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Companies Act Implementation October 2008

On the 1 October 2008 a raft of further provisions under the Companies Act 2006 came into force. The UK200Group Lawyer members have prepared an outline of the changes. Some, such as the implementation of three new statutory duties for directors and the abolition of the financial assistance rules, will have a profound effect.

New Trading Disclosure Regulations

Where should the name of a company be displayed?

Contributor

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New trading disclosure regulations came into force on 1 October 2008 which replace existing requirements. There are some important new duties and some changes to the existing law. Company directors should make themselves aware of the new requirements and take steps to ensure compliance as a breach may result in financial penalties.

The new regulations require a company to continuously display its registered name at its registered office and any inspection place. A company is also required to display its

registered name at any location at which it carries on business, unless that location is primarily used for living accommodation. The display of the registered name of a company must be capable of being read with the naked eye, and must be positioned so that it can be easily seen by any visitor to the premises.

A company must also disclose its registered name on most of its business communications, including business letters, cheques, websites, orders for goods or services, bills, invoices and other demands

for payment. In addition, a company must publish certain particulars on its business letters, order forms and websites. These particulars are:

- the part of the UK where the company is registered
- the registered number of the company
- the address of the company's registered office.

Furthermore, if a written request for information is made to a company, it must disclose details of its registered office, any inspection place and details of the company

records kept at that office or place. This information must be provided within 5 days of receiving such a request.

Failure to comply with the regulations is an offence committed by the company and each officer of the company (including shadow directors) who is in default. Both the company and any officer of the company that is guilty of such an offence are liable on summary conviction to a maximum fine of £1000 plus £100 per day for continued contravention.

Financial Assistance

Abolition on prohibition for private companies

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The Companies Act 1985 has for some years prohibited companies and/or their subsidiaries from giving 'financial assistance' to a person for the purpose of acquiring the company's shares. The prohibition applies to financial assistance, whether given directly or indirectly, before or at the same time as the acquisition.

Financial assistance is the reduction or discharge of any liability that has been incurred by a person (or any other person) for the purpose of acquiring shares in a company (which includes by way of the giving of a guarantee, security or indemnity). The Companies Act 1985 also contains an

exception to the prohibition, which applies to private limited companies only. This exception became known as the 'whitewash' procedure which was complicated and expensive to go through.

However, as of 1 October 2008 the 'whitewash' procedure became a thing of the past. The section in the Companies Act 1985 containing the prohibition of the giving of financial assistance by companies is repealed by the Companies Act 2006 and will not be replaced for private limited companies (although please note that this is not the case with public limited companies and the subsidiaries of public

companies where the prohibition remains).

The abolition will prove popular among those wishing to buy and sell private limited companies as it should make the whole process simpler, cheaper and quicker.

However, directors will still need to carefully consider whether or not the financial assistance is in the interests of the company and to have regard to the statutory duties which they owe to the company, including the duty to act, in good faith, in the way which would be most likely to promote the success of the company for the benefit of its

members as a whole.

Please also note that common law rules with regard to the maintenance of capital continue to apply. As a consequence of this there are situations which will amount to an unlawful reduction of capital and therefore be in breach of the law. For example, giving cash to a shareholder to buy shares in the company where the company does not have sufficient distributable reserves to cover the gift. It is therefore important that the directors take professional advice if they are in any doubt as to the company's net asset position and its ability to pay its debts as and when they fall due.

Changes to Company Director requirements

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What is section 155?

Section 155 of the Companies Act 2006 is a new requirement which came into force on 1 October 2008 and requires all companies to have at least one director who is a natural person, i.e. an individual. A legal entity (e.g. a company or a firm) can still be a director, but it cannot be the sole director. There is no requirement for a company secretary to be a natural person.

Section 155(2) also provides that the requirement is met if the director is a corporation sole (for example, the Archbishop of Canterbury) or someone appointed on the basis of some other appointment that they hold. A corporation sole is a corporation that is constituted in a single person.

