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The Companies Act 2006 – Client Briefing No. 4

The Companies Act 2006

Introduction

As our corporate clients will be aware, the Companies Act 2006 (the Act) is being introduced over a period of time by statutory instrument, with the Government having set a target date of October 2008 to have the complete Act in force.

Parts of the Act came into force on 8 November 2006, 1 January 2007, and 20 January 2007. Two further statutory instruments brought still more parts of the Act into force from 6 April. These were:

- Statutory Instrument 2006 No. 3428 (C.132) (Commencement No. 1, Consequential Amendments, Transitional Provisions and Savings) Order 2006
- Statutory Instrument 2007 No. 1093 (C.49) "The Companies Act 2006 (Commencement No. 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007"

We have provided details of the above statutory instruments in previous Client Briefings. This Briefing summarises the content of two further statutory instruments which bring into force more sections of the Act.

Statutory Instrument 2007 No. 2194 (C.84) "The Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007"

The majority of this Order comes into force on 1 October 2007 but certain parts will come into force at later dates, details of which are set out below.

Overview

The Order provides for the commencement of a number of sections of the Act from 1 October 2007, details of which are set out below. Some of the sections are of a specialised nature and some will affect most companies. In this Client Briefing we shall concentrate on those parts of the Act that will impact most companies.

Detailed content

Provisions of the Companies Act 2006 coming into force on 1 October 2007

(a) sections 29 and 30 (resolutions and agreements affecting a company's constitution);

Advice: These sections deal with the requirement to file copies of resolutions with the registrar.

(b) sections 116 to 119 (inspection of register of members);

Advice: These sections deal with the right of members and any other person to inspect a company's register and the index of members' names. New provisions are included concerning information which must be given by a person requesting this information. These provisions have been introduced to protect members of companies from receiving threats or unsolicited correspondence from activist groups, eg animal rights groups.

(c) sections 145 to 153 (exercise of members' rights);

Advice: These sections deal with the right of a member of a traded company to nominate another person to enjoy information rights in relation to the company. Note that these sections only relate to traded companies and so will not affect private companies.

(d) in Part 10 (a company's directors):

- section 154 (companies required to have directors);
- section 160 (appointment of directors of public company to be voted on individually);
- section 161 (validity of acts of directors);
- sections 168 and 169 (removal of directors);
- sections 170 to 181 (general duties of directors), except sections 175 to 177 (duty to avoid conflicts of interest, duty not to accept benefits from third parties and duty to declare interest in proposed transaction or arrangement);
- sections 188 to 226 (transactions with directors requiring approval of members);
- sections 227 to 230 (directors' service contracts);
- section 231 (contract with sole member who is also a director);
- sections 232 to 239 (directors' liabilities);
- sections 247 to 259 (supplementary provisions);

Advice: The above sections deal with a number of practical matters affecting directors. Note in particular that the new general duties of directors will come into force but that a number of more specific duties will be brought in at a later date. Previous corporate legislation contained no provisions relating to directors duties but it is now considered important that such duties are set out in the legislation itself.

(e) sections 260 to 269 (derivative claims and proceedings by members);

Advice: These sections introduce new legislation concerning the rights of members to bring actions against a company's directors for acts or omissions involving negligence, default, breach of duty or breach of trust. We would advise that all client companies should be aware of the concept of a derivative claim but would suggest that such claims will be extremely rare in practice, especially in relation to private companies.

- (f) in Part 13 (resolutions and meetings):
- sections 281 to 287 (general provisions about resolutions);
 - sections 288 to 300 (written resolutions);
 - sections 301 to 307, 310 to 326, 327(1), (2)(a) and (b) and (3), 328, 329, 330(1) to (5), (6)(a) and (b) and (7), 331, 332, 334 and 335 (resolutions at meetings);
 - sections 336 to 340 (public companies: additional requirements for AGMs);
 - sections 341 to 354 (additional requirements for quoted companies);
 - sections 355 to 359 (records of resolutions and meetings);
 - sections 360 and 361 (supplementary provisions);

Advice: These sections define the various types of resolutions a company can pass and set out the procedures for passing resolutions. Note that the extraordinary resolution no longer exists and all resolutions are either ordinary resolutions (more than 50% majority) or special resolutions (75% or more).

