



# BURGES SALMON BRIEFING

## The Companies Act 2006 – An overview

January 2007

### Introduction

**The Companies Act 2006 (the new Act) received Royal Assent on 8 November 2006. The new Act contains 1,300 sections, 16 schedules, is over 700 pages long and the index alone runs to just short of 60 pages. It is the result of the longest bill ever to pass through Parliament. This briefing is one in a series looking at the key implications of the new Act for companies and their directors.**

**The purpose of this briefing note is to provide you with a general overview of the new Act, an implementation timetable and guidance on the new e-communication provisions which take effect from 20 January 2007.**

#### Will the new Act replace the current Companies Acts?

Yes. The new Act will replace the vast majority of the existing companies legislation contained in the Companies Act 1985, the Companies Act 1989 and the Companies (Audit, Investigations and Community Enterprise) Act 2004. The provisions that will survive relate mainly to community interest companies and investigations. This helps to explain the length of the new Act.

#### When will the new Act come into force?

All provisions of the new Act are expected to come into force by October 2008. A few have already become effective and others will come into force in January 2007. The implementation timetable at the end of this briefing sets out our understanding of the current position. We will update this timetable when the Government announces the implementation date for the remaining provisions. It is possible that the Government will bring forward some of the de-regulatory measures for private companies (such as the removal of the prohibition on financial assistance).

#### Early introduction of provisions relating to company communications

The company communications provisions (sections 1143 to 1148) will come into force on 20 January 2007. The Government expects these new provisions to deliver significant savings to business. The table at the end of this briefing headed "**Company communications provisions – practical implications**" will help you to assess whether these new provisions will deliver real savings for your company. Other anticipated benefits from the increased use of e-communications include improved accessibility to information and "enhanced immediacy of dialogue between companies and shareholders".

Companies admitted to the Official List will also need to consider the provisions relating to electronic communications contained in the new Disclosure and Transparency Rules (DTR). DTR 6.1.7 to 6.1.8 contain the relevant guidance and rules. List! (Issue No. 14) published by the FSA in December 2006 (available on the FSA website [www.fsa.gov.uk/pubs/ukla/list\\_dec06.pdf](http://www.fsa.gov.uk/pubs/ukla/list_dec06.pdf)) contains some helpful informal guidance for listed companies on this topic.

#### How will the new Act affect existing companies?

It is not clear how the other provisions of the new Act will apply to existing companies. A limited DTI consultation on the application of the Companies Bill to existing companies was carried out in August 2006. The Government reported the results of this consultation in late December 2006 and intends to consult on further transitional issues as part of a wider consultation on implementation in February 2007. Transitional provisions for existing companies are therefore still awaited but the results of the initial consultation revealed a general view that a company's existing arrangements should be respected. The practical consequences of this being that where a company's articles expressly require something that the new Act does not require, the company will need shareholder approval to amend its articles to dispense with the requirement if it wants to benefit from the relaxations in the new Act.

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### Will I benefit from the new Act?

The new Act is intended to simplify and modernise current company law. On paper at least it seems to achieve this for private companies where there will be some significant areas of deregulation. However, public companies will face additional procedural requirements and quoted companies (for this purpose companies admitted to the Official List) even more, designed mainly to ensure increased disclosure and the availability of information to members and the public generally. The regulatory gap between private and quoted companies will increase.

### What do we need to do now?

Companies should be reviewing the provisions which take effect in January 2007 and considering whether any procedural changes are required as a result. The key points to consider in January 2007 are:

- company particulars to be disclosed on company documents and websites - further details are set out in the Stop Press at the end of this briefing headed "**Company particulars to be disclosed**". This applies to all companies;
- company communication provisions – further details are set out in the section towards the end of this briefing headed "**Company communications provisions – practical implications**". This applies to all companies;
- the provisions contained in the DTR dealing with the disclosure of major shareholdings. This applies to all companies whose voting shares are admitted to the Official List, AIM or PLUS Market; and
- the replacement of the section 212 regime by section 793 of the new Act. This only applies to public companies.

### What do we need to do before October 2008?

Until the Government reports on the results of the February consultation on implementation and issues the appropriate transitional regulations, it will be difficult to plan with certainty for the implementation of the new Act. Most companies will ultimately need to amend their articles of association but it is not yet clear how important it will be to do this before the new Act is fully in force.

