conflict with, or materially add to, any of the prior existing requirements for (re)insurers so it should not give rise to particular changes. Those undertakings which avail of the Corporate Governance Code derogation whereby the board may sit as the audit committee may need to include a reference to this in the directors' report under the "comply or explain" requirement.

A specific exception in the Act regarding the new audit committee regime is for captives (insurance and reinsurance). While the Central Bank's Corporate Governance Code of application to the captive sector allowed a lighter approach to audit committees, the Statutory Audit Regulations when implemented did not take account of this. Therefore, in given scenarios, captives have had a technical obligation to establish an audit committee including a need for two independent non-executive directors (one of whom has to have competence in auditing or accounting). Through the application of the Act, this will no longer apply save in

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scenarios where the captive is a subsidiary of a credit institution or is a captive which has issued transferable securities to the public.

It is our understanding that the requirement to comply with the provisions in the Act relating to audit committees will be applied for financial years commencing after 1 June 2015 (i.e. for a 31 December year-end, from 1 January 2016) although this is as yet to be confirmed.

The Act does not create the requirement to establish any other new types of committee.

Directors' Compliance Statement

The Act introduces a directors' compliance statement which must be made by the directors of relevant companies subject to the Act. It is likely to apply to most (re)insurance undertakings, as they will exceed the qualifying thresholds (a balance sheet in excess of €12.5 million and turnover in excess of €25 million).

The new statement will exist in addition to the compliance statement which must accompany annual regulatory returns of (re)insurance undertakings provided to the Central Bank and the statement under the Corporate Governance Codes (general or captive).

The directors' compliance statement is made by the directors within the body of the director's report which accompanies the audited financial statements of the company. It requires directors to acknowledge each year that they are responsible for securing material compliance with "relevant obligations" under company law and tax law. "Relevant obligations" for these purposes refers to something that may give rise to a Category 1 or 2 offence under the Act (i.e. at a level which is likely to be more than just a summary conviction or give rise to a small fine – it is actually a broad range), a serious market abuse or prospectus offence (for publicly listed companies) and any obligation that concerns "tax law" (i.e. any aspect).

The statement must confirm that each of the following has been done or, if it has not done, the reasons why this is the case:

(i) The drawing up of a compliance policy statement setting out the company's policies (that, in the directors' opinion, are appropriate to the company) regarding compliance by it with its "relevant obligations".

(ii) Putting in place arrangements that are, in the directors' opinion, designed *to secure material compliance* with "relevant obligations" (which may include reliance on the advice of persons who appear to the directors to have the requisite knowledge and experience).

(iii) There has been an ongoing review of the compliance arrangements.

It is our understanding that the requirement to include the compliance statement in the body of the directors' report accompanying financial statements will be apply to financial years commencing after 1 June 2015 (i.e. for a 31 December year-end, from 1 January 2016) although this is yet to be confirmed. Notwithstanding this, the process of implementation (including the drawing-up of the compliance policy and other protocols) should be commenced soon so that they are in place at the start of the relevant financial year for which the statement will have to be made.

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"Registered Persons"

For (re)insurance undertakings that wish to avail of it, the Act includes provisions concerning the concept of "registered persons". Under these provisions, a list of registered persons will be maintained by the CRO. Where the board of directors of a company authorises a person as being entitled to bind the company, it may notify the registrar (by filing the relevant form) and the authority of the person will be registered. The purpose of the provisions is to make it clearer, by reference to a register kept at the CRO, as to who has power to bind the company. The Act provides that the board of directors of a company and any registered person shall be deemed to have authority to bind the company and to authorise others to do so.

These provisions could affect (re)insurance companies' executive licences and delegated authorities. It may, for example, become the practice to register individuals where they act as a branch representative or have another form of binding authority on behalf of an undertaking. Entry on the register would then be produced as proof of power to bind. The practice may also emerge that individuals other than directors who have authority to use the company seal would be registered persons.

Other Key Changes

The Act covers a broad range of areas. Whilst this briefing focuses on the initial implications for (re)insurance undertakings, there are other areas of interest which (in short form) we highlight here.

The detail which follows applies, generally speaking, to each of the new types of companies described - LTDs, DACs, PLCs and SEs.

Directors' Duties and the Company Secretary's Role

In line with the approach adopted in the UK, the Act introduces for the first time in Irish law a list of the principal fiduciary duties of the directors of an Irish company. The list sets out broad general principles based on existing common law and equitable principles which have been developed by courts in Ireland and other jurisdictions (in particular, England) over many years. This approach will lead to greater clarity for directors although it continues to leave discretion to the courts on how to interpret these duties.

A new statutory duty affecting directors in the Act – and that will be in scope for the new directors' compliance statement, as it may give rise to a Category 2 offence – is the need for a confirmation given to the auditors in the context of the audit process that all relevant information has been disclosed by the directors to the auditors and that each director has taken all steps needed to make him/herself aware of all relevant audit information.

Those involved in drafting the papers relating to new board appointments will need to bear in mind the Act includes that each director has a duty to ensure that the provisions of the Act are complied with by their company. Directors will need to be made aware of these changes from the 1 June 2015 commencement date.