Necessary action

Any existing company which does not have a director who is a natural person will have

needed to appoint such a director before 1 October 2008. There is a grace period which expires on 30 September 2010 for companies which did not have at least one director who was a natural person on 8 November 2006 (the date on which the Companies Act 2006 received Royal Assent), to meet this requirement.

Consequences of failure to comply

Under Section 156 of the Companies Act 2006, the Secretary of State may direct the company to make the necessary appointment by issuing a notice. Non-compliance with the notice will constitute an offence.

Purpose of section 155

In October 2006, Margaret Hodge (at that time Minister of State for Industry) confirmed during a debate on the Companies Bill that the

purpose of this provision was merely practical. Namely, to ease communication and litigation by enabling UK residents to serve documents on an individual director.

This assertion is supported by Section 12 of the Companies Act 2006, which states that newly incorporated companies must include in the statement of proposed officers a service address for each director who is a natural person. This is in addition to the requirement for the usual residential address of each proposed director.

During consideration of the Companies Bill in the House of Commons on 17 October 2006, it was argued that the provision should be extended to add that the natural person director must also be domiciled in the UK in order to improve the accountability of directors and companies. In order to assist the UK authorities should companies need to be pursued for tax

avoidance, money laundering or even financing terrorism. This amendment appeared to stem from a desire for a company's responsibilities to be borne by a human being. However, ultimately this amendment was deemed too onerous, as it would require all UK companies to have a UK resident director, and was not adopted.

When the Department for Business, Enterprise and Regulatory Reform, BERR (then DTI) consulted about the implications of the Companies Bill 2006, there was some hesitation about the provision. One such argument was that sole corporate directors are suitable for structured finance arrangements and that those involved in structured finance transactions may find it simpler and cheaper to use companies incorporated in other jurisdictions as a result of this provision.

Minimum Age for Directors

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For the first time (subject to any exceptions prescribed by the Secretary of State by regulation), the Act has introduced a minimum age for appointment as a director. With effect from 1 October 2008, a person may not be appointed a director of a company unless they have attained the age of sixteen years. However, persons less than that age may still be liable if they act as a shadow director or purport to act as a director. Existing under age directors (if indeed there are any!) will cease to be directors of their companies on 1 October 2008.

Directors and Changes under the Companies Act 2006

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Under the new Act there are a number of changes relating to the directors' 'conflicts of interest' duties.

These changes cover the duty of directors:

- to avoid conflicts of interest
- not to accept benefits from third parties
- to declare an interest in proposed transactions or arrangements

The changes are set out in more detail below:

Duty to avoid conflicts of interest (Section 175)

Under the new Act a director must avoid situations in which he has a direct or indirect interest that conflicts with, or may conflict with, the company's interest. This applies to the exploitation of

property or an opportunity and whether or not the company could take advantage of such information or opportunity.

Section 175 will not be breached, for private companies, where board consent has been given by directors who are genuinely independent although the company's constitution must allow such authorisation.

It will only be effective if the required quorum is met without counting the director in question and if conflicted directors have not participated in taking of the decision.

Duty not to accept benefits from third parties (Section 176)

Under Section 176, shareholders will be able to authorise the receipt of benefits

but the board of directors of the company will not.

The duty will not be breached if the acceptance of the benefit cannot be regarded as likely to give rise to a conflict of interest but as a general point company policy on accepting corporate hospitality should be considered in the light of the changes.

Duty to declare interest in proposed transaction or arrangement with the company (Section 177)

Section 177 will replace the general rule that directors may not have an interest in a transaction with the company unless the interest has been authorised by the shareholders.

Under the new Act directors must declare to the other directors the nature and

extent of any interest in a proposed transaction or arrangement with the company although there is no need to make a declaration if the interest cannot reasonably be regarded as likely to give rise to a conflict of interest.

The director need not be a party to the transaction for the duty to apply. An interest of another person in a contract with the company may require the director to make a disclosure under this duty, if the other person's interest amounts to a direct or indirect interest on the part of the director.

In the light of the changes companies should review their procedures on potential conflicts of interest and proposed transactions between a director and the company.