Once things are clearer, companies can also start to consider other practical issues. We suggest this will involve:

- reviewing the practices, procedures and documentation for shareholder meetings;
- considering changes to board procedures;
- briefing directors on the new directors' duties provisions; and
- for quoted companies, considering the information to be included in the expanded business review and the procedures to be put in place to comply with requests for shareholder information.

## Overview

### Directors

#### Directors' duties (sections 170-181)

The new Act sets out for the first time the general duties owed by directors to their company (see box headed "**Statutory Statement of Directors' Duties**"). The codification of directors' duties was one of the most publicised and controversial aspects of the new Act. These statutory duties are based on and replace the existing common law rules and equitable principles relating to directors' duties. However a link with current practice will remain as the new Act states that "*regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties*" (section 170 (4)). It was the Government's general intention not to change the existing duties significantly but to make them clearer and more accessible to directors. However as the statutory duties are expressed differently from the existing principles it remains to be seen how this will work in practice. There is likely to be a period of some uncertainty and bedding-in while we see how the courts apply the new law.

#### Statutory Statement of Directors' Duties

The new Act sets out the following duties:

- duty one – to act within powers (section 171);
- duty two – to promote the success of the company (section 172);
- duty three – to exercise independent judgment (section 173);
- duty four – to exercise reasonable care, skill and diligence (section 174);
- duty five – to avoid conflicts of interest (section 175);
- duty six – not to accept benefits from third parties (section 176); and
- duty seven – to declare interest in proposed transaction or arrangement (section 177).

## Promote the success of the company (section 172)

The duty which attracted the most comment during the passage of the Companies Bill through Parliament was the duty to promote the success of the company. This duty replaces the common law duty to act in good faith in the best interests of the company as a whole. Directors will need to have regard to a list of factors when considering how to act in a manner which promotes the success of the company for the benefit of its members. The factors set out in the new Act embody the concept of "enlightened shareholder value".

## Enlightened Shareholder Value (section 172)

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.

What does "success" mean in this context? During the passage of the Companies Bill through Parliament the Government stated that success for a commercial company will normally mean a "long-term increase in value" (Lord Sainsbury of Turville) (Hansard col. 245 11 January 2006).

## What does a director need to do to discharge this duty?

The Government has published explanatory notes on the new Act and the sections which relate to the duty to promote the success of the company are set out below. The explanatory notes are available on the Office of Public Sector Information website [http://www.opsi.gov.uk/acts/en2006/ukpgaen\\_20060046\\_en.pdf](http://www.opsi.gov.uk/acts/en2006/ukpgaen_20060046_en.pdf).

*"This duty codifies the current law and enshrines in statute what is commonly referred to as the principle of "enlightened shareholder value". The duty requires a director to act in the way he or she 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 to the factors listed." (Paragraph 325)*

*"This list is not exhaustive, but highlights areas of particular importance which reflect wider expectations of responsible business behaviour, such as the interests of the company's employees and the impact of the company's operations on the community and the environment." (Paragraph 326)*

*"The decision as to what will promote the success of the company, and what constitutes such success, is one for the director's good faith judgment. This ensures that business decisions on, for example, strategy and tactics are for the directors, and not subject to decision by the courts, subject to good faith." (Paragraph 327)*

*"In having regard to the factors listed, the duty to exercise reasonable care, skill and diligence (section 174) will apply. It will not be sufficient to pay lip service to the factors, and, in many cases the directors will need to take action to comply with this aspect of the duty. At the same time, the duty does not require a director to do more than good faith and the duty to exercise reasonable care, skill and diligence would require, nor would it be possible for a director acting in good faith to be held liable for a process failure which would not have affected his decision as to which course of action would best promote the success of the company." (Paragraph 328)*

## Will board procedure change as a result of this new provision?

It is possible that the introduction of this list of factors may lead to a change in practice in the way board decisions are made and documented. Will it lead to extra administration and a longer board evaluation process to demonstrate that directors have given due regard? Or will there perhaps be a temptation for market practice to follow a token "box-ticking" approach by using pro forma board minutes considering each of the factors listed in turn?

The Government has stated that the new provisions are not intended to increase bureaucracy and that there will be no more need for a paper trail than there is today. In the House of Lords, Lord Goldsmith stated that *"There is nothing in the Bill that says there is a need for a paper trail... I do not agree that the effect of passing this Bill will be that directors will be subject to a breach if they cannot demonstrate that they have considered every element. It will be for the person who is asserting breach of duty to make that case good..."* (Hansard col. 841, 9 May 2006).

