

## Chartered Accountants Ireland or CCAB-I material

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### Technical Alerts

#### TA 01/2015 - Independent Accountant's Reports Pursuant to Sections 141 and 152 of the Irish Collective Asset-Management Vehicles Act 2015

*Reviewed in 2022*

*This document was reviewed in 2021. The content remains the same as issued in 2015 and does not require updating in 2022.*

September 2015

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## **1. Introduction**

The Irish Collective Asset Management Vehicle Act 2015 ('the ICAV Act') was signed into law on 4th March 2015. An ICAV is a new form of collective investment vehicle for Undertakings for Collective Investment in Transferable Securities ('UCITS') and Alternative Investment Funds ('AIFs'). The ICAV Act provides a corporate structure that is designed specifically for investment funds and which is not subject to many rules and requirements applicable to other forms of company.

As a corporate entity an ICAV is governed by a board of directors and owned by shareholders. ICAVs are regulated funds and therefore also need authorisation to carry on business either as an AIF or as a UCITS.

## **2. Conversion of Investment Company or UCITS TO ICAV**

Part 8 of the ICAV Act addresses conversions by existing investment companies or UCITS to ICAV and sets out the application process to be followed for such a conversion.

Section 141(1) requires that a director of an applicant makes a statutory declaration that he or she has made a full inquiry into the company's affairs and has formed the opinion that the applicant company 'is able to pay its debts as they fall due' ('the declaration'). This declaration has no effect unless it contains a statement of assets and liabilities and is accompanied by a report by an independent person<sup>1</sup> expressing an opinion that the director's declaration and the statement of assets and liabilities 'are reasonable'.

## **3. Migration**

Part 9 of the ICAV Act contains provisions relating to migration of entities into the State from other 'relevant jurisdictions' prescribed by the Minister to become ICAVs, and also from the State, to cease to be ICAVs.

Section 152 contains the same 'declaration of solvency' requirement relating to both inward migration and deregistration of an ICAV in the event of migration outside the State.

## **4. Wording of 'declaration of solvency'**

A particular difficulty has been identified with the wording in sections 141 and 152 and relates to the nature of the director's declaration, specifically that the company will be able to pay its 'debts as they fall due'.

The Audit & Assurance Committee of Chartered Accountants Ireland ('AAC') has considered the requirements of sections 141 and 152 declarations. Given the open ended nature of this formulation of words and the absence of any time horizon (ie no limitation in amount or time period) AAC believes that it will be extremely difficult for a director to make such a declaration and consequently for the independent person to issue an opinion.

Similar issues previously arose with section 34 (as amended) of the Companies Act, 1990 (now repealed). A similar formulation of words caused the Institute to advise its members over a number of years not to provide such opinions. This position was maintained until the repeal and replacement of section 34 by the provisions of the Companies Act 2014 (the so called summary approval procedure in Chapter 7 of Part 4 of that Act).

AAC has also concluded similarly in respect of sections 141 and 152 of the ICAV Act and is of the view that the current wording of these sections will make it extremely difficult for both directors and an independent person to provide the required declarations and reports.

## **5. Communication with Department of Finance**

The Institute has highlighted these issues to the Department of Finance ('DoF') which is currently considering the matters raised.

A solution identified by the Institute in its communication to DoF is to amend sections 141 and 152 to reflect wording that is contained in section 1415 of the Companies Act 2014 which also addresses a 'declaration of solvency'. Section 1415(1) identifies

specifically those 'debts' for the purposes of that declaration (being those contained in the statement of assets and liabilities prepared for the purposes of section 1415).

#### **6.Suggested interim approach to report of independent person under sections 141 and 152**

The Institute is conscious of the strategic importance attached to the ICAV Act. For relatively straightforward conversions and migrations under Parts 8 & 9 of the ICAV Act, it is possible that the independent person may be able to issue a report on the reasonableness of the directors' declaration **but** specifying those debts that are the subject of that declaration (ie following an approach similar to that set out in section 1415 of the Companies Act 2014).