Relaxation in the rules governing reduction in share capital for private companies

Contributor



On 1 October 2008, sections 641 to 644 of the Companies Act 2006 introduced a new 'solvency statement' procedure for the reduction of share capital. This is in addition to the old court application procedure to reduce share capital (which will remain available).

The new procedure requires a

special resolution of the company's members and a 'solvency statement' from the directors of the company. The company's articles of association must not specifically prohibit a reduction of share capital.

The solvency statement must be in a prescribed form and

requires each director to confirm that they have formed the opinion that:

- as regards the company's situation at the date of the statement, there is no ground on which the company could then be found to be unable to pay (or otherwise discharge)

its debts;

- if it is intended that the company were to be wound up in the following 12 months, it will be able to pay its debts in full within 12 months of the commencement of the winding up; and
- in all other cases, the company will be able to pay

(or otherwise discharge) its debts as they fall due during the year immediately following the date of the statement.

If one or more of the directors are unable or unwilling to make the solvency statement, unless they resign prior to making the statement, the company will need to use the court application procedure instead. In making the solvency statement, the directors need to consider contingent and prospective

liabilities. They may also find it helpful to review management accounts and perhaps even prepare accounts or a balance sheet.

Directors who make a solvency statement without having reasonable grounds for the opinion expressed in it commit a criminal offence, liable to a fine or a maximum imprisonment of two years, or both.

No later than 15 days after the directors have made the

solvency statement, the company's members must pass a special resolution reducing the share capital. The solvency statement must also be provided to the members at the time (or before) the resolution is passed.

This resolution must be filed with the Registrar of Companies within 15 days of being passed, together with the solvency statement, a statement of capital setting out details of the reduced

share capital and a further statement by the directors confirming that the procedural requirements of the Act have been complied with.

The solvency statement procedure is intended to provide a quicker, cheaper and more simple approach to the reduction of share capital; it remains to be seen how successful it will be.

Changes to the rules regarding objection to company names

Contributor



From 1 October 2008, sections 69 – 74 of the Companies Act 2006 introduced a new system of adjudication where there is an objection to a company's registered name.

An objection must be made by application to a 'company names adjudicator'. The office of the adjudicator, the Company Names Tribunal, is at the UK Intellectual Property Office. Procedural rules for applications are set out in The Company Names Adjudicator Rules 2008 (the 'Rules') which also came into force on 1 October 2008.

Applications may be brought by an individual or a company. The grounds for objecting to a company's registered name are that it is:

(a) the same as a name associated with the applicant

in which he has goodwill; or

(b) sufficiently similar to such a name that its use in the UK is likely to mislead by suggesting a connection between the company and the applicant.

The company concerned will be the primary respondent to the application although any of its members or directors may be joined as respondents.

If one or both of these grounds are established the respondents must show that:

(a) the name was registered before the commencement of the activities on which the applicant relies to show goodwill;

(b) the company:

(i) is operating under the name; or

(ii) is proposing to do so and has incurred substantial start-up costs in preparation; or
(iii) was formerly operating under the name and is now dormant;

(c) the name was registered in the ordinary course of a company formation business and the company is available for sale to the applicant on the standard terms of that business;

(d) the name was adopted in good faith; or

(e) the interests of the applicant are not adversely affected to any significant extent.

If none of those is shown, the objection will be upheld.

Where the adjudicator is

satisfied that the respondent has shown one or more of these factors, the objection will still be upheld if the applicant can establish that the main purpose of the respondent(s) in registering the name was to obtain money (or other benefit) from the applicant or to prevent the applicant from registering the name i.e. 'opportunistic registration'.

Where an objection is upheld, the adjudicator will order the respondent company to change its name by a specified date to one which is not an 'offending name' (i.e. a name closely related to the original name). If the change has not been implemented by that deadline the adjudicator may determine a new name for the respondent company.