Margaret Hodge, the Minister responsible for the implementation of the new Act, confirmed this view during debate on the Companies Bill in the House of Commons:

*"The clause does not impose a requirement on directors to keep records, as some people have suggested, in any circumstances in which they would not have to do so now. That is an important point, because companies might wish to record their decision-making process in respect of key business decisions, but nothing is gained by a box-ticking mentality that records information without proper reason"* (Hansard col. 592, 11 July 2006).

#### Does this really represent a significant change to the factors which a director should consider?

Arguably, the list of factors simply represent the matters which a director would in any event have borne in mind in where relevant when exercising his normal duty of skill and care. The key for directors will be to continue to ensure that they exercise their judgment in good faith and have properly considered the wider implications of their actions. This section of the new Act builds on the language used in section 309 of the Companies Act 1985 which requires directors to have regard to the interests of the company's employees in general.

Directors should also note the link between section 172 and section 417 (contents of directors' report: business review) which states that *"the purpose of the business review is to inform members of the company and help them assess how the directors have performed their duty under section 172"*.

#### Conflicts of interest

The one area in which the Government intended to make a change to the existing law on directors' duties is in relation to conflicts of interest. The new Act distinguishes three separate types of conflict:

- arrangements where the company is not a party such as the exploitation of any property, information or opportunity (whether or not the company could take advantage of it);
- proposed arrangements where the company will be a party; and
- existing arrangements where the company is a party.

The new Act makes it clear that the provisions on conflicts of interest do not apply *"if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest"*. The explanatory notes do not give any examples of how this exception can be used.

#### Arrangements where the company is not a party

A director *"must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company"* (section 175). This applies in particular to the exploitation of any property, information or opportunity. It is immaterial whether the company could take advantage of the property, information or opportunity.

The new Act permits directors who do not have a conflict to authorise such conflicts provided that in the case of a private company nothing in the company's constitution invalidates such authorisation and in the case of a public company that its constitution includes provision enabling the directors to authorise the matter. Currently shareholder approval is required.

In practical terms, directors who hold more than one position (as many non-executives do) will need to consider if these positions could conflict and if so, whether that conflict is authorised by the company's articles of association (to the extent permitted by the new Act) and can be authorised by the other directors.

#### Conflicts - proposed arrangements where the company will be a party

If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors (section 177). The declaration must be made before the company enters into the transaction or arrangement and this represents a slight difference from the equivalent provision in section 317 of the Companies Act 1985.

#### Conflicts - existing arrangements where the company is a party

Where a director of a company is in any way, directly or indirectly, interested in a transaction or arrangement that has been entered into by the company, he must declare the nature and extent of the interest to the other directors in accordance with section 182. This is not one of the general statutory duties but clearly links into to conflicts of interest.

### Claims against directors – the statutory derivative claim (sections 260 - 264)

The new Act will introduce a statutory procedure allowing shareholders to sue directors on behalf of the company for breach of duty or trust, negligence or default. The new regime is wider than the rights presently available under the existing common law and there are some significant changes, for example there will no longer be a requirement that a director must have benefited from his negligence. There is concern that the new regime will result in a surge of derivative actions, not least from disgruntled shareholders trying to stir up trouble and create adverse publicity. However, a number of hurdles have been introduced to protect directors from unjustified claims, including the need to obtain the court's consent to pursue a claim by demonstrating a clear case and the possibility of being responsible for the costs of unsuccessful claims.

In view of the new codified duties and derivative claims regime we suggest that companies review their directors' and officers' liability policies to ensure that directors continue to be adequately protected following implementation of the new Act.

**We will be publishing a separate more detailed briefing on how the new Act will affect directors in due course.**

### Enhanced Shareholder Rights

One of the Government's key objectives in reforming company law was the concept of enhanced shareholder engagement - improving the provision of information to shareholders and investor participation. Some of the key changes introduced by the new Act to achieve this objective include:

#### Exercise of members' rights (sections 145 and 146)

All companies will be able to include a provision in their articles of association allowing a member to nominate another person to enjoy and exercise all or some of his member's rights including to receive notice of meetings, require directors to call a general meeting, appoint proxies and receive reports and accounts. The nominated person will typically be the indirect investor who holds shares through an intermediary shareholder but unless restricted by the company's articles of association members will be free to nominate any person to enjoy such rights.

In addition, a nominee shareholder in a company admitted to the Official List may request that the indirect investor should enjoy certain information rights. These include rights to receive all communications that the company sends to members generally as well as the right to receive reports and accounts.