Note, in particular, that section 318 now specifically provides that if a company is a one member company, the quorum at a meeting of the company can be one. In practice this has always been the position but it is now set out in the legislation.

- (g) section 417 (contents of directors' report: business review);

Advice: This is an important section which requires all companies (except small companies) to include a business review in the directors' report. The required content of the business review is set out in this section.

- (h) sections 485 to 488 (appointment of auditors of private companies);

Advice: These sections set out the requirement for certain private companies to appoint auditors and the term of office for such auditors. In particular, section 487 provides for the automatic reappointment of an auditor without the need for the company to pass an elective resolution to this effect.

- (i) section 993 (fraudulent trading);

Advice: This section states if any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence.

- (j) sections 994 to 999 (protection of members against unfair prejudice);

Advice: In the main these sections restate the provisions contained in the 1985 Act.

- (k) sections 1035 to 1039 and 1124 and Schedule 3 (company investigations: amendments);

Advice: These sections relate to company investigations and will rarely be encountered by most companies.

- (l) sections 1121 to 1123 and 1125 to 1133 (general supplementary provisions relating to offences), as they apply to offences under Part 14 or 15 of the 1985 Act.

Advice: These sections relate to the liability of an officer of a company who is in default.

In addition, sections 362 to 379 of the Companies Act 2006 (control of political donations and expenditure), with the exception of the provisions specified in article 5 of this Order (which relate to independent election candidates), come into force in Great Britain on 1 October 2007.

Advice: These sections will only impact those companies that make political donations.

Provisions of the Companies Act 2006 coming into force on 15 December 2007

Section 1068 of the Companies Act 2006 (registrar's requirements as to form, authentication and manner of delivery), other than subsection (5) (which is already wholly in force), comes into force on 15 December 2007 so far as necessary for the purposes of any regulations made before that date in implementation of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

Advice: This section relates to the delivery of documents to the registrar but will only affect a small number of companies.

Statutory Instrument 2007 No. 2541 “The Companies (Tables A to F) (Amendment) Regulations 2007”

These Regulations are important from a practical viewpoint as they may affect a company's articles of association.

Overview

The Regulations will come into force on **1 October 2007**.

Readers will not doubt be aware that a company can draft its own articles of association or it can adopt in whole or in part one of the model sets of articles in Tables A to F. If a company does not file any articles one of the Tables will, by default, govern the company.

Note that a company is governed by the Table which was in existence on the date the company was incorporated. If a Table is subsequently amended, this amendment will not affect the company (unless the company specifically resolves to include the amendment). The only exception to this rule is if new or amended legislation conflicts with a matter contained in a Table. If this is the case then, by default, the company's articles are held to be amended to comply with the new or amended legislation.

Detailed content

The Regulations make amendments to Table A (Regulations for Management of a Company Limited by Shares) and Table C (A Company Limited by Guarantee and not having a Share Capital).

The Regulations will affect all companies registered on or after 1 October 2007 which adopt all or part of either Table A or Table C.

Part 2 makes amendments to **Table A** which apply to **all companies**, as follows:

- regulation 3 widens the definition of "the Act" which means the Companies Act 1985 to include provisions of the Companies Act 2006 ("the 2006 Act");
- regulation 4 omits regulation 36 from Table A as references to extraordinary general meetings have no meaning under the 2006 Act;
- regulation 5 amends regulation 37 of Table A to reflect the change in timing for calling a meeting provided by section 304 of the 2006 Act;
- regulation 6 omits regulation 53 from Table A as it conflicts with section 281(1) of the 2006 Act for private companies and with section 281(2) of the 2006 Act for public companies;
- regulation 7 omits the reference to extraordinary resolution in regulation 117 of Table A as this has no meaning under the 2006 Act.

