

# Asset Management conference 2016

## *The changing face of Asset Management*

27 September 2016



# CP 86 – A value added proposition?

27 September 2016

**Noel Ford**  
Governance Ireland



# What is CP 86?



- started in 2014
- an initial focus group of industry stakeholders engaged to identify key issues
- three core pillars – Governance – Compliance – Supervision
- **why?** Obviously the find in a CBI initiative to further underpin the substantive controls of fund management companies actions on behalf of Investors funds and over the activities of their delegates
- to examine and improve fund management company effectiveness
- consultation process from increased PRISM visits were highly complimentary

# What's new?



- revised position on the number of designated persons roles
- recognition of separate states between director role and designated function role. – separate letters of engagement
- managerial functions aggregated to 6 key themes
- AIFMD 15 to 6/UCITS 9 to 6
- organisational effectiveness role
- directors time commitments – limits placed – 2000 Hrs/20 Irish Fund Boards (On a case by case basis)
- CBI Access to key data and people



BAD



BETTER



GOOD



INFORMATION IS NOT ENOUGH

# Who is impacted?



- all fund management companies and their delegates
- AIFM 146/UCITS 83 – ( CBI 8/16)
- first round of feedback elicited 47 responses
- consultation process invites to ALL stakeholders
- resistance or fatigue or both?
- governance – relates to the way in which directors of FMCs should perform their roles and guide the company.
- compliance – concerns how designated persons carry out designated functions and ensure FMC are fully compliant
- super visibility – concerns how the CBI will carry out it supervision model

# Time line to compliance



- all FMC companies
- for those authorised on or after Nov 2015 – applies immediately
- for those authorised prior to Nov 2015 – 2017
- 6 aggregated managerial functions early adopters
- organisation effectiveness role – as per June 2016 – confirmed no further guidance require
- FMCs ‘should not be delaying their implementation of OER’
- minimum – annual review and report based on on-going assessment of control environment
- validate the reality of the business plan or programme of activities as being factual and in place

# What does it mean for boards?



- compliance pillar
- UCITS and AIFM regimes place a substantial regulatory burden on the FMC and its board
- context : Companies Act 2014, Director Compliance Statements, Market Abuse Directives, EMIR, MiFiD II , 2013 CBI (Enforcement) Act
- substantive tests – FMC must fully understand their regulatory obligations, they must comply and demonstrate compliance
- designated functions are outsourced – the service providers must have the necessary resources, knowledge of the business and professional expertise to cover the mandate
- white labelling now needs to withstand an independent OER
- must demonstrate effectiveness and process



Eric Teitelbaum

*"If Anderson is C.E.O., and Wyatt is C.F.O., and you're C.O.O.,  
then who am I, and what am I doing here?"*

CN  
COLLECTION

# If you had to focus on the big stuff?



- director capacity – now a key risk indicator
- vital to establish a transparent and critically assess register of interests
- designation functions – internally or externally outsourced
- location of DPs – presents a challenge re EEA and US and Brexit
- organisation effectiveness – must be undertaken by INED/Chair
- aggregating the management functions to 6....the other streams need to be covered

# Designated functions – rationalised(?)



- regulatory compliance
- fund risk management
- operational risk management
- investment management
- capital and finance management
- distribution can often be the furthest function from the Board – need to fully understand how the distribution function works and what the strategy is

# Directors time commitments - defined



- differentiate between directors role and designated function
- CBI now recognises the difference
- limits placed on quantum of work
- 20 Irish Fund Boards /2000 hours
- set at sub-fund level
- not tenable to have a full time roles and carry out INED roles
- exceeding the limits – results in risk profile being upgraded
- deliberate initiative to have the INED responsible for OER
- possible concentration risk needs to be addressed