#### Proxies (sections 324 - 330)

Members' rights to appoint proxies are enhanced. Members will have the statutory right to appoint more than one proxy, provided each is appointed to exercise the rights attached to different shares held by the member (many companies articles of association already provide for this). Proxies will have the same right to attend, speak (currently only allowed for private companies) and vote at meetings as the member, even on a show of hands.

These provisions are intended to increase the rights of indirect investors who under the existing regime are in many respects disenfranchised and have to rely on contractual arrangements with their nominee to obtain information and voting input. There will inevitably be a certain level of concern, particularly for companies admitted to the Official List, that this new regime will add to the administration costs of the company.

#### Access to the Register of Members (sections 116-120)

The new Act introduces restrictions on the ability of the public to inspect a company's register of members. A person wishing to inspect the register will have to provide their name, address, the purpose for which they will use the information, whether the information will be disclosed to any other person and, if so, for what purpose. It will be an offence to knowingly or recklessly make false or misleading statements when making a request for access to inspect the register or to disclose information to another person knowing or suspecting that that person may use the information for an improper purpose. A company has a shorter period to comply with a request for access than under the existing law, 5 days rather than 10 days. Alternatively, if it considers that the request is not being made for a proper purpose it may apply to the court for permission to refuse the request.

To bolster the restrictions on access under the new Act the Government intends (subject to consultation) to tighten disclosure of information at Companies House. If implemented, private companies will no longer have to supply the addresses of their members to Companies House in the company's annual return and public companies will be exempt from the obligation to supply details of

members who hold less than 5% of any class of shares. The Government sees this as a practical way of ensuring that the protection provided to members by the new Act is not eroded by the availability of personal details from Companies House.

#### Reports and accounts (section 442)

The period for filing accounts will be shortened from ten months from the end of the relevant accounting reference period to nine months for private companies and from seven months to six months for public companies. (Under the DTR companies admitted to the Official List will be required to publish annual reports within 4 months of the end of their financial year. Our earlier briefing considered this in more detail, see '*Companies Act 2006 – Provisions coming into force in January 2007*' available at [http://www.burges-salmon.co.uk/publications/content/Companies\\_Act\\_2006\\_BRM0120\\_12\\_06.pdf](http://www.burges-salmon.co.uk/publications/content/Companies_Act_2006_BRM0120_12_06.pdf)). The Government's intention being to create a regime where the information in the published accounts will be more recent and useful. On a practical level, companies may need to instruct their auditors to start work earlier to meet the shortened reporting period.

It is possible that these time limits will be changed again in the future to reconcile the time differences for filing with Companies House and with HM Revenue and Customs as the Government has asked that they work towards implementing a joint filing facility by 2010.

#### Polls (sections 342 – 351)

Members of companies admitted to the Official List will be able to request an independent report on any poll taken or to be taken at a general meeting of the company in certain circumstances. The request must be made no later than one week after the meeting by:

- members holding at least 5% of the total voting rights of all members who have a right to vote on the poll; or
- at least 100 members who have a right to vote on the poll and who hold shares in the company with an average sum of not less than £100 paid up on those shares.

Appointment of an independent assessor must be made within one week of request for a report and a copy of his report must be made available on a website that is maintained by or on behalf of the company. Reports must contain the assessor's opinion on whether the procedures for the poll were adequate, whether the votes (including proxy votes) were fairly and accurately counted and whether the validity of proxy appointments was assessed. The independent assessor is granted powers to attend meetings and gain access to information from the company and its directors, employees, shareholders and agents. Whether it becomes a publicity tool for disgruntled shareholders or is used by those with genuine concerns remains to be seen but either way there is likely to be some concern as to the level of additional administrative work and cost potentially involved.