The text for future appointment letters will need to change. The Act requires that each director must provide a written statement upon his/her appointment in the following terms: "*I acknowledge that, as a director, I have legal duties and obligations imposed by the Companies Act, other statutes and at common law.*"

Directors will need to be made aware that, in respect of infringements of company law by companies, officers of the company will be presumed to have permitted a default by their company, and so be "officers in

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default", where it is proved that they were aware of the basic facts concerning the default, unless they show they took all reasonable steps to prevent it or that, by reason of circumstances beyond their control, they were unable to do so.

The provisions in the Act regarding directors' and officers' insurance and, for example, a company funding the payment of premium and the defence of claims will be generally the same as the current regime.

In regard to company secretaries, the Act envisages a specified scope to be given to the company secretarial function on its role. This may need to be an item considered by the board of directors, in order that it can be described and delegated appropriately.

On appointment, a new company secretary must sign an acknowledgement of the duties and responsibilities in the same manner as a director. The Act imposes a new duty on directors to ensure that the company secretary has the necessary skills or resources required to discharge the related duties.

Restructurings and High Court Applications

In mergers, restructurings and portfolio transfers, (re)insurance companies often need a court approval for changes. While it will always need to be looked at individually, the Act has a new "Summary Approval Procedure" which allows the possibility of avoiding the expense of some court processes (although insurers – but not reinsurers – will still need to bear in mind the court-sanctioned portfolio transfer requirement under the Assurance Companies Act 1909, which remains).

In areas such as a reduction of capital (e.g. a capital release where distributable profits may technically not exist) or the merger of two companies, whereas previously a court approval was needed, it might now be possible to invoke the Summary Approval Procedure. The process will vary depending on what the company is seeking to do, meaning there is a different (though generally similar) Summary Approval Procedure applicable to each, but it broadly involves the following steps:

(i) The shareholders must pass a special resolution (unanimous for mergers) giving the directors authority to carry out the activity.

(ii) A declaration is made by the directors and lodged in the CRO. In it, the directors must make statements concerning the continued solvency of the company, having taken into account the proposed changes.

(iii) In some cases, there will be a need for an independent report (e.g. from an accountant).

In some scenarios, there may be concern as to whether directors are exposing themselves to any potential personal liability in making solvency statements in order to avoid the need for a High Court application and this will require a case-by-case analysis. The option will, however, be a useful alternative to consider from 1 June 2015.

The processes for voluntary wind-ups of solvent companies and strike-offs will also be easier under the Act.

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Registration of Security Interests (e.g. Reinsurance Collateral Structures)

(Re)insurance companies which give security over assets, such as collateral arrangements involving trusts and funds withheld, may need to take account of changes. The Act clarifies the position relating to charges over cash accounts, which do not need to be registered. The general rule will remain that charges must be registered within a 21-day period to secure priority, but now with alternative one-stage or two-stage processes. The one-stage process will be similar to the current regime; however, the two-stage process will allow a preliminary filing of an intention to create a charge (thereby creating priority), with a second filing on the creation of the charge to occur within a 21-day period.

Realised Profits of Assurance Companies / Assurance Companies Holding Shares in Holding Company

The Act continues the existing requirement affecting life companies regarding any surplus or deficit on the technical side of the balance sheet. This provides that the surplus in a fund can only be treated a realised profit (and thus available for distribution – subject to any other criteria, such as a condition imposed by the Central Bank) where there is an excess shown on foot of an actuarial investigation. The actuarial investigation must be conducted in accordance with the Assurance Companies Act 1909 or any successor provision (in the context of roll-out of the Solvency II regime, there is room for manoeuvre given aspects of the current legislation may change).

There is also a continuation of the carve-out which allows a life company within the meaning of the Insurance Act 1989 to own shares in its holding company where it arises in the use of the life fund (i.e. the technical side of the insurer's balance sheet). This is an exception to the conditions usually imposed on companies owning shares in a holding company (e.g. a need for distributable profits to fund the acquisition and an authorisation by shareholders). The carve-out for assurance companies is restricted to 10% of any class of shares in issue and the parent's shares must be publicly listed.

(Re)insurers which are subsidiaries within groups need to bear in mind that any other holding of securities in an Irish parent (e.g. a non-life insurer or reinsurer which is a subsidiary holding shares in its listed parent as investment assets / supporting technical reserves) must still fall within the exceptions now provided under the Act.

External Companies / Branches

While not generally in scope for the main changes, non-Irish (re)insurers (or other entities, such as Insurance Mediation Directive companies) which operate as branches in the State need to be aware of changes. Existing branches of external companies under the Companies Acts will automatically become either a "branch EEA" or a "branch non-EEA". External companies which had registered as a "place of business" as opposed to a "full" branch under the current regime will be cancelled on commencement of the Act. The legislation regarding having a "place of business in the State" in the current Companies Acts (as distinct from "full" branch) will cease as a concept.

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WILLIAM FRY

Contact Us

The William Fry team is happy to help on specific queries arising from this briefing. This includes working with compliance and company secretarial functions as they inform directors and other stakeholders of the new obligations and working with (re)insurance groups in the adoption of the new documents and in dealings with the Central Bank of Ireland and other bodies like the Companies Registration Office.

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This publication is intended as a general guide only and not as a detailed legal analysis. It is an understanding of the proposed Companies Act 2014, and related issues, at the present date. It should not be used as a substitute for professional advice based on the facts of a particular case.

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