Part 3 makes amendments to **Table A** which apply to **private companies limited by shares only**, as follows:

- regulation 9 amends regulation 38 of Table A so as to omit references which are inapplicable to private companies under the 2006 Act. Similarly regulations 11 and 12 amend regulations 60 and 61 of Table A so as to remove references to annual and extraordinary general meetings for private companies;
- regulation 10 amends regulation 40 of Table A to reflect section 318 of the 2006 Act which sets a quorum for a meeting of one qualifying person in the case of a single member company;
- regulations 13 to 18 omit or amend regulations 73 to 80 of Table A to reflect the fact that the 2006 Act does not contain provisions on the appointment and retirement of directors by rotation.

Part 4 makes amendments to **Table A** which apply to **public companies limited by shares only**. Regulations 20, 21 and 22 amend regulations 38, 60 and 61 of Table A by omitting references to extraordinary general meetings.

Part 5 (regulation 23) amends **Table C** so that the version of Table A which, as modified by Table C, applies to companies limited by guarantee is the version of Table A which applies to private companies limited by shares.

Advice: There should be no major problem in relation to new companies registered on or after 1 October 2007 but existing companies may need to consider amending their articles.

Unfortunately, this is not the end of the story as in the near future new model articles will be produced and so the existing Tables (as amended by the new Regulations) will be superseded by the new model articles, necessitating further changes. We shall keep all clients up to date with this topic in future issues of our Client Briefings.

Where can I go for further information about the Act and its implementation?

If you require further information about the Act you can, of course, contact us. However, in addition we would advise readers to access the Department for Business Enterprise & Regulatory Reform (DBERR) (formerly the DTI) website at www.berr.gov.uk/bbf/co-act-2006/. Set out below are the areas of this part of the website that may be of assistance to clients.

There are a number of hypertext links to various publications, including:

- The Act itself
- The Explanatory Notes to the Act
- Tables of origins and destinations
- The TSO bookshop where hard copies of the Act, Explanatory Notes and the Tables of origins and destinations can be purchased
- The table of commencement dates for the Act

On the **left-hand side of the screen** you will find links to the following:

FAQ – the Companies Act 1985. These questions relate, of course, to the 1985 Act which by 1 October 2008 will have been replaced by the 2006 Act. These questions therefore can largely be ignored so far as the 2006 Act is concerned.

FAQ – Companies Act 2006. These questions and their answers will prove useful in answering a number of practical questions.

Related Documents: Company Law Review. This relates to the Company Law Review commissioned by the Government and which gave rise to the 2006 Act. In practice this document can safely be ignored.

White Paper March 2005. This White Paper set out the Government's proposals for the Company Law Reform Bill (now the 2006 Act) and, once again, can safely be ignored.

Hansard References. This document sets out the references to Hansard during the Bill's passage through the Commons, Lords and various committee stages. In practice it can safely be ignored.

Major Benefits to Business. This document summarises what the Government considers will be the major benefits accruing to business by changes made to existing legislation and new legislation introduced by the Act.

Regulations and Commencement Orders – made or before Parliament. This is an important section and includes the various Commencement Orders which have or will introduce the various parts of the Act.

Regulations – draft. As the name suggests, this section of the website sets out the draft Regulations which will be introduced in the future. We would advise that clients can ignore these drafts until they become law.

On the **right hand side of the screen** there are a number of related documents, as follows:

Companies Act 2006: private company information. This is a useful document which give details as to what the Act means for private companies.

Companies Act 2006: a summary of what it means for private companies. This is a summary of the above document.

Companies Act 2006: duties of company directors. Ministerial statements. This document contains guidance in relation to the new statutory statement of directors' duties in the shape of a structured collection of Statements made by Ministers in Parliament during the passage of the Bill. It will prove useful to directors of companies.

Companies Act 2006: Regulatory Impact Assessment: January 2007. This document sets out the suggested benefits of the Act. It is to a large degree an academic paper and in practice can be ignored.

Should you have any queries relating to the content of this document, please do not hesitate to contact us.

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