### Private company de-regulation and streamlining

The new Act will introduce a host of changes designed to simplify and streamline regulation applying to private companies as a consequence of the Government's 'think small first' vision. Key changes include:

- There will no longer be a compulsory requirement to have a company secretary although private companies may still choose to retain the role (section 270). If a company does have a company secretary he will retain the signing authority currently enjoyed under the existing legislation.
- The current 'elective' regime which allows private companies to dispense with AGMs, laying accounts in general meetings and appointing auditors annually will become the default position. Private companies can 'opt-in' to these additional procedures if they choose.
- It will be easier to pass written resolutions (sections 288–300). The current law requires unanimous shareholder approval to pass any written resolution whereas under the new regime a 75% majority of eligible votes will pass a special resolution and a simple majority will pass an ordinary resolution. Coupled with the fact that there will be no need to hold AGMs it is thought that shareholder meetings in private companies will largely become a thing of the past.
- The financial assistance prohibition for the purchase of a company's own shares will be abolished for private companies. The relaxation of this area of the law for private companies should lead to less complex transactions. However, there has been some debate that lenders who are accustomed to using the existing whitewash procedure as a means of encouraging directors to apply their minds to the implications of the transaction, may consider introducing provisions in their facility documents with the company prohibiting financial assistance without their consent. It is hoped that lenders will take a sensible approach and not effectively reintroduce the existing cumbersome regime by the back door. There has also been some concern that the relaxation

of the financial assistance prohibition will revive common law rules which existed before the introduction of the statutory prohibition and whitewash procedure. The Government has promised that a "savings" provisions will take effect on commencement of the new regime to clarify that the removal of the prohibition will not prevent private companies from entering into transactions which they could lawfully enter into under the existing whitewash procedure.

- The new Act will introduce a new procedure for private companies to reduce their share capital on the basis of a directors' solvency statement (sections 642-644). This will be an alternative to the court approved procedure (sections 645-649) which is currently the only method for a share capital reduction.
- The introduction of new model articles described by the DTI as simpler and reflecting the way small companies operate. Existing companies will not be forced to adopt the model but it may prove to be easier than amending existing articles to reflect and gain full advantage of the relaxations under the new Act. Again, things will be clearer once the Government publishes the transitional provisions.

Whilst these changes should reduce the regulatory burden on private companies, companies will need to consider how the new regime will impact on operational procedures and documentation on a practical level.

**We will be publishing a separate more detailed briefing on how the new Act affects private companies in due course.**

## Some other key changes

### Limitation of auditors' liability (sections 534 – 538)

Auditors and companies will be allowed to agree a limit on the auditor's liability to a company for negligence, default or breach of duty or trust in relation to the audit of the accounts. This will be done by way of a liability limitation agreement (LLA) applying to each year's audit. It will not be possible to enter into a rolling agreement for future audits and shareholders will have to be asked to approve the principal terms of the LLA each year (although private companies may resolve on a yearly basis to waive the need for approval). It is likely that the negotiation of a LLA will become an integral part of a company's annual engagement terms with its auditor.

In practice, the introduction of the LLA will introduce caps on auditors' liability. However, an LLA will not be effective if it attempts to limit the auditor's liability to an amount less than that which is fair and reasonable having regard to the auditor's responsibilities, the nature and purpose of the auditor's contractual obligations to the company and the professional standards expected of him. The courts will have the power to look through any cap that limits liability below this standard and adjust it to an amount that the court thinks is fair and reasonable.

Following concerns from smaller audit firms that the large accountancy firms could drive caps high and effectively "price" them out of the market, the Government has power to make regulations defining the content of LLAs. It also has the power to make regulations to require disclosure of LLAs in a company's accounts.

### Business review (section 417)

As a result of the Government's consultation on what should replace the ill-fated operating and financial review (OFR), the new Act introduces changes to the existing regime for business reviews in annual reports. Most significantly, companies admitted to the Official List will be subject to additional content requirements. A number of other changes will apply to the business reviews of all companies required to produce one.

The current provisions relating to the content of the business review will largely be repeated but the new Act now states that the underlying purpose of the business review is to inform members and help them assess how the directors have performed their duty to promote the success of the company. The general provisions will apply to all companies except those that are subject to the small companies regime for accounts and reports (consequently the majority of private companies are unlikely to need to produce one). These general provisions are:

- A fair review of the company's business covering the development and performance of that business during the financial year and its position at the end of that year consistent with the size and complexity of the business.
- A description of the principal risks and uncertainties facing the company.

The additional content to be included for companies admitted to the Official List mirrors, to a large extent, the material that quoted

companies were obliged to disclose previously in the OFR. They will also have to disclose, to the extent necessary for an understanding of the development, performance or position of the company's business:

- 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.
- Information about persons with whom the company has contractual or other arrangements which are essential to the business of the company. This is the controversial 'supply chain reporting' introduced in the very last weeks of the passage of the bill through Parliament which raised much opposition from business organisations. The Government has stated that supply chain reporting will not require companies to list all their suppliers and customers but that companies admitted to the Official List will have to disclose "significant relationships", such as major suppliers and key customers likely to influence the performance of the business and its value.

