



A Guide To:

THE COMPANIES ACT 2006

INTRODUCTION

In November 2006 a new Companies Act was passed which was intended to modernise and simplify British Company law. The Act started life 10 years earlier as “the Company Law Review” with the aim to simplify corporate administration for private companies. Over the years it became more and more complex, upgraded to “the Company Law Reform Bill” and was finally passed as “the Companies Act 2006” - the longest and most complex piece of legislation ever to have passed through Parliament.

The final printed bill runs to 760 pages without counting secondary legislation. Ah, that’s “simplification” for you!

Despite the remarkably long gestation period the Act was never fully scrutinised or debated in Parliament - there just wasn’t enough parliamentary time. As a result, and given the complexity of the Act, its implementation proved to be an administrative and legislative nightmare. Not only was secondary legislation necessary before several of the changes could take effect but the interaction with other legislation was not fully appreciated or considered. As a result some of the major changes could not be introduced until other legislation was altered or enacted.

The Act was originally intended to be fully in operation by October 2007 but early on this slipped to October 2008 and when the Registrar of Companies made it clear that there was no way that the Companies House staff and systems could possibly cope with all the changes in that timescale the Government accounced, in December 2007, a further delay for large parts of the Act until October 2009.

This guide highlights some of the key changes within the Act and details those which are already in operation together with the latest timetable for implementation between now and October 2009. There are many changes to the way that Companies will now be managed but readers should be aware that Companies formed before October 2009 may not automatically be able to take advantage of some of the changes without altering their Articles of Association. This is because whilst the new Act overrides the default requirements of the earlier Acts it cannot override some specific changes that are contained in the Articles of Association of many companies. For this reason Directors should have their Articles of Association reviewed by appropriate professional advisors.

BACKGROUND

From the outset the Government intended that key themes underpinning the process would be:

- To enhance shareholder engagement and a long term investment culture.
- A “think small first” approach.
- To make it easier to set up and run a company.
- To provide flexibility for the future.

The Act in its final form represents a thorough overhaul of company law and also consolidates existing law to create a comprehensive code of company law in one place. As such it is both welcome and well overdue.

CHANGES AFFECTING DIRECTORS

Directors Duties

Surprisingly, although a massive body of case law and precedent has built up over centuries, no previous legislation has ever set out the duties that a director was expected to show towards a company. In addition the various corporate governance codes are only that – codes – and whilst these indicate “best practice” they are not legally enforceable.

The new Act sets out seven statutory duties designed to reflect (and to replace) the existing position as follows:

“A Director must”

- Act in accordance with the company’s constitution and only exercise his/her powers for the purposes for which they were conferred.
- Promote the success of the company for the benefit of its members as a whole, having regard to:
 - The interests of the company’s employees
 - The need to foster business relationships with the company’s suppliers and customers
 - The impact of the company’s operations on the community and the environment
 - The desirability of the company maintaining a reputation for high standards of business conduct
 - The need to act fairly as between members of the company
 - The likely long term consequences of any decision taken
- Exercise independent judgement.
- Exercise reasonable care, skill and diligence.
- Avoid conflicts of interest. This duty applies to the exploitation of any business opportunities. Conflicts can be authorised by directors without an interest in the matter in question, if, in the case of public companies, the company’s articles permit or if, in the case of private companies, they do not prohibit it.
- Not accept benefits from third parties.
- Declare to the other directors any interest in a proposed transaction or arrangement with the company.

Although intended to reflect the current position there are changes, most notably (a) the requirement for directors to have regard to the factors referred to above in connection with their duty to promote the success of the company - this is the Government’s concept of “enlightened shareholder value” – and (b) allowing independent directors to authorise conflicts of interest – currently this can only be done by shareholders.

The duty to promote the success of a company having regard to the factors listed above is one of the most controversial provisions of the new Act. It reflects the existing duty to act in the best interest of the company, but the wording is different as, of course, are the factors to be taken into account. There is concern over the interpretation of this duty. In particular, the weight to be given to each factor, the extent to which directors will have to take independent advice, and what records must be kept. The Government has said that “success” means long term increase in value and that the Act does not require directors to keep additional records, it simply requires them to have due regard to these wider factors, with the weight to be given to any factor a matter for their good faith and business judgement.

