

Directors' Compliance Statement - The Companies Act 2014

Impact on UCITS funds and Section 110s

July 2016

The Companies Act 2014 ("the Act") was enacted in December 2014 and has introduced the requirement for a number of assertions to be made with regard to compliance as part of the directors' report for affected companies.

Section 225 of the Act sets out the requirement to include the directors' compliance statement ("DCS") in the directors' report of the annual audited financial accounts.

On a first review of Section 225 of the Act it may not be obvious that Irish UCITS funds established as PLCs and qualifying companies under Section 110 of the Irish Taxes Consolidation Act 1997 are required

to comply. However on closer inspection they currently are caught under the Act and they must prepare a DCS on a comply or explain basis. Under Section 943(1) (g) (i) of the Act the Minister has the power to make regulations exempting Section 110s from the DCS requirement but such regulations have not yet been made.

In scope

Funds: Established as public limited companies (PLCs) under the Irish UCITS Regulations.

Section 110s: Until such time as the exemption for Section 110s is effected, a qualifying company under Section 110 of the Taxes Consolidation Act 1997

structured as a PLC or even if it is not a PLC but where it reaches the threshold under the Act of a "large private company".

A "large private company" is a company limited by shares, designated activity companies and guarantee companies which have gross assets exceeding €12.5 million and a turnover* exceeding €25 million.

Exempt under the Act: Unlimited companies and Part 24 investment companies incorporated under the Act (a PLC company to which the UCITS regulations do not apply) are not subject to this requirement.



It is important to note that other fund service providers who meet the thresholds of a "large private company" under the Act must also prepare a DCS.

Will your Fund or Section 110 need to prepare a Directors' Compliance Statement?

- **Question:** Are you a UCITS PLC or Section 110 PLC?
- **Answer:** Yes - a Directors' Compliance Statement is required.
- **Question:** A Section 110 with a turnover* of more than €25 million and gross assets of more than €12.5 million in its financial years commencing on or after 1 June 2015?
- **Answer:** Yes - a Directors' Compliance Statement is required.
- **Adapt:** Section 110s that currently do not reach these thresholds need to be on alert, if these thresholds are breached this could trigger the requirement for a DCS.
- **Note:** The DCS refers to compliance by a single-entity. Even if one entity has included a DCS in the directors' report then other entities within the group (if applicable) will need to include their own DCS.

**Turnover is defined in the Act as the amounts of revenue derived from the provision of goods and services falling within the company's ordinary activities, after deduction of a) trade discounts, b) value-added tax, c) and any other tax based on the amounts so derived, and in the case of a company whose ordinary activities include the making or holding of investments includes the gross revenue derived from such activities.*

Directors' Compliance Statement ("DCS") Requirements

A DCS is essentially a statement confirming that a compliance policy statement has been drawn up setting out the company's compliance policies and that, during the relevant financial year, appropriate arrangements or structures have been put in place (or were in place) which ensure reasonable assurance of material compliance with the "relevant obligations". The directors must acknowledge that they are responsible for securing the company's compliance with these "relevant obligations" and must also confirm that a review has been conducted during the year of such arrangements or structures referred to above.

"relevant obligations" under the Act :

- The Companies Act – where breach of an obligation would be a category 1 and 2 offence under the Act (serious offences under the Act) and other "serious" offences defined in the Act.
- Market Abuse Regulations – market abuse and market manipulation
- Prospectus Regulations – failure to prepare a prospectus
- Transparency Regulations
- Tax obligations covering all tax heads

Content



State that the directors acknowledge their responsibility for ensuring compliance with the relevant obligations;



State that the directors have drawn up a company policy statement with regard to compliance with the relevant obligations;



State that the directors have ensured procedures and arrangements are in place to ensure material compliance with the relevant obligations; and



State that directors have conducted a review of the effectiveness of the procedures and arrangements during the fiscal year.

Directors: Review – Assess – Improve

One of the challenges for directors of UCITS PLCs and Section 110s is the basis on which they will make this statement.

UCITS PLCs and Section 110s are unique, they operate a business model that outsources many of their core activities and functions. Significant day-to-day control is exerted by the entities to whom activities have been outsourced while ultimate responsibility remains with the directors.

Section 225 takes into account the practical reality that directors will be receiving guidance and assistance from third parties, thus directors need to understand the relevant obligations (as applicable to their company) and whether they are **reasonably assured** by the arrangements and structures in place of **material compliance** with these **relevant obligations**.

Directors need to make certain that the board minutes accurately record how they receive information, how they evaluate information and how they decide on the outsourcing of core business activities that impact on their ability to comply with the relevant obligations. The minutes should also reflect reporting lines to the board. The term "material compliance" is not defined, directors will need to assess how

they will determine "material" compliance with the relevant obligations.