**We will consider the contents of the new business review further in a separate briefing looking specifically at the new Act's effect on public and quoted companies in due course.**

#### Disclosure of voting by institutional investors (sections 1277-1280)

Currently, there is no statutory obligation on institutional investors to disclose details of how they have voted shares which they hold. The new Act gives the Government the power to require institutions to provide information about the exercise of voting rights attached to certain shares in which they have an interest. If introduced, this obligation to disclose will be enforceable by civil proceedings brought by any person to whom the information should have been provided or any regulatory authority specified in the regulations. There has been an increasing trend towards voluntary disclosure by institutions, often on public websites. (The Institutional Shareholders' Committee Statement of Principles sets out best practice and recommends that fund managers report to their clients on a regular basis on how they have discharged their responsibilities.) The institutions themselves have expressed concern about the necessity of a mandatory regime and the parliamentary debates raised concern as to whether mandatory disclosure could actually undermine the voting process where a particularly sensitive issue is being considered. The Government has maintained the position that it requires a very wide power so that it can shape the disclosure regime as necessary at the relevant time and that it will only use the power following consultation if the voluntary regime does not improve current disclosure practice. We will need to wait and see whether the threat of statutory mandatory disclosure encourages and develops the trend towards adequate voluntary disclosure.

## Conclusion

The new Act will affect nearly every aspect of company law. Whilst we do not expect the new regime to have a huge impact on the foundations of the way companies operate in the UK, there will undoubtedly be many procedural changes and, for public and quoted companies, increased regulatory measures to get to grips with over the next few years. The active EU Directives environment is likely to add to this state of flux.

## Further information

For further information please speak to your usual contact at Burges Salmon or contact:

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## Company communications provisions – practical implications

### Current position

The Companies Act 1985 permits the use of e-communications for certain specific communications, for example the circulation of the annual report and accounts, summary financial statements, AGM notices and the appointment of proxies.

### Greater use of e-communications for all companies

The e-communications provisions of the new Act will be brought into force on 20 January 2007 and will allow companies to make greater use of e-communications when sending documents or information to shareholders. Generally companies will be able, subject to shareholder approval, to default to using e-communications. Individuals however will retain the right to receive information in paper form if they wish (section 1145).

The e-communications provisions set out in the new Act (found in sections 1143 to 1148 and schedules 4 and 5) apply to all companies, public and private.

### Key change for all companies relates to the use of websites

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. 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 admitted to the Official List – Disclosure and Transparency Rules

Provisions relating to the use of electronic communications by listed companies are also set out in the new Disclosure and Transparency Rules (DTR) which will come into effect from 20 January 2007 (see DTR 6.1.7 and 6.1.8). DTR 6.1.7 (G) states that an issuer may use "electronic means" to convey information to shareholders or holders of debt securities provided it complies with the conditions set out in DTR 6.1.8 (R) including that a decision to use electronic means must be taken in a general meeting.

Clearly it is not ideal to have two sets of provisions governing this area. However the FSA has stated that the requirements of the DTR should be applied in a way which is consistent with those of the new Act. The FSA has also stated that issuers will not be able to use e-communications for any mailing that needs to be restricted for example because of US securities laws as DTR 6.1.8 (2) states that the use of electronic means must not depend on the location of the shareholder. No doubt the interaction between the electronic communication provisions in the new Act and those contained in the DTR will throw up some issues.

Quoted companies looking to extend any existing rights or to introduce rights to use e-communications may wish to use the 2007 AGM to obtain a shareholder resolution or to amend their articles to allow the use of electronic communications as a default position. It would be possible to use the 2007 AGM Notice as a means of canvassing shareholder preferences and companies may wish to think about whether this would be practical for them. Alternatively, companies could use their next shareholder mailing following the AGM to obtain individual preferences.

Private companies looking to benefit from the new e-communications regime may also wish to take steps to amend their articles of association following the 20 January 2007 implementation date.

If you are preparing AGM paperwork or are otherwise considering amending your articles of association to benefit from the new communications regime and need advice please speak to your usual Burges Salmon contact.

The DTI briefing on the First Commencement Order contains some useful frequently asked questions and these are summarized below. The full briefing is available at <http://www.dti.gov.uk/files/file36201.doc>.