Although the duties listed replace the equivalent existing duties, it is not an exhaustive list. For example a director is under a duty to consider the interest of creditors in times of threatened insolvency. Failure to do so could still lead to civil and criminal penalty under both the Companies Act and the Insolvency Act. Shareholders can, as at present, ratify most breaches, but a new provision will mean that the vote of any person who is connected with the director in question must be disregarded. So if all or a majority of the shareholders are also directors who is able to ratify?

So far as the power for independent directors to approve conflicts of interest is concerned, the government has indicated that transitional provisions will be introduced providing that existing companies will require members approval to permit this. Most of these provisions came into force in October 2007, but provisions relating to directors conflicts of interest are only due to come into effect in October 2008.

Directors Liability – Derivative Claims

A new statutory procedure for claims against directors by shareholders on behalf of a company was introduced by the Act in October 2007.

A claim may be brought in the event of negligence, default, breach of duty (including the above mentioned duties) or breach of trust by a director.

This procedure replaces the existing common law right to bring a derivative action but includes some significant differences intended to make the process more modern, flexible and accessible. In particular:

- There is no need to prove that a director has benefited personally.
- It is not necessary for the shareholders to show that the directors who carried out the wrongdoing control the majority of the company's shares (i.e. the old requirement that the wrongdoing amounts to a fraud on the minority).

There is concern that the procedure will be used by pressure groups (e.g. environmental groups) to challenge directors decisions on the basis that they have not properly taken into account the factors they are required to as part of the new duty to promote the success of the company. In order to alleviate concerns over increased and speculative litigation, provisions are included requiring a claimant to present a good case to the court before the action can be continued, with the court having the ability, if appropriate, to make a costs order against an applicant as a deterrent to vexatious actions.

Transitional provisions mean that (a) the new procedure will not apply to claims issued before 1 October 2007 where the claimant has applied for permission to continue the claim before that date and (b) if the claim arises from acts or omissions occurring before that date, the new procedure will only apply if the claim would have been allowed to proceed under the old derivative claim procedure.

Business Review

In respect of all accounting periods *beginning* on or after 1 October 2007 all companies (other than those meeting the statutory definition of a small company) must include a business review in their directors report. The new Act extends the information to be included, especially for companies that are officially listed¹ (not AIM) which must include certain forward-looking statements. In particular such quoted companies must, to the extent necessary for an understanding of the development, performance or position of the company's business, include:

- The main trends and factors likely to affect the future development, performance and position of the company's business.
- Information about environmental matters, the company's employees, and social and community issues.
- Information about persons with whom the company has contractual or other arrangements

which are essential to the business of the company unless such disclosure would, in the directors opinion, be seriously prejudicial to that person and contrary to the public interest.

This last requirement has caused some controversy, but the Government has stated that they do not envisage companies having to give sensitive lists of customers and suppliers, or producing “miles and miles” of paperwork, but that directors must use their judgement to decide what is relevant in the supply chain for them to report on.

Directors will not have to disclose information about impending developments if in their opinion such disclosure would be seriously prejudicial to the interests of the company and of course in some cases disclosure may in fact be illegal under other legislation.

The Act states that the overall purpose of the business review is to allow members to assess how the directors have performed their statutory duty to promote the success of the company and accordingly the provisions complement the new statutory duties.

Directors Liability for Statements in Reports

The Act introduced a new liability regime as from 20 January 2007 by which a director will be liable to compensate the company for any loss it suffers as a result of any untrue or misleading statement in, or omission from, the directors report (including the business review), the remuneration report and information in summary financial statements derived from them.

A director will only be liable if he knew (or was reckless as to whether) the statement was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact.

A director will not be liable to any other person resulting from reliance on these reports.

The Governments stated intention in formulating this regime is to ensure that the right incentives are in place to encourage meaningful, forward-looking information for shareholders, while also ensuring an appropriate but limited right to recover losses.

See below for details of the new liability regime for misleading statements in reports by quoted companies.

Fraud Act 2006

This Act introduces a criminal offence of “fraud by abuse of position” which can apply to directors who dishonestly abuse their position to obtain a gain or cause a loss to someone, for example by diverting business opportunities from the company to themselves. It came into effect on 15 January 2007.