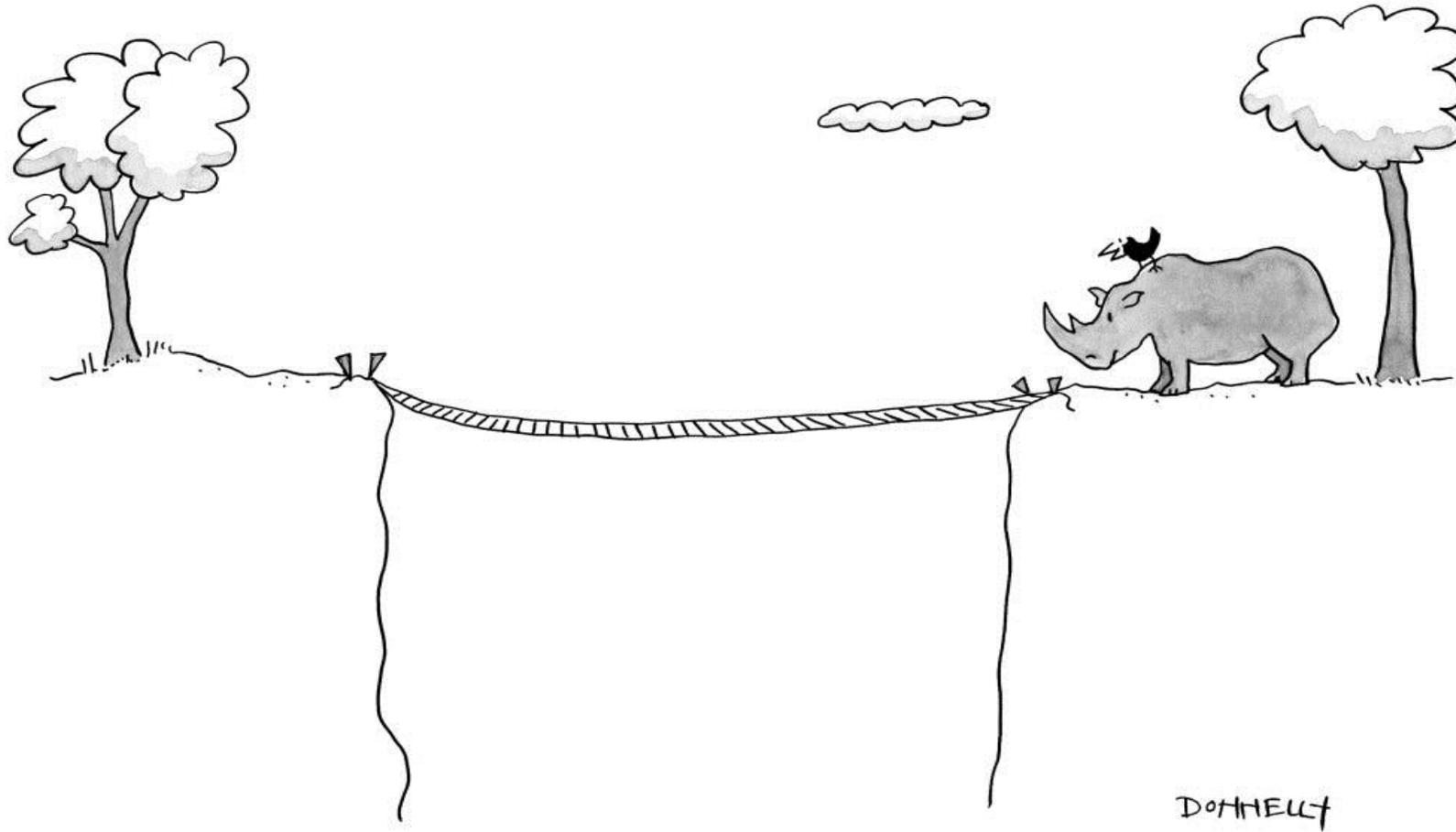


"It will help if you're able to be motivated by things other than money."