#### **We already use website communications with shareholders who want it. Can we just continue as we are?**

Yes. If a company already has an individual shareholder's agreement to circulate the annual report and accounts, summary financial statement or AGM notice to the shareholder by website, the company will be able to continue to do this under paragraph 9 of Schedule 5 to the new Act. As under existing law, the company will be required to notify the shareholder each time information is posted on the website.

#### **Our articles already make provision for e-communications with our shareholders. Will we still have to pass a resolution?**

No. Where the articles already contain provisions to the effect that the company may send or supply documents or information to members by website, no resolution is required. However, where a company wishes to go further than the terms of the articles, for example where the articles only cover certain specific documents, then a new resolution will be required to provide general cover for other documents that the company wishes to communicate by website.

Companies admitted to the Official List are subject to the DTR, which include a transitional provision to ensure that where a company could already lawfully use electronic means to communicate to shareholders (or holders of debt securities) under existing law, the company will be able to continue doing so (see Transitional Provision 12 in DTR Sourcebook Transitional Provisions).

#### **We want to start using email communication only with our shareholders. What do we need to do?**

Part 3 of Schedule 5 of the new Act deals with communications in electronic form. The company needs to seek individual agreement of each intended recipient to receive information by email. Where an individual does not agree or fails to provide an email address, the company will need to send information in hard copy.

#### **We want to default to using website communications. What do we need to do?**

The company will need both to seek individual agreement of each intended recipient (paragraph 9 of Schedule 5 of the new Act) and to pass a resolution for the company to use website communications as the default. Where an individual fails to respond within 28 days, the company may consider this as the individual's deemed agreement to website communications. Where an individual does not agree to website communications, the company cannot ask again for his or her agreement within less than 12 months.

#### **What if an email bounces back with an undelivered message?**

The 1985 Act continues to apply to the substantive requirement to give notice and those to whom it must be given, and there have been no changes to that as a result of the First Commencement Order. This provision does not prevent a company making provision in its articles not to send notice of a general meeting to members for whom the company no longer has a valid address (section 310(4) of the new Act). Section 423(2) makes similar provision for the annual report and accounts.

#### **Under paragraph 10(3)(b) of Schedule 5 of the new Act, someone who responds to the company's request to agree to website communication is deemed not to have agreed. What if he or she does want to agree?**

The intention behind paragraph 10(3)(b) is to require only those who do not agree to website communication to inform the company, while those who do agree should remain silent as a nil return within 28 days will be taken as deemed agreement. Companies will need to consider a form of wording in their requests to shareholders and others to ensure that it is clear that any other response is not a response to the invitation "to agree".

#### **We are concerned that wider use of e-communications will discourage shareholders, who are not willing to go on-line to cast their proxy instructions. What can we do?**

When a company defaults to website communications, it must notify – either by email or in hard copy – each shareholder that information has been posted on the website. One option would be to ensure that such notification – whether an email or a postcard or letter – includes, for example, the time and date of the AGM, a list of the resolutions and instructions on how to vote or give proxy voting instructions. This would enable those, who are not able or not willing to communicate with the company electronically, to 'post' their proxy voting instructions back to the company.

#### **Can we communicate by other means, such as text message?**

Yes. Part 4 of Schedule 4 and Part 5 of Schedule 5 allow an individual and a company to communicate by means other than in hard copy or electronic form. Clearly, the individual and the company will wish to consider what form of documentary evidence they might wish to keep to record that information has been sent.

## Implementation timetable – key dates

### 2006

Date	Event
8 November	Companies Bill received Royal Assent.
7 December	Companies Act 2006 published in electronic form (available at <a href="http://www.opsi.gov.uk">www.opsi.gov.uk</a> ).
20 December	Government published "Results of Consultation on the application of the Companies Bill to existing companies on issues related to the constitution – Summary of responses and the Government's conclusions" (available at <a href="http://www.dti.gov.uk/files/file36130.doc">http://www.dti.gov.uk/files/file36130.doc</a> ).
21 December	The Companies Act 2006 (Commencement No.1, Transitional Provisions and Savings) Order 2006 ((2006/3428) laid before Parliament.
21 December	The Companies (Registrar, Languages and Trading Disclosures) Regulations 2006 (2006/3429) laid before Parliament.
22 December	Implementation Briefing on First Commencement Order made available (available on the DTI website <a href="http://www.dti.gov.uk/files/file36201.doc">http://www.dti.gov.uk/files/file36201.doc</a> ).
29 December	Companies admitted to the Official List, AIM and PLUS Markets required to announce total number of voting rights.