Loans to Directors

Currently, loans to directors are prohibited, with limited exceptions such as loans of small amounts. The most significant change the new Act introduces is that loans made on or after 1 October 2007 may be made to directors provided they are approved by shareholders.

Payments for Loss of Office

The position remains that shareholders approval is required for payments to a director as compensation for loss of office but there is some clarification and there are some new provisions which came into force in October 2007. Key points are:

- The Act clarifies the fact that these provisions cover payments to directors relating to their position as employees, not just as directors.
- Payments to connected persons of directors and past directors are also covered.
- Some exemptions are included, notably payments made in good faith in settlement of a claim or discharging an existing obligation (e.g. under the director’s employment contract).

Service Contracts

- Service contracts entered into on or after 1 October 2007 for a term over 2 years must be approved by shareholders, as opposed to the current 5 year period.
- The following contracts must be made available for inspection and shareholders will now be entitled to ask for copies:
 - contracts entered into on or after 1 October 2007
 - contracts entered into before that time which cannot be terminated within 12 months.

Notice of Interest in Shares

The requirement for directors to give notice of their interest in the company's shares was removed in April 2007. Directors of publicly traded companies will still be required to give notice of substantial shareholdings (now based on a new concept of control over voting rights - see below).

Details of Other Directorships

From October 2007 details of other directorships held by a director will no longer have to be included in the register of directors or filed at Companies House.

Protection of Private Addresses

From October 2009, directors and company secretaries will be able to give a service address on the public register and their residential address will be kept in a separate secure register with restricted access e.g. for specified public authorities and, to a limited extent, credit reference agencies. So far as existing filed private addresses are concerned, regulations will be introduced permitting their removal from the public register; however the scope of such provisions as currently proposed is very limited. Removal will only be available for addresses filed after 1 January 2003 (for practical reasons) and only for those directors and secretaries who are at risk of violence or intimidation and have already applied for a confidentiality order under existing law or who are employed by or provide services to certain government security departments.

Natural Person, Age

From October 2008, at least one director of a company must be a natural person, so it will no longer be possible to have all corporate directors. However, it is proposed that companies without a natural person as a director on 8 November 2006 will have a grace period until October 2010 in which to make the appointment.

There will be a new minimum age of 16 for individuals and the old provision requiring a director of a public company to retire at 70 unless otherwise approved by shareholders has already been removed.

CHANGES AFFECTING SHARE CAPITAL

Authorised Share Capital

From October 2009 companies will no longer need to have an authorised share capital. Existing provisions regarding authorised share capital will continue to operate as a restriction on the number of shares which can be issued. Accordingly, if existing companies wish to do away with that restriction they will need to amend their Articles. If new companies formed after these provisions come into effect want a restriction on the number of shares which can be issued, then they will have to include a restriction in their Articles.

Share Premium Account

The purposes for which the share premium account can be used will be reduced from October 2009.

It will only be possible to use it in respect of share issues to write off (a) the expenses of the issue of the shares in question and (b) any commission paid on those shares. It can also still be used in paying up fully paid bonus shares. However preliminary expenses, such as the costs of setting up a new company for a listing, can no longer be written off against the share premium account and neither can any expenses incurred, commission paid, or discount allowed on an issue of debentures.

Re-denomination of Share Capital

Companies which prepare their accounts in another currency, such as the euro, may wish to convert their share capital to that currency to avoid any exchange risk. At present, because the conversion can involve a reduction in the share capital, this can only be done by way of a court approved reduction of capital or, for a private company, a buyback of its own shares and the issue of new shares following the procedures set out in the Companies Act 1985, which in either case will be time consuming and costly. A new simplified procedure is to be introduced requiring only shareholder resolutions. If the initial redenomination produces an unsuitable nominal value per share (for example a fraction in the new currency), a company can by special resolution reduce the company's share capital by not more than 10% to achieve a more sensible nominal value.

These provisions are due to come into force in October 2009.

SHAREHOLDERS ADDRESSES

The Act introduces new provisions on access to the register of members and it is proposed that these provisions will apply to a company once it has filed an annual return made up to a date *after* 30 September 2007. Anyone seeking to inspect the register of members must give their details and the purpose for which the information is required. With court approval, a company can refuse access if it is not for a proper purpose. This provision is intended to prevent abuse of shareholders registers, which is welcome. One shortcoming however is that “proper purpose” is not defined which may make companies reluctant to incur the expense of a court application.

