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The Companies Act 2006 – Client Briefing No. 9

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 2009 to have the complete Act in force.

This Client Briefing summarises the provisions of the Companies Act 2006 which come into force on 1 October 2008.

Clients should note that all statutory instruments relating to the commencement of provisions of the Act in 2007 and 2008 have now been made.

We would remind clients that the Department for Business Enterprise & Regulatory Reform (BERR) has a section on its website devoted to frequently asked questions on the 2006 Act. These are constantly being added to and may be of assistance to clients in answering specific queries.

Go to <http://www.berr.gov.uk/bbf/co-act-2006/index.html>. Then click on "FAQ Companies Act 2006" on the menu on the left of the screen.

Provisions coming into force on 1 October 2008

The following provisions will be commenced with effect from 1 October 2008. We have included advice where relevant in relation to these provisions.

Sections 69 to 74 (Objection to company names).

These sections provide for individuals or businesses to object to the Company Names Adjudicator (a new office under the Act) in cases where a company is formed with the same or a similar name to that of a newly formed company. Existing legislation states that a company cannot be formed with a name which is the same as an existing company and in the case of a similar name only a company could complain to the registrar and attempt to have the newer company's name changed. Under these provisions a right to complain is also given to individuals and unincorporated businesses.

Our advice:

Should you become aware that a company has been formed after your company or business and which has a name similar to that of your company or your unincorporated business you can consider lodging a complaint. The procedures for doing so are contained in the Company Names Adjudicator Rules 2008 (SI 2008.1738). If you require any assistance you should contact us.

Sections 82 to 85 (Trading disclosures).

These sections relate, in the main, to the disclosure of certain information about a company in specified locations, eg on its letterhead and other stationery. The Companies Act 1985 sets out the regulations relating to such matters in the body of the Act. However, in line with the approach adopted by the 2006 Act, the Act allows the Secretary of State to make regulations relating to the disclosure of company information outside of the Act in the form of separate regulations. In the main the new regulations are similar to those contained in the 1985 Act and so it should not be necessary for companies to amend their stationery.

Sections 155 to 159 (Provisions relating to corporate directors and under-age directors).

Section 155 requires a company to have at least one director who is a natural person. Under the 1985 Act all the directors of a company could be other companies. This is no longer the case.

Our advice:

If your company has no natural directors it should, before 1 October 2008, appoint at least one person who is a natural person.

Section 156 empowers the Secretary of State to give a company direction which is in breach of the requirement to have the minimum number of directors (at least one director for a private company and at least two directors for a public company) or the requirement to have at least one director who is a natural person (see above). The section gives details as to the form and content of the direction and the time periods to be imposed on the company to make good any default.

Our advice:

The above direction will take the form of correspondence generated by Companies House.

Section 157 requires that any director of a company must be aged 16 or over. Section 158 and 159 set out provisions relating to the appointment and resignation of under-aged directors.

Our advice:

If your company has one or more directors under the age of 16 they should resign prior to 1 October 2008. However, section 159(2) states that the under-aged director will cease to be a director on the date section 157 comes into force (ie 1 October 2008). For this reason, if the company does not resign the director then he or she will automatically cease to be a director and the registrar must note this fact on the register. So, in practice, you have a choice – resign the director by filing the appropriate statutory form or do nothing in which case the director will automatically cease to be a director on 1 October 2008.

Sections 175 to 177, 180(1), (2)(in part) & (4)(b), & 181(2) & (3) (General duties of directors in respect of conflicts of interest).

Clients may be aware that, for the first time in statute, the 2006 Act sets out certain statutory duties of directors. These are:

- The duty to act within their powers
- The duty to promote the success of the company
- The duty to exercise independent judgment
- The duty to exercise reasonable care, skill and diligence
- The duty to avoid conflicts of interest
- The duty not to accept benefits from third parties
- The duty to declare an interest in a proposed transaction or arrangement

The provisions of the Act relating to the first four duties listed above were introduced by a previous statutory instrument. It is the last three duties which will come into force on 1 October 2008.

Our advice:

In most cases involving private companies there will be few instances where there is the danger of the directors being in breach of the above duties. However, in cases where such situations occur it is important that the director concerned should formally declare any potential or actual conflict. Please contact us should you require any assistance in this regard.

Sections 182 to 187 (Declaration by a director of an interest in an existing transaction or arrangement).

These sections require a director of a company who is in any way interested in a transaction or arrangement that has been entered into by his company to declare the nature and extent of his interest to the other directors. Note that these sections do not apply if the interest has been declared under section 177 (duty to declare an interest in a proposed transaction or arrangement – see above).

Sections 544, 641(1)(a) & (2)-(6), 642, 643, 652 & 654 (Share capital provisions, mostly introducing the new solvency statement procedure for capital reduction for private companies).

These sections relate to private (not public) companies who wish to reduce their share capital.

Note that this new provision does not repeal the existing method of reducing share capital by means of confirmation by the Courts. These provisions still exist.

The new provisions introduced by the 2006 Act only apply to private companies and attempt to provide a more “user friendly” method of reducing share capital than by having to apply to the Courts. Note that at all times the legislation is intent on protecting creditors who may suffer due to a reduction in share capital.

The new provisions allow for a company to reduce its share capital in any way but in particular to:

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up, or
- (b) either with or without extinguishing or reducing liability on any of its shares—
 - (i) cancel any paid-up share capital that is lost or unrepresented by available assets, or
 - (ii) repay any paid-up share capital in excess of the company’s wants.

Example:

A company has issued 1,000 £1 shares. Only 100 of these shares have been paid for and the holders of the remaining 900 shares are debtors for these shares. If the company no longer requires the £900 for the unpaid shares it can cancel these shares without having to apply to the Courts.

Sections 642 to 644 provide the mechanics relating to the solvency statement that must be made by the company’s directors.

Sections 652 and 653 relate to the effect of a reduction of capital on the members and creditors of the company.

Financial assistance for the purchase of own shares

In addition to the above new provisions contained in the 2006 Act, the restrictions under the Companies Act 1985 on financial assistance for the acquisition of shares in private companies, including the “whitewash” procedure will be repealed. This repeal is to be welcomed and will facilitate the provision of financial assistance, including administrative matters.

Our advice:

Although the restrictions on providing financial assistance to private companies for the purchase of their own shares have been repealed, the procedures involved, including any taxation considerations, can be complex and we would advise that you seek our assistance before proceeding.

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

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