# Organisational effectiveness



- opportunity or curse?
- each FMC must nominate an INED to be responsible for OER
- cannot be undertaken by any of the delegates
- assessment by an Independent or independent assessment?
- industry cohorts – concerned at the executive nature of the work
- not every INED will have the range of industry expertise to assess the control environment, document it, critically assess the effectiveness and report to the board
- support is needed and the CBI recognise this



# Industry reaction



- there is a distinct difference between the industry as viewed by the CBI and the industry as occupied by key stakeholders. The gap is worrying
- reaction to claims of deficient investment management and risk skill sets by CBI
- over engineered and missing key areas
- business as usual, just carry on
- where is the value to the investors?
- cost of compliance is killing performance

# The danger of regulatory fatigue and costs



- tsunami of regulation – 60 directives since 2009
- board constricted by legislative compliance
- investors tied to safer investing with higher costs = low performance
- UCITS V and AIFMD
- CBI 2013 (Enforcement) Act
- Companies Act 2014
- directors compliance statements
- preparing for MiFID II
- EMIR
- market abuse regulation
- learned helplessness
- legal/consultants review/advise needed – all the time

# Documentation – comply or explain



- Pillar III – super visibility
- access to key data and reports
- access to key people/designated persons
- quality of data and speed of retrieval
- central email and communication hub
- going forward – not acceptable to have a dislocated, multi-layered archive of board data spread over several sites

# An investment in board enhancement



- OER need not be a huge burden
- depends on the maturity and structure of the business
- may simply be a function of documenting and rationalising what already exists
- a licence to INED to understand full business environment
- could afford an informed and positive board challenge and oversight
- annual review and report could be seen as a reasonable basis for a board plan of activity for the coming year
- real concern of the loss of objective independence
- question: does it really add any value to investor?

# Learning curves



- executive directors will always be closer to the DNA of the business
- independent directors will usually be involved after the fact
- legally there is no separation between classes of directors
- increasingly Investor due diligence processes pose real questions on the function of the board
- challenge : If you don't understand it , how can you provide oversight and guidance?
- there is a need to invest in supporting directors to meet these new levels of corporate and regulatory standards
- it's evolution not revolution



“What if we don’t change at all ...  
and something magical just happens?”

# Conclusion



- opportunity or curse...it's here
- role of the INED
- international alignment in terms of regulatory oversight
- principal based approach Vs rules based approach
- do the extra requirements amount to better governance and investor protection?
- possibly?

# Questions & feedback



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# Directors' Responsibilities

27 September 2016

**Amanda-Jayne Comyn**  
Director - Tax  
Grant Thornton



# Directors' Duties



- Directors' Duties
  - Part 5 CA 2014
  - Breaches – Part 14 CA 2014
  - Definition of director expanded
    - Shadow directors – Section 221 CA 2014
    - De-facto Directors – Section 222 CA 2014
  - General and fiduciary duties

# Company Secretary



- Officer of the company who acts in accordance with the directors' instructions
- **Overseer** of day to day running of company, maintenance of records, filing of returns and accounts
- Written declaration acknowledging role and responsibilities associated with the role
- Directors must satisfy themselves that company secretary has necessary skills **or resources** available to perform duties
- Duties include: co-signing annual return and certifying true copies of financial statements with AR

# Types of Director



- (1) Executive Director** – works on a full-time basis for the company
- (2) Non-Executive Director** – works in a part-time capacity for the company
- (3) Alternate Director** – person appointed to act for another director with agreement by the other directors
- (4) Shadow Director** – person in accordance with whose instruction the board of directors is accustomed to act
- (5) De-facto Director** – person who occupies the position of director but who has not been formally appointed

# Definition of Director



**Director** was defined in the 1963 Act as:

*“including any person occupying the position of director by whatever name called” (i.e. executive and non-executive)*

**Shadow directors** were included under the 1990 Act in respect of certain duties only – liability for fraudulent/reckless trading, restriction and disqualification, conflicts of interest.

**CA 2014** expands the definition to expressly include: Shadow directors, De-facto directors in addition to formally appointed directors.