Directors can rely on the advice of a **suitable person, but they need to ensure that that person** has the necessary **expertise and knowledge** to advise the company on relevant compliance obligations AND the directors must acknowledge they are **ultimately responsible** for compliance. Directors must demonstrate that they retain ultimate responsibility in executing their oversight role. It is important to note the Act provides that if there is default in complying with the statement, each director to whom the default is attributable shall be guilty of a Category 3 offence, which means a fine of up to €5,000 and/or 6 months in prison. The DCS reflects the ultimate goal of the governance of funds - the protection of investors.

Directors must Review, Assess and if necessary Improve these arrangements and structures to ensure that they are relevant and effective.

Are you on course for Compliance?

Dedicated resources need to be assigned to understand the impact of this section of the Act. An initial assessment of the status of conformance with the requirements of this section of the Act needs to be performed, in order to complete any required remediation prior to the first relevant financial year end i.e. accounting

periods beginning on or after 1 June 2015.

It remains to be seen if the Minister for Jobs, Enterprise and Innovation will use his powers under the Act and grant an exemption to UCITS PLCs and / or Section 110s (which breach the large private company threshold) from the DCS requirement. In the meantime, for UCITS PLCs and Section 110s (if applicable) with years beginning on or after 1 June 2015, the current situation is that they are required to comply with the Act and prepare a DCS.

How can Deloitte help?

Introducing the Assessment Cube

To help you to develop an initial assessment of the status of your conformance with the requirements of the Act, we have developed a risk assessment tool called the Assessment Cube. The Assessment Cube has specifically designed questions based on the company law requirements and taxation requirements. It categorises and scores responses in four interrelated components: governance, people, processes and data & systems - which together form the integrated framework for internal controls over the relevant compliance areas. When we utilise the Assessment Cube, we do consider the impact of the outsource model generally applied in the environments of Section 110s and UCITS funds.

Understanding priorities

The Assessment Cube output provides an indicative assessment of risk, using the

system of red, amber and green, based on your responses to our questionnaire. This allows Directors and Senior Management to easily identify priorities for action and potential risk areas. The heat map output shown below is supported by detailed observations which will enable management to understand and address shortcomings.

How we can help you

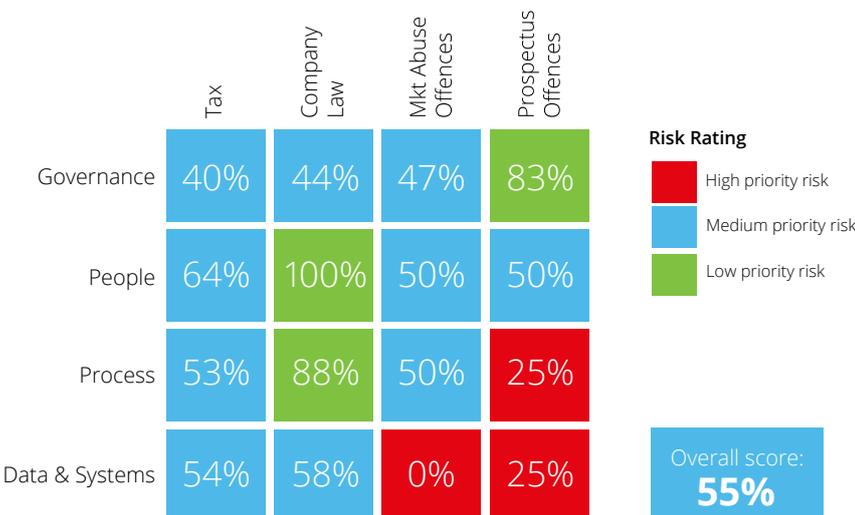
We understand that the new requirements are onerous and we would be happy to help you to provide the required assurance to Directors for the new statements to be made.

Management Self-Assessment

- We will populate responses to the Assessment Cube tool based on interviews and representations from management. This will be performed in a workshop format and will be led by Deloitte specialists in respect of company secretarial, taxation, regulatory and process and controls. The results of this self-assessment will be summarised in a report that highlights the areas which resulted in "amber" or "red" scorings and will give a visual representation of the areas for potential focus. The report will also include our recommendations to remediate the 'amber' or 'red' scorings, as appropriate. The responses provided by management would not be independently reviewed or validated but would provide an indication of management's perception of current processes in place.

Independent Assessment

- This approach would include the independent assessment by Deloitte of responses provided by management with regard to the tool. We would then work with management and the Directors to prepare an implementation plan to address process, governance or control gaps identified during the review. The report produced would include enhancement opportunities identified and the remediation plans as agreed with management to address shortcomings. This could then be considered by Directors when forming their opinion and statement with regard to the organisation's compliance.



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