The Rules also deal with

7. The 2006 Act introduces a statutory basis for derivative claims by the shareholders against a company;
 8. Shareholders have the right to appoint multiple proxies. However, each appointment must relate to a specific share and multiple proxies of the same shareholder will not count as more than one person when calculating the quorum of a meeting (unless the articles of association provide otherwise).
 9. Proxies now have the right to speak at general meetings and this overrides any contrary provision in the articles of association.
 10. Loans to directors by the company of more than £10,000 are permitted, but only with prior shareholder approval. No shareholder approval is required for loans of less than £10,000.
 11. The common law principle of unanimous consent can now only be relied on where the approval process is simply for the benefit and protection of the shareholders and not other persons or groups.
 12. Shareholders cannot requisition resolutions at general meetings which would be ineffective, defamatory, frivolous or vexatious.
 13. Companies formed after 1 October 2007 can no longer have a provision in their constitution that, on an equality of votes at general meetings, the chairman has a casting vote. However, companies formed prior to 1 October 2007 that already had this provision in their articles of association will still be able to make use of it.
- to turnover 'not more than £25.9 million' and balance sheet total 'not more than £11.4 million' to balance sheet total 'not more than £12.9 million'.
6. The exemption for medium sized groups from having to prepare consolidated accounts has been abolished and will now only be available to small groups. Many medium-sized groups will now have to prepare group accounts for the first time.
 7. The financial thresholds for classification as a small group company for accounting periods that begin on or after 6 April 2008 have increased from turnover 'not more than £5.6 million net (or £6.72 million gross)' to turnover 'not more than £6.5 million net (or £7.8 million gross)' and balance sheet total 'not more than £2.8 million net (or £3.36 million gross)' to balance sheet total 'not more than £3.26 million net (or £3.9 million gross)'.
 8. The financial thresholds for classification as a medium-sized group company for accounting periods that begin on or after 6 April 2008 have increased from turnover 'not more than £22.8 million net (or £27.36 million gross)' to turnover 'not more than £25.9 million net (or £31.1 million gross)' and balance sheet total 'not more than £11.4 million net (or £13.68 million gross)' to balance sheet total 'not more than £12.9 million net (or £15.5 million gross)'.
 9. To qualify for a total audit exemption a company must now qualify as a small company, have a turnover of not more than £6.5 million and have a balance sheet of not more than £3.26 million.

CHANGES INTRODUCED IN APRIL 2008

In addition to the changes referred to above, a further tranche of amendments under the 2006 Act were introduced on 6 April 2008. These changes included:

1. The requirement for a private limited company to have a company secretary has been abolished. Having a company secretary has become optional, subject to any provision in the articles of association making specific reference to the company having a secretary. If a company decides that it no longer wishes to have a company secretary the articles of association will need to be reviewed and amended where necessary. However, this amendment to the legislation does not change the rights and responsibilities of a company and the functions that were once carried out by the company secretary will still need to be dealt with.
2. The execution of deeds by a company can now be dealt with by a single director, who can sign a deed on behalf of a company in the presence of an independent witness.
3. The requirement for the filing of accounts for any accounting periods that begin on or after 6th April 2008 has been reduced from 10 months from the end of the relevant accounting reference period to 9 months from the end of the relevant accounting reference period. This amendment will also affect Limited Liability Partnerships.
4. The financial thresholds for classification as an individual small company for accounting periods that begin on or after 6 April 2008 have increased from turnover 'not more than £5.6 million' to turnover 'not more than £6.5 million' and balance sheet total 'not more than £2.8 million' to balance sheet total 'not more than £3.26 million'.
5. The financial thresholds for classification as an individual medium-sized company for accounting periods that begin on or after 6 April 2008 have increased from turnover 'not more than £22.8 million'
10. Subject to any provisions in the articles of association to the contrary, where a company will be required to produce audited accounts and the directors of the company have appointed an auditor for that purpose, such appointment no longer needs to be ratified by the members of the company at the next general meeting. It is now a statutory requirement that auditors' reports for accounting periods starting on or after 6 April 2008 will have to state the name of the auditor preparing the report and must be signed and dated by the auditor. It is also now an offence if a person knowingly or recklessly causes an auditors' report to include any misleading, false or deceptive material.
11. Auditors have a duty to deposit a statement at the company's registered office when they leave office setting out any of the circumstances connected with their ceasing to hold office that need to be brought to the attention of the members or creditors of the company. If there are no such circumstances a statement confirming that fact must still be lodged.
12. Auditors may now agree with the company to limit the amount of liability that may be owed by them to the company in the course of the audit of accounts. Any such limitation of liability must only relate to the audit of accounts for one financial year, must be authorised by the members of the company and must be fair and reasonable.
13. The requirement for a company to hold entries about past members has been reduced from a period of 20 years to a period of 10 years.
14. In cases where the directors of a company have an absolute discretion as to whether to register a share transfer they must now either register a transfer of shares or provide the transferee with reasons for their refusal. In either case, the directors must do so as soon as practicable, but no later than two months after the lodging of the transfer. If the directors refuse to register a transfer, the transferee is entitled to any information he may reasonably require about the reasons for refusal. These obligations will override anything to the contrary contained in the articles of association of a company.