### 2007

Date	Event
1 January	The Companies Act 2006 (Commencement No.1, Transitional Provisions and Savings) Order 2006 ((2006/3428) came into force. This sets the 1 January, 20 January and 6 April implementation and repeal dates which are referred to below.
1 January	The Companies (Registrar, Languages and Trading Disclosures) Regulations 2006 (2006/3429) came into force. These Regulations implement provisions of the First Company Law Amendment Directive (EEC 2003/58/EC) relating to electronic communications with the Registrar of Companies and related matters. These Regulations also introduced additional disclosure requirements for websites and company order forms by amending sections 349 and 351 of the Companies Act 1985. Please note that references in the amended sections to a document of any type are to a document of that type in hard copy or electronic form.
20 January	<p>The following provisions of the new Act will come into force:</p> <ul style="list-style-type: none"> <li>- the company communications provisions (sections 1143 to 1148 and schedules 4 and 5) including provisions facilitating electronic communication;</li> <li>- the provisions dealing with a public company's right to investigate who has an interest in its shares (sections 791 to 810, 811(1) to (3), 813 and 815 to 828). These replace equivalent provisions contained in sections 212 to 219 of the Companies Act 1985. Section 212 notices will be replaced by section 793 notices.</li> <li>- directors' liability for false or misleading statements in the directors' report, the directors' remuneration report and any summary financial statement derived from such reports (section 463). A "safe-harbour" has been introduced to limit the civil liability of directors in relation to statements made in such reports (section 463 (3)). 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.</li> </ul> <p>The existing provisions relating to the disclosure of major shareholdings in sections 198 to 211 of the Companies Act 1985 will be repealed and replaced by the new Disclosure and Transparency Rules (which will also commence on 20 January). The new Disclosure and Transparency Rules are available at <a href="http://www.fsa.gov.uk/pages/handbook">www.fsa.gov.uk/pages/handbook</a>.</p>
February	Government expected to launch a consultation on its detailed implementation plans.

## 2007 continued...

Date	Event
6 April	<p>Expected commencement date for provisions relating to public company takeovers which are contained in Part 28 of the new Act. A separate commencement order will be required as the First Commencement Order does not deal with Part 28.</p> <p>The following sections of the Companies Act 1985 will be repealed:</p> <ul style="list-style-type: none"><li>- authentication of documents (section 41);</li><li>- maximum age limit for directors of a public company (sections 293 and 294);</li><li>- prohibition on company paying a director remuneration free of income tax (section 311);</li><li>- prohibition on directors and their families dealing in options over shares in a company admitted to the Official List, AIM or PLUS Markets (sections 323 and 327);</li><li>- disclosure by a director of dealings by that director and members of his family in the company's shares or debentures (section 324 to 326, 328 to 329 and parts 2 to 4 of schedule 13). The register of directors' interests required by section 325 will become redundant;</li><li>- special provisions for banking companies etc in respect of loans to directors (sections 343 and 344);</li><li>- company's power to close register (section 358);</li><li>- power for the Secretary of State to bring civil proceedings on company's behalf (section 438);</li><li>- certain companies, including insurance companies, to publish periodical statement (section 720); and</li><li>- annual report by Secretary of State to Parliament in respect of matters within the Companies Acts (section 729).</li></ul>

## 2008

Date	Event
By October	All provisions to come into force

### STOP PRESS

#### Company particulars to be disclosed

As mentioned in our earlier briefing "*Companies Act 2006 – Provisions coming into force in January 2007*" changes have been made to the regime for disclosure of particulars in company correspondence in order to implement amendments to the First Company Law Directive. Since our earlier briefing was published the regulations to implement these amendments have been made and the scope of the new regime (which is effective from 1 January 2007) is summarised below. The amendments basically extend the scope of the existing disclosure requirements to catch websites and electronic forms of documentation. These requirements also apply to Limited Liability Partnerships.

A company (whether private or public) must disclose its full company name on a range of correspondence (business letters, notices, invoices, orders, letters of credit etc) and its websites. It must also disclose certain other particulars (its place of registration, its registered number and the address of its registered office) on its websites, business letters and order forms. Both of these disclosure requirements apply to such documentation in hard or electronic format. (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.) The most significant practical effect of this is that potentially business emails fall within the meaning of business letters and as such should include the particulars mentioned above. It is anticipated that companies will take a prudent approach and include these particulars in standard wording at the end of all emails sent on company business.