These provisions would be of limited value if shareholders' addresses were available at Companies House and therefore the Government proposes to introduce regulations providing that:

- Private companies and public companies not listed on the London Stock Exchange's main market or other regulated markets will not have to file addresses.
- Companies that are listed on a regulated market will only have to file addresses of shareholders holding 5% or more of any class of shares.

CHANGES AFFECTING A COMPANY'S CONSTITUTION

With the intention of having all key constitutional provisions in one document, the Articles, the importance of the Memorandum of Association will be significantly reduced as from October 2009. It will essentially be a “snapshot” of certain parts of the constitution of the Company at the time of registration and will have no continuing relevance. For existing companies, certain provisions of the Memorandum will be treated as provisions in the Articles, so there will be no need for amendment, although companies may wish to do so for clarity and as part of an overall review of the Articles in the light of the new Act.

One of the most significant changes is to the objects of a company. The Act provides that a company's objects will be unrestricted, unless the Articles specifically restrict them.

Historically a company has only been able to act within its stated objects and this has been the subject of much litigation. Even modifications to the rule have left areas of uncertainty which are now swept away. Although the new rule applies to both new and existing companies it is not clear if the existing objects in the Memorandum will be regarded as restrictions and therefore the safest course, if a company wishes to avail itself of an unrestricted objects clause, is to amend its Memorandum and Articles upon the coming into force of the new law.

New model Articles for both public and private companies will be introduced in October 2009, replacing the current "Table A" default regulations, although existing companies will continue to be regulated by their existing Articles (including the existing "Table A" regulations, to the extent they have adopted them) unless they choose to change to the new model Articles. The new model Articles for private companies are intended to be much simpler than the existing "Table A" regulations and accordingly more appropriate for private companies.

CHANGES SPECIFIC TO THE ADMINISTRATION OF PRIVATE COMPANIES

A number of changes have been made with the primary intention of simplifying and deregulating private company administration in accordance with the Government's theme of "think small first".

Company Secretaries

A private company will, from 6 April 2008, no longer be obliged to have a company secretary, although it may do so if it wishes. If there is no company secretary then the directors will be jointly and severally liable for the legal duties normally the responsibility of the company secretary – such as those under Health & Safety legislation – unless the board specifically charge one (or more) of their number as being so responsible. In general, and particularly where there is only one director, practical considerations suggest that companies would be best advised to continue to have a company secretary even if that person is also a director.

Resolutions and Meetings

Private companies are no longer required to hold an annual general meeting unless they wish to and consequently will not have to lay accounts before the AGM or re-elect the auditors annually (in effect the old elective resolution regime will become the default position). Annual accounts will have to be sent to members by the time they are due to be filed with Companies House.

It will be easier for private companies to take decisions by written resolution. A new concept of ordinary and special written resolutions is introduced which will only require approval by the same percentage of shareholders required to pass ordinary resolutions and special resolutions (namely over 50% and 75% respectively). This contrasts with the existing position where a written resolution must be unanimous. In addition written resolutions can be sent to and returned by shareholders electronically and no longer need to be sent to the auditors.

Financial Assistance

The prohibition on a company giving financial assistance for the acquisition of its own shares will be removed for private companies, although it will still apply to public companies.

Under the current provisions a private company can only give financial assistance (e.g. gift, loan, guarantee) if (a) its net assets are not reduced or, to the extent that they are, there are distributable profits available to cover the amount of any such reduction and (b) it follows the "whitewash" procedure involving a directors statement of solvency, the passing of a special resolution and an auditors report.

There has been some doubt expressed as to whether the repeal of these provisions would have its intended effect because of the possible application of the (similar) common law rule against any reduction in a company's share capital. The Government's view is that case law is superseded by statutory legislation which covers the same ground and this is not changed by the subsequent repeal of that legislation. It proposes to include a "saving" provision to this effect in the commencement order, which is due in October 2009. The outcome of its consultation on the final form of the wording is awaited.

In any event directors and lenders will have to consider carefully if the giving of any financial assistance is in breach of directors duties and if the transaction is at risk of being set aside as being at an undervalue under insolvency law.