An illustrative example of a report drafted on this basis is shown at Appendix 1. Independent persons will, however, still need to consider specific facts and circumstances, including the nature of the debts so defined, when they will fall due and whether the nature of the entity's assets are such that resources will be available at the appropriate point(s) in time. More complex investment vehicles may present significant challenges in obtaining sufficient certainty for independent persons to provide a positive opinion that the directors' statement is reasonable.

While the Institute is aware that a number of reports under section 141 following this approach have been acceptable to the Central Bank of Ireland, it does not believe that this is a long term sustainable solution. Accordingly, we shall continue to seek a legislative solution to this problem.

#### **Appendix 1 Illustrative Report**

##### **INDEPENDENT ACCOUNTANT'S REPORT TO [ INSERT LEGAL ENTITY NAME ] PURSUANT TO SECTION 141 OF THE IRISH COLLECTIVE ASSET-MANAGEMENT VEHICLES ACT 2015**

We have examined the Declaration of solvency (the "Declaration") made by the directors of [*Insert legal entity name*] (the "Company") on [Date of Declaration] in accordance with Section 141 of the Irish Collective Asset-management Vehicles Act 2015 in connection with the company's application to the Central Bank to be registered as an Irish collective asset-management vehicle.

##### ***Respective responsibilities of Director and independent accountants***

The Company's directors are responsible for ensuring that the Company maintains adequate accounting records which disclose with reasonable accuracy, at any time, the financial position of the Company and for the preparation of the statement of the Company's assets and liabilities as at [30 April 2015] included in the Declaration. The director providing the statutory declaration is also responsible for making a full enquiry into the affairs of the Company and, having done so, forming the opinion that the Company as at [Date], is able to pay its debts stated in the statement of the Company's assets and liabilities, as they fall due.

Our responsibility as independent accountant is to state whether in our opinion, based on information and explanations given to us,

- the statement of the Company's assets and liabilities at [30 April 2015], and
- the opinion of the director that the company is able to pay its debts as they fall due,

are reasonable.

This report is made solely to the Company in accordance with section 141 of the Irish Collective Asset- management Vehicles Act 2015. Our work has been undertaken so that we might state to the Company's shareholders those matters we are required to state to them under section 141 of the Irish Collective Asset-management Vehicles Act 2015 and for no other purpose. To the fullest extent permitted by law, we do not accept or assume responsibility to anyone other than the Company, for our work, for this report, or for the opinion we have formed.

##### ***Basis of opinion***

The scope of our work for the purpose of this report was limited to those procedures we considered necessary to form the opinion that:

- (i)the statement of the Company's assets and liabilities as at [ Date]; and
- (ii)the opinion of the director of the Company, that the Company as at [Date], is able to pay its debts shown in that statement as they fall due,

are reasonable.

Those procedures are restricted solely to the matters specified in the declaration and are separate from the audit of the Company's annual financial statements.

In forming our opinion on whether the director's opinion that the company is able to pay its debts as they fall due is reasonable, the debts we considered were the debts as set out in the statement of assets and liabilities as at [Date] and did not include any debts incurred after that date.

***Inherent limitation***

The opinion of the director that the company is able to pay its debts as they fall due requires the consideration of future events, however, as not all future events or conditions can be predicted and events and conditions may not occur as expected, there can be no guarantee that the company is able to pay its debts, as set out in the statement of the company's assets and liabilities as at [Date] as they fall due.

***Opinion***

In our opinion, based on the information and explanations given to us, the statement of the Company's assets and liabilities as at [30 April 2015], and the opinion of the Director of the Company included on page [X] of this statutory declaration that the Company as at the date of declaration is able to pay its debts shown in that statement as they fall due, are reasonable.

Chartered Accountants

Place

Date

1 An 'independent person' is defined by section 141(4) as 'a person who, at the time the report is made, is qualified to be the auditor of the applicant'.