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practical matters such as service, electronic filing, fees and forms, and whether an objection should be dealt with as a paper application or by oral hearing. Appeals against the decision of an

adjudicator are made to the High Court.

It should be noted that company names adjudicators only deal with cases brought under section 69 of the Act.

Where a complainant believes that a company name is too similar to their own company name but there is no suspected opportunism this sort of dispute will still be dealt with by Companies

House. Allegations of 'passing off' will continue to be dealt with by the courts.

Changes to Annual Returns

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With effect from 1 October 2008, the annual return of a company which is a private company or a non-traded company (meaning a company none of whose shares are shares admitted to trading on a regulated market) need only contain the names of shareholders as they appear on the company's Register of Members and does not need to include their addresses.

The Companies Act 2006

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CHANGES INTRODUCED IN OCTOBER 2007

The following amendments have been introduced by the 2006 Act but may require amendments to be made to the articles of association before a company is able to take advantage of the changes:

1. Annual general meetings are now optional and an elective resolution is no longer required to opt out of the need to hold an AGM;
2. Extraordinary general meetings are now simply known as 'general meetings';
3. All shareholders meetings can now be called on a 14 'clear' day notice period, rather than the 21 day period that was sometimes required by the old legislation;
4. A company's articles of association may now provide for another person to be nominated to exercise some or all of the rights of a registered shareholder;
5. Shareholders of a company may ratify a director's conduct amounting to negligence, default, breach of duty or breach of trust in relation to the company by ordinary resolution;
6. The default approval level for short notice of general meetings of a company is now 90% of shareholders entitled to attend and vote;
7. The statutory 48 hour cut-off point for returning forms of proxy for general meetings is now calculated by reference to working days;
8. Essentially, elective and extraordinary resolutions have ceased to exist leaving just ordinary and special resolutions.

OTHER CHANGES INTRODUCED BY THE 2006 ACT IN OCTOBER 2007:

1. Written resolutions no longer need to be signed by all of the shareholders of a company. Instead, the required majority for special resolutions will be 75% of all shareholders entitled to attend and vote at a general meeting and for ordinary resolutions will be a simple majority of all shareholders entitled to attend and vote at a general meeting;
2. Certain directors' duties have been codified – including the duties to act within their powers, to promote the success of the company, to exercise independent judgment and to exercise reasonable care, skill and diligence;
3. Private companies (except those under the small companies' accounting regime) must produce a 'business review' for any financial year beginning on or after 1 October 2007. The definition of 'substantial property transactions' has been altered to transactions involving a non-cash asset which exceeds either 10% of the company's asset value and is more than £5,000, or which exceeds £100,000.
4. The definition of connected person for the purpose of a substantial property transaction has been extended to cover spouses, civil partners, children (including adults), parents, certain partners and certain bodies corporate, trustees and business partners.
5. Shareholder approval is required for service contracts guaranteeing a director's term of employment which is for a period of more than two years. This is down from 5 years in the old legislation;
6. Minutes of general meetings, resolutions passed other than at general meetings and decisions of a sole shareholder must now only be kept by the company for a period of 10 years rather than indefinitely;

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