Reduction of Capital

Reductions of capital are used for various purposes such as a return of capital to shareholders or the elimination of accumulated losses.

Currently capital can only be reduced on a court application. A simplified procedure with no need to apply to the courts will be introduced in October 2009 for private companies, involving the directors making a solvency statement in the prescribed form. The existing court procedure will be retained for both public and private companies.

The Act provides that a reserve arising on a reduction will only be distributable in cases to be specified in regulations – these have not yet been finalised but the Government proposes that amounts credited to reserves following a reduction of capital under Generally Accepted Accounting Principles be treated as a realised profit which can be offset against realised losses for the purposes of calculating whether the company can pay a dividend.

Allotment of Shares

Currently shareholder consent is required for the allotment of shares, which may be by way of a general authorisation subsisting for up to five years for public companies and indefinitely for private companies. A significant change in the new Act is that private companies with only one class of shares will not need that authority unless it is specifically required by their Articles. Any such allotment will, of course, continue to be subject to any rights of pre-emption.

Whilst this may be a useful deregulatory step, like the abolition of an authorised share capital, it does remove an important shareholder protection and unless all the shareholders are suitably represented on the board, it would be sensible to consider some restrictions in the Articles. To protect shareholders of existing companies the government proposes to introduce transitional provisions which will allow control over allotments to remain with shareholders where the Articles of those companies do not contain authority permitting directors to allot shares. Those companies will have to amend their Articles for the new provisions to have effect.

For private companies with more than one class of share and for public companies shareholder authorisation is required along similar lines to the current provisions. One particular change is that for private companies, as for public companies, such authorisation cannot be for more than 5 years. It is currently envisaged that existing authorisations will continue to have legal effect but doubt remains as to whether this can apply to those authorisations with more than 5 years left to run..

These provisions are due to come into force in October 2009.

CHANGES SPECIFIC TO THE ADMINISTRATION OF PUBLIC COMPANIES

Whilst the focus on private company administration has been simplification and de-regulation, in the case of public companies the focus has been more on the theme of enhancing shareholder engagement and encouraging a long term investment culture, *which in some cases means increased regulation*.

A number of measures have been introduced to enhance the timeliness and transparency of company information and proceedings as follows:

- Public companies must now hold their AGM within 6 months of the end of the financial year – this is to ensure shareholders have a timely opportunity to hold the directors to account. This measure came into force in October 2007. It ties in with the new requirement for accounts to be filed within 6 months of year end (see below).
- As under current law, a specified minority of shareholders² can requisition resolutions at an AGM. From October 2007, where shareholders of a public company deliver the requisition before the company's year end, the company must circulate it at the company's expense – it cannot require the requisitionists to pay as is presently the case.

- Companies officially listed in the UK (not AIM) will from April 2008 be required to make available on a website their annual report and accounts and the results of any polls taken on resolutions at a shareholders' meeting (held after 30 September 2007).
- A specified minority of shareholders² of such quoted companies can require them to:
 - Obtain an independent report on a poll (from October 2007).
 - Publish on a website a statement raising questions about the accounts or the departure of an auditor, which such shareholders propose to bring up at the next meeting at which the accounts are to be discussed (from April 2008).

Company Reporting

For companies admitted to trading on the London Stock Exchange's main market and other regulated markets (not AIM) the new Disclosure Rules and Transparency Rules introduced by the Financial Services Authority on 20 January 2007 (pursuant to powers in the new Act) mean that:

- There will be changes to the periodic reporting rules for financial periods starting on or after 20 January 2007. For example, there will be amended content and timing requirements for financial reports, there is a new requirement for interim management statements and annual and half yearly reports will have to include responsibility statements.
- There will be more detailed obligations on communications with shareholders and additional rules on filing information with the Financial Services Authority.

These measures implement the EU Transparency Directive.

Liability for Statements in Reports

New provisions inserted into the Financial Services and Markets Act establish a regime for civil liability to third parties by companies admitted to trading on the London Stock Exchange's main market and other regulated markets¹ (not AIM) in respect of the annual report, the half yearly report, the interim management statement or any preliminary statement published in advance of the annual report.