# Role of Director



- No formal qualification requirement
- Officer of the company not employee
- Requirement to have at least 2 directors except with a LTD
- Director is appointed by the members of the company
- Primary function of a director is to manage the company on behalf of the members
- Director owes primary duty to the company alone and not the members who appointed them

# Provisions in Companies Act 2014



- Internal rules on corporate governance are contained in Part 4 and 5 CA 2014
- Any current or prospective director should familiarise themselves with expectations and legal responsibilities
  - Part 4 Sections 128 – 167 (corporate governance); and
  - Part 5 Sections 219 – 255 (duties and breaches)
- On appointment a director must sign a declaration acknowledging the legal duties and obligations associated with the role
- Certain restrictions on transactions between a company and its directors

# Directors' Duties



***In the past determining the duties and responsibilities of the directors has not been clear, the codification of directors duties in the Act gives clarity for directors. These are set out in eight fiduciary duties which will apply to directors, shadow directors and de facto directors***

- Part 5 CA 2014 deals with Directors duties and consequences for breaches of duties
- Duties are broken into 2 categories: general duties and fiduciary duties
- Company must ensure that person eligible to be a director
  - undischarged bankrupt
  - <18 years of age
  - statutory auditor of the company
  - disqualified director
  - body corporate or unincorporated body of persons

# Breach of Duties



- **General Duties**

- Dealt with under Part 14 of the Act
- Each section specifies the penalty attaching for a breach  
e.g. Section 225 - Directors' Compliance Statement – failure to provide is a Category 3 offence
- General breach of company law will not affect the:-
  - validity of a contract or other transaction; or
  - enforceability of any contract or other transaction.

- **Fiduciary Duties**

- 8 fiduciary duties specified in Section 228
- Breach of 6 of the 8 fiduciary duties falls within Section 232
- Duty to account to the company directly for the gain; and
- Indemnify the company in respect of any loss or damage resulting from breach

# General Duties



- Ensure compliance by company with CA 2014 – historically was a duty of the company secretary
- Directors must have regard for the interests of employees ~~and members~~ in the performance of their functions (this duty is still owed to the company rather than the employees or members)
- Duty to keep adequate accounting records
- Duty to prepare financial statements
- Duty to maintain certain registers
- Duty to ensure certain documents are filed with the CRO
- Duty to disclose
  - personal information for register of directors
  - interests in shares of company or related company (1% exemption)
  - interest in a contract with the company
  - disclose payments in relation to share transfers
- Duty to convene meetings

# Fiduciary Duties



- act in good faith;
- act honestly and responsibly;
- act in accordance with the company's constitution;
- not use the company's property, information or opportunities for the director's own or anyone else's benefit;
- agree not to restrict the director's power to exercise an independent judgement;
- avoid any conflict between the director's duties to the company and the director's other interests;
- exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person in the same position with the same knowledge; and
- have regard to the interests of ~~its employees and~~ of its members as a whole.

# Audit Committees

27 September 2016

**Amanda-Jayne Comyn**  
Director - Tax  
Grant Thornton





# Audit committees

## Establish or explain

- a large company shall either:
  - establish an audit committee and confirm in the Directors' Report; or
  - if not established, explain why not in the Directors' Report

<b>A company:</b>	<b>Large</b>
<b>Turnover*</b>	<b>&gt;€50m</b>
<b>Total assets*</b>	<b>&gt;€25m</b>
<b>or</b>	
<b>A group together meeting the above criteria</b>	

\*for the current and preceding financial year

# Audit Committee – Responsibilities



## Responsibilities of Audit Committee

- The audit committee's responsibilities include monitoring:
  - the company's financial reporting process
  - the effectiveness of the company's systems of internal control and risk management
  - the company's statutory audit and statutory financial statements
  - reviewing the independence of the statutory auditor

# Audit committees- Structure



## Structure of Audit Committee

- Must have at least one independent director who:
  - is a non-executive director and
  - possesses the requisite degree of independence:
    - no time during 3 year period before appointment did they have a material business relationship or
    - hold employment
- Must have competence in accounting or auditing

# Audit committees – Powers and Reporting



## Powers

- empowered to investigate and call persons relevant to its function before the committee
- empowered to take external legal or professional advice at the company's expense

## Reporting

- audit committee is a committee of the board and therefore has no official reporting requirements

# Audit committees- Issues to address



## Risk Assessment

- Does the annual report clearly identify the company's business and an accurate risk and uncertainties assessment?
- How are risks managed and are the methods adequate?
- Has the company monitored the effect of financial markets and reduced supply in credit, supplier or customer default risk?
- Do the financial statements correctly reflect the accounting policies and practice of the company and estimation uncertainties in stating asset values?
- Have all issues brought to the board and/or management over the year been considered for disclosure?

