

## Companies Act 2006 - Provisions coming into force in January 2007

### Introduction

The Companies Act 2006 was granted Royal Assent on 8 November. The new Act was published on the website of the Office of Public Sector Information ([www.opsi.gov.uk](http://www.opsi.gov.uk)) on 7 December. The purpose of this briefing is to make you aware of certain provisions of the new Act which will become effective during the course of the next two months and to cover some other aspects of the Act. The Government intends to bring the remaining provisions of the Act into force by October 2008.

### Series of briefing notes

We will be producing a series of briefing notes to cover the key changes introduced by the new Act. Whilst the codification of directors' duties and the new statutory derivative action have attracted the most press attention, there are a large number of other important changes.

### Further changes to reflect new EU Directives

Company law will be subject to further changes in 2007/8 to reflect the requirements of a number of new EU Directives on company law which were published in the Official Journal of the European Union during the Autumn. In addition, the proposed shareholder rights directive could have a significant impact on company meetings and notice periods.

### What next?

The Government has announced that it will carry out a formal consultation in 2007 on how the provisions of the Act should apply to existing companies. This will build on the initial consultation carried out by the Government in August 2006. In addition, the Government will also need to produce a significant amount of detailed secondary legislation to give effect to the Act. Watch this space is perhaps the best advice at this stage. When the results of this consultation have been published, companies will be able to plan for the implementation of the Act.

### Duty to promote the success of the company

One of the important areas which every director and company will need to consider is how they should deal with the new statutory duty to promote the success of the company. This is contained in section 172 of the Act and the text is set out below: "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:

- the likely consequences of any decision in the long term;
- the interests of the company's employees;
- the need to foster the company's business relationships with suppliers, customers and others;
- 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; and
- the need to act fairly as between members of the company."

Will board minutes become lengthy defence documents to claims for breach of duty and list how the various factors were taken into account at each and every meeting or will wiser counsel prevail? The answer to this question will only become clear in a few years time. We expect that many companies will continue to rely on their existing systems of internal control to help them take robust business decisions and that their process of preparing board minutes will not change significantly. The Government has made it clear that there is nothing in the Act which says there is a need for a paper trail.

### **Disclosure of total number of voting rights (by 29 December 2006)**

Each company admitted to the Official List, AIM or PLUS market must announce the total number of voting rights in respect of each class of share which it issues and which is admitted to trading on a regulated market or UK prescribed market and the number of voting rights attaching to any shares held by the issuer in treasury. This is to enable shareholders to calculate their holdings in the company and determine whether a disclosure is required under the Disclosure and Transparency Rules (see below). Companies must also disclose any subsequent alteration which occurs before 20 January 2007.

### **Disclosures on company websites and order forms (by 31 December 2006)**

A company (whether private or public) must disclose certain particulars (its name, its place of registration, its registered number and the address of its registered office) on its website and on its order forms. Certain additional particulars must be provided if the company is an investment company or if the company is exempt from the obligation to use the word "limited" as part of its name. Companies already disclose these particulars in all business letters and this simply extends the scope of that existing requirement. These latest changes have been introduced to implement amendments to the First Company Law Directive.

### **Electronic communications with shareholders (effective in January 2007)**

Companies will now be able to make greater use of electronic communications when sending documents or information to shareholders (Section 1144 (Sending or supplying documents or information)). Currently electronic communications can only be used for specific communications.

The key change relates to the use of websites. If a company obtains the relevant authority, it can use its website to make documents available to shareholders who specifically agree to the use of the website and to those shareholders who fail to respond to a request to do so. The format of the request must state clearly that the effect of a failure to respond will be deemed consent to the supply of documents via the website. Currently the express consent of a shareholder is required before documents can be made available to him via the website. Authority can be given by a shareholders' resolution or by the company's articles. No distinction is made between private, public and quoted companies.

The company must notify the recipient of the presence of the document or information on the website, the address of the website, the place on the website where it can be accessed and how to access the document or information. Notifications will need to be sent in hard copy form (unless the shareholder has already under existing arrangements consented to the use of electronic communications). Companies should review their procedures for communicating with shareholders and decide how to take advantage of these new provisions.

### **Disclosure and Transparency Rules (effective from 20 January 2007)**

The EU Transparency Directive (TD) must be implemented into national law by 20 January 2007. The TD covers periodic financial reporting for listed companies and the disclosure of major shareholdings in companies whose voting shares are admitted to the Official List, AIM or PLUS market. In the UK, these changes will be implemented by the Act and by new Disclosure and Transparency Rules (DTR) which will be made by the Financial Services Authority (FSA). Near final rules were published in October 2006 (see FSA Policy Statement 06/11 "Implementation of the Transparency Directive"). We expect final rules to be available at the end of this month. A special edition of List! will be published to cover this topic. Those parts of the Act which deal with the implementation of the TD and which grant the FSA power to make the DTR have already become effective.

The DTR require companies admitted to the Official List to publish annual financial reports, half-yearly financial reports and interim management statements. The financial reporting rules take effect for financial years commencing on or after 20 January 2007. The time for publication of the annual report has been reduced from six to four months. Annual reports and half-yearly reports must contain a directors' responsibility statement. In addition, a new "interim management statement" must be published in the middle of each half-year. Note that companies will not be required to publish a preliminary announcement of their annual results.