Such issuers will be liable to pay compensation only to a person who has acquired securities and suffered loss as a result of any untrue or misleading statement in, or omission from, such reports. An issuer will be liable if a person discharging managerial responsibilities for the publication (this will usually be a director) knew that the statement was wrong or misleading, was reckless as to whether it was or knew any omission was a dishonest concealment of a material fact. It is unclear if as things stand a person who has disposed of securities on the basis of an untrue or misleading statement and suffered a loss can claim compensation.

Shareholders are only able to claim against the company itself, although the company may, in turn, be able to claim against a director.

The Transparency Directive required the introduction of a liability regime for statements in these reports but left the details to each country to determine. The Government has stated that its intentions in drafting these liability provisions have been to provide certainty in an uncertain area and to ensure that the potential scope of the liability is reasonable. In particular they were anxious not to extend unnecessarily the scope of the duties which might be owed to investors or wider classes of third parties, in order to protect the interests of a company's members, employees and creditors. It remains to be seen whether this liability regime will be as effective as the Government hope.

Disclosure of Control over Substantial Voting Rights

The old regime requiring shareholders of public companies to disclose substantial interests in shares over certain thresholds (starting at 3%) was repealed on 20 January 2007 and has been replaced with a new regime (also implementing the Transparency Directive) contained within the Financial Services

Authority's Disclosure Rules and Transparency Rules, which requires disclosure of control over voting rights as opposed to disclosure of interests in shares.

The new provisions apply to UK companies admitted to trading on the London Stock Exchange's main market, AIM, the Plus Markets and other regulated or prescribed markets and to non-UK companies on a regulated market for which the UK is their Home State. The regulations do not apply to non-UK companies on AIM, the Plus Markets or other prescribed markets.

For UK issuers the Financial Services Authority is keeping the old 3% starting threshold (subject to certain exemptions) and so shareholders (direct or indirect) must simultaneously inform the issuer and the Financial Services Authority if their percentage of voting rights reaches, exceeds or falls below 3% and each 1% above 3% of the issuer's total voting rights and capital in issue. For non UK issuers on a regulated market the thresholds will be the minimum requirements as set out in the Transparency Directive, namely 5%, 10%, 15%, 20% 25% 30%, 50% and 75%, which may cause some confusion.

Also likely to lead to some confusion is the fact that the old regime by which a public company can require shareholders to give details of beneficial interests in shares remains largely intact.

Trading Disclosures

The current requirements to include company details in certain company documents have been updated to include documents in electronic form and websites. A company must now include its name, registered number, place of registration and address on all business letters (including emails), order forms and in all websites.

Enfranchising Indirect Shareholders

As part of the government's stated aim of enhancing shareholder engagement, more rights were given to the beneficial owners of shares held through nominees with effect from October 2007. The Act provides:

- That nominee holders of shares in companies admitted to trading on the London Stock Exchange's main market and other regulated markets (not AIM) may require the Company to send all communications (e.g. the report and accounts) to the beneficial owner.
- That a member of any company, public or private, may nominate another person to exercise certain of their rights as a member (e.g. the right to be sent proposed written resolutions and the right to appoint a proxy). However, this provision is voluntary and only has effect if a company amends its Articles to permit it.
- Enhanced proxy rights making it easier for nominee holders to nominate the beneficial owners to attend meetings. In particular a registered shareholder can nominate more than one proxy so nominees holding shares for multiple owners can nominate those owners in respect of the shares owned by them. Proxies will also have the right to vote on a show of hands rather than just on a poll and can be counted in a quorum.

This is one area where it is anticipated that there will be significant compliance costs for companies.

Quoted companies will no doubt have been consulting with their registrars to ensure they are able to comply with these provisions..

ELECTRONIC COMMUNICATIONS WITH SHAREHOLDERS

Previous provisions regarding electronic communications by a company were limited in that they only applied to certain documents and required specific agreement. The new provisions apply to all communications under the companies acts and, whilst specific shareholder consent to electronic communications generally is still required, a significant change is that shareholders will be deemed to have agreed to website communication if they do not reply within 28 days of request. They will of course have to be notified of a posting on a website and such notification will need to be in hard copy

unless the shareholder has consented to email communication, either generally or specifically. A shareholders' resolution or an amendment to the Articles is required authorising communication by website posting. Companies admitted to trading on the London Stock Exchange's main market and other regulated markets also need a shareholders' resolution authorising electronic communications with shareholders generally, such as by email.