# Audit committees- Issues to address



## Reliance on Estimates and Assumptions

- Have processes to generate cash forecasts been reviewed and accounting valuation including use of key assumptions?
- Are they supported by internal controls and reasonableness checks?
- Have all risks been assessed including low probability but high impact?
- investment assets – have appropriate additional procedures been undertaken to estimate fair values?

# Audit committees- Issues to address



## Audit Quality

- is the committee satisfied that the external auditor has addressed risk in the audit strategy and plan?
- has the committee discussed business and financial risks with the external auditor?

# Questions & feedback



# Audit committees

27 September 2016

**Amanda-Jayne Comyn**  
Director - Tax  
Grant Thornton



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# Questions & feedback



# Director's compliance statements

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**Paschal Comerford**  
Tax Director  
Grant Thornton



# Director's compliance statement



- annual statement in the Directors Report acknowledging that they are responsible for securing company's compliance with its '*relevant obligations*' [Section 225, CA14]
- compliance Statement applies to all **public limited companies** (except investment companies) and to all **large limited companies**
- “**comply or explain rule**”
- applies to financial statement periods commencing on or after **1 June 2015**

# Director's compliance statement



- directors must make an annual statement in their Directors' Report, acknowledging that:
- to include confirmation of the following assurance measures having been done or if not, explaining why not:
  - **Compliance Policy Statement** setting out company's policies regarding compliance with its *relevant obligations*\*
  - the putting in place of arrangements or structures designed to secure *material* compliance with the company's obligations
  - the annual review of said arrangements or structures

# Director's compliance statement



## Non-compliance

- each director guilty
- category 3 offence under the Act:
  - class A fine: not exceeding €5,000 and/or
  - imprisonment not exceeding 6 months



# Scope



## Irish Companies

### Covered:

- Public Limited Companies (PLCs)
- Large private companies
  - Turnover > €25m, and  
Balance Sheet assets > €12.5m
- Limited Companies
- DACs
- S110
- UCITS

### Excluded:

- Small Private companies
- Unlimited companies
- Investment companies

## Relevant obligations

- “Tax law”:
  - Tax Acts
  - CGT Acts
  - VAT Acts
  - CAT Act
  - SDCA
  - Customs & Excise Acts
- Companies Act: where a breach constitutes a more serious offence, i.e.
  - Category 1 & 2 offence
  - Serious market abuse offence
  - Serious prospectus abuse offence

# How to demonstrate compliance



*Arrangements or structures...will be regarded as being designed to secure **material compliance** ...if they provide **reasonable assurance** of compliance ....with those obligations.*



Terms are not defined in the legislation and guidance has yet to be issued.....

# How to demonstrate compliance – what do terms mean?



## Appropriate arrangements or structures

The framework of responsibilities, policies, appropriate people and procedures in place for identifying, managing and mitigating relevant compliance risk, and the systems and processes which put this framework into practice.

## Material compliance

‘Material’ is not defined but needs to be considered in the context of the business and the sensitivity of the particular tax.

- The focus is likely to be on the significance of an item in the context of the business and whether the occurrence of errors indicates problems in the systems or processes.

# How to demonstrate compliance – what do terms mean?



## Reasonable assurance

PCAOB – “Reasonable assurance includes the understanding that there is a remote likelihood that material (non-compliance) will not be prevented or detected on a timely basis. Not absolute assurance but a high level of assurance.”



# Key points to take away



- early board engagement is critical – communication, oversight and desired level of assurance needs to be exhibited throughout the period
- key starting point is identifying company specific “relevant obligations”
- need to take account of normal, recurring obligations – and also one-off transaction driven obligations. Areas of higher risk may need added focus
- if starting now.....timelines may be tight if processes, documentation and controls need to be developed, initial focus on elements that are currently in place – but may need enhancement and increased formality (e.g. policies, procedures, controls documentation..)
- consider the review requirement. Who will do it? Scope? Timing? Possible remediation

# Questions & feedback