The new rules for the disclosure of major shareholdings will replace the current regime which is contained in the Companies Act 1985 (sections 198 to 211). The new rules are effective from 20 January 2007 (but see above for the first monthly statement of

total voting rights which must be published by 29 December 2006). Investors will use new form TR-1 to make disclosures. The 3% disclosure threshold will be retained but disclosure will be in respect of shareholdings and voting rights rather than the current concept of interest in shares. There is no change to the section 212 company investigation provisions which will be carried over into the new Act (section 793 (Notice by company requiring information about interests in its shares)).

The TD requires companies admitted to the Official List to disclose "regulated information" to the public throughout the EU and in a manner which ensures "fast access to such information on a non-discriminatory basis". The FSA has made it clear that existing methods of disseminating information via a RIS should be adequate for this purpose.

### **Listed companies – compensation in respect of periodic financial reports and preliminary announcements (new regime effective from 20 January 2007)**

Companies admitted to the Official List will be subject to a new statutory liability regime in respect of periodic financial reports published as a result of a requirement imposed by the TD. The same regime will also apply to preliminary announcements if published.

The Act introduces new provisions which make an issuer liable to pay compensation to a person who has acquired securities issued by it and suffered loss in respect of them as a result of any untrue or misleading statement in a relevant publication or the omission from any such publication of any matter required to be included in it (Section 1270 (Liability for false or misleading statements in certain publications)).

However the issuer will only be liable if a person discharging managerial responsibilities (**PDMRs**) within the issuer in relation to the relevant publication knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or knew the omission to be a dishonest concealment of a material fact. For the purposes of this section only directors of the issuer will be PDMRs (which contrasts with the current use of that term in FSMA).

Only the issuer will be liable to a person who has acquired securities in these circumstances. Investors will not be able to bring claims against directors as a result of this new provision. The Act makes it clear that a person other than the issuer is not subject to any liability, other than to the issuer, in respect of any such loss.

### **Public company takeovers (effective in January 2007)**

The Act implements the EU Takeover Directive and will repeal the Takeovers Directive (Interim Implementation) Regulations 2006 which have been in force since 20 May 2006. A separate note will explain the significance of this change.

## **Some of the key changes which will be introduced by 2008:**

### **All companies**

**Directors' duties:** New statutory statement of directors' general duties (sections 171 to 177).

**Minimum age for director:** A person cannot become a director until he becomes 16 (section 157).

**Corporate directors:** Each company must have at least one director who is a natural person (section 155).

**Derivative actions:** New statutory right for shareholders to bring claims against directors in a derivative action on behalf of the company for negligence, default, breach of duty or breach of trust. A shareholder must obtain the court's permission to continue any derivative claim under the Act (sections 260-264).

**Indirect shareholders:** The Act allows a member to nominate another person to exercise all or any specified rights of the member in relation to the company. The nominated person can exercise these rights as if he were a member of the company. Companies will need to modify their articles if they want to permit members to nominate others to exercise their rights. There is no requirement that the other person has a beneficial interest in the shares but presumably articles will seek to control the identity of such persons (section 145). Please note that this new regime does not enable the nominated person to enforce these rights directly against the company.

**Register of members:** If someone wants to inspect or copy the register they must submit a request in the prescribed form to the company (section 116). It will be a criminal offence for a person knowingly or recklessly to make a statement that is misleading, false or deceptive in a request under that section. If a company receives a request then it has only five working days to comply with that request or apply to the court. If the court is satisfied that the inspection or copy is not sought for a "proper purpose" it can direct the company not to comply with the request. Proper purpose is not a defined term. The Government believes that a court or company will instinctively know a purpose that is not proper when it sees one!

**Auditor's liability:** Liability limitation agreements will be introduced to enable auditors to limit liability in respect of an audit of accounts (section 534).

### **Private companies**

Simpler regime for private companies which will not be required to have a company secretary (section 270), are no longer prevented from giving financial assistance for the acquisition of their own shares, can reduce their share capital without court sanction (sections 642 to 644), will be able to conduct almost all business by way of resolutions in writing and those resolutions do not need to be unanimous (section 288).

### **Traded companies/Quoted companies (Companies admitted to the Official List)**

**"Information rights":** A member of a company who holds shares on behalf of another person may nominate that person to enjoy information rights. Information rights means the right to receive a copy of all communications that the company sends to its members generally or to any class of its members that includes the person making the nomination (section 146).

**OFR/business review:** A quoted company must produce an expanded business review which covers the main trends and factors likely to affect the future development, performance and position of the company's business, information about environmental matters (including the impact of the company's business on the environment), the company's employees, and social and community issues and information about persons with whom the company has contractual or other arrangements which are essential to the business of the company (referred to as supply chain reporting) (section 417). The matter of reporting on the supply chain in the business review was an issue which sparked controversy when it was introduced right at the end of the passage of the Bill through Parliament. A "safe-harbour" has been introduced to limit the civil liability of directors in relation to statements made in the directors' report, the director's remuneration report and in a summary financial statement derived from either of those reports. A director will be liable to the company only if he knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or he knew the omission to be a dishonest concealment of a material fact (section 463). A director will not be liable to investors or other third parties in relation to any such statements which are published in accordance with the Act.

**Disclosure of voting by institutions:** The Act gives the Government power to make regulations to require institutions to disclose specified information about the exercise of voting rights and related matters (sections 1277 to 1280).

### **Further information**

For further information please speak to your usual contact at Burges Salmon or contact **Nick Graves** (0117 939 2200) (nick.graves@burges-salmon.com) (Partner) or **Alyson Whale** (0117 939 2294) (alyson.whale@burges-salmon.com) (Professional Support Lawyer).

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