One of the main advantages of these provisions is to facilitate the posting of annual reports etc on a website which should lead to considerable cost savings, although even if a shareholder has consented to electronic communications, that shareholder still has a right to request hard copies which must be provided free of charge.

A further change introduced by the Act is that if the company gives an email address in a notice calling a meeting or a proxy invitation or form (or, from October 2007, in any document containing or accompanying a proposed written resolution), then a shareholder can communicate electronically with the company in relation to such document, subject to any limitations on the use of the address as may be specified in the document.

Save as indicated above, these provisions came into force on 20 January 2007.

Companies can continue to rely on existing arrangements to use electronic communications but may prefer to take advantage of the wider scope of the new provisions and the deemed consent procedure for website communications. A company wishing to benefit from these provisions should consider taking the necessary steps now or at the next AGM.

AUDITORS LIABILITY AND ACCOUNTS

At present, under the Companies Act 1985, any provision that exempts an auditor from liability for the audit (with very limited exceptions) is not enforceable. The new Act permits Auditors to limit their liability annually in respect of each audit, although the amount of such limitation must be fair and reasonable to be enforceable and must be approved by a shareholders' resolution (or shareholders in a private company can waive their right of approval).

Auditors' can be charged with 2 new criminal offences in relation to the audit:

- To knowingly or recklessly include any matter that is misleading, false or deceptive in a material particular.
- To knowingly or recklessly omit from the report any of the required statements when there are problems with the accounts.

In addition a senior statutory auditor must be identified who must sign the audit report in his or her own name. These provisions come into effect on 6 April 2008.

ACCOUNTING ISSUES

In addition to other measures referred to in this briefing:

- The time for private companies to file accounts at Companies House will be reduced from 10 months to 9 months from the year end and for public companies will be reduced from 7 months to 6 months (for companies admitted to trading on a regulated market it is already 4 months).
- There will be a single set of regulations gathering together all the accounting requirements applicable to small companies.
- The medium-sized group exemption from preparing consolidated accounts will be removed, although the exemption for small companies remains.
- Directors have a new general obligation not to approve accounts unless they give a true and fair view of the financial position of the company.

Accounting provisions generally under the Act are due to come into effect in respect of accounting periods beginning on or after 6 April 2008.

POLITICAL DONATIONS AND EXPENDITURE

Complex regulations regarding the making of Political donations in cash or kind came into effect on 1 October 2007. In general any such donation must be approved by resolution of the members rather than the directors. The regulations apply to donations made to “independent” candidates seeking election to any political forum as well as to registered political parties or candidates.

These new regulations are subject to amendment following the proposed review of the financing of political parties and recent instances of “irregularity” by government ministers.

QUOTED COMPANIES

The Act contains regulations which affect quoted companies² particularly in respect of takeover and transparency legislation including the Financial Services and Markets Act 2000, the EU “transparency obligations directive” and the workings of the Takeover Panel. It is worth noting that it is open to the UK government to extend the requirements of the UK Companies Act in these areas to Isle of Man and Channel Islands companies and for that reason it is advisable for such companies to be aware of the requirements of the UK and EU legislation even if such an extension has not been sought at the time of consideration.

OVERSEAS COMPANIES

As things stand overseas companies operating under the Branch Registration Regime will, as from 1 October 2009, come fully under the UK Companies Act in every respect, unless subsequent legislation specifically exempts them from parts of the Act.

LIMITED LIABILITY PARTNERSHIPS

The Companies Act applies to LLPs even though these are not actually companies but partnerships. In general all matters discussed in this briefing paper apply to LLPs with the exception of the duties of directors. References to shares and control broadly relate to percentage of partnership assets and percentage of voting rights held.

Footnotes

1 These provisions apply to companies officially listed in the UK, another EEA state or on the New York Stock Exchange or NASDAQ.

2 i.e. shareholders holding 5% of the voting shares or 100 voting shareholders holding shares on which an average of £100 per member has been paid up.

You may now wish to review your company’s Articles of Association to identify any action that you wish to take in response to the deregulation under the new Act. Please contact us if you would like to discuss the options available in more detail.

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