



BURGES SALMON BRIEFING

The Companies Act 2006

What does it mean for Directors?

February 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 outline the main provisions which affect directors and to consider the practical implications of the changes to the existing regime.

What are the key changes affecting directors?

Key changes include:

- the codification of directors' duties;
- the new duty to promote the success of the company;
- new provisions dealing with a director's conflict of interest and, in certain circumstances, providing for board authorisation;
- a new procedure for shareholders to take action against a director on behalf of the company (derivative claims) which has given rise to concerns that directors now face an increased risk of litigation;
- guaranteed term of a director's service contract reduced from five to two years but remains out of line with the recommendations of the Combined Code on Corporate Governance;
- the relaxation of the rules prohibiting certain transactions between a director and a company;
- new regime for the indemnification of a director of a company that is a trustee of an occupational pension scheme (qualifying pension scheme indemnity provision);
- director's home addresses will not, in future, be made available on the public record at Companies House (but no provision is made for current home addresses to be removed);
- the repeal of the provisions which required a director to notify the company of his interests in the shares or debentures of that company (section 324 of the Companies Act 1985) but directors of listed companies and companies admitted to AIM and PLUS Market are subject to Chapter 5 of the Disclosure and Transparency Rules;
- no upper age limit for directors but new minimum age limit of 16; and
- every company must have at least one director who is a natural person.

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. 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).

The uncertainty in this area should be resolved when the Government issues its consultation document this month. There have been indications that the Government wants to implement as much of the new Act as possible by October 2007.

Burges Salmon LLP Narrow Quay House Narrow Quay Bristol BS1 4AH
 tel: +44 (0) 117 939 2000 fax: +44 (0) 117 902 4400
 Holbrook House 14 Great Queen Street London WC2B 5DG
 tel: +44 (0) 20 7405 4343 fax: +44 (0) 20 7405 6788
www.burges-salmon.com



How will the new Act affect existing companies?

It is not clear how 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.

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.

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**"). Historically, duties owed by directors have not been set out in statute but have developed, over time, through the courts. This significant change introduces a statutory set of duties which 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.

The duties will be owed to a company and will be owed by every person who is a director of the company. Section 250 of the new Act (which repeats section 741 of the Companies Act 1985) states that references to a director include any person occupying the position of director by whatever name called. The general duties will be owed by de-facto directors in the same way and to the same extent as properly appointed directors. Shadow directors are also covered but only where, and to the extent that, the corresponding common law rules or equitable principles apply. Another curious link with current practice.

The duty to avoid conflicts of interest will apply to a former director as regards the exploitation of any property, information or opportunity which he became aware of when he was a director. Former directors are also covered by section 176 (duty not to accept benefits from third parties).

Of course, there are many directors' duties that remain uncodified e.g. the duty to consider the interests of creditors in a threatened insolvency. Indeed the statutory duties are not a complete list of all the duties owed by a director to a company e.g. the duty to file accounts with Companies House.

Duty to act within powers (section 171)

A director must act in accordance with the company's constitution and exercise all powers for the purposes for which they were conferred. The constitution for these purposes is defined in section 257.

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).

Duty to 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. However that concept will remain relevant to companies which are subject to the City Code on Takeovers and Mergers. General Principle 3 states that *"The board of an offeree company must act in the 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.

"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 provisions?

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 would consider?

Arguably, the list of factors simply represents the matters which a director would in any event have borne in mind 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"*.

Duty to exercise independent judgment (section 173)

A director must exercise independent judgment. However the section states that a director can act:

- in accordance with an agreement entered into by the company which restricts the future exercise of discretion by its directors; or
- in a way authorised by the company's constitution.

Duty to exercise reasonable care, skill and diligence (section 174)

This duty codifies the existing duty to exercise reasonable care, skill and diligence. A director owes a duty to his company to exercise the same care, skill and diligence that would be exercised by a reasonably diligent person with:

- the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as the director in relation to that company (an objective test); and
- the general knowledge, skill and experience that the director actually has (a subjective test).

The subjective test can only operate to increase the standard of knowledge, skill and diligence expected of a director.

This duty is based on the tests laid down in section 214(4) of the Insolvency Act 1986. It reflects the approach the courts have recently taken when framing the duty to exercise reasonable skill and care (see for example *Re D'Jan of London Ltd* [1994] 1 BCLC 561).

Duty to avoid conflicts of interest (section 175)

A director of a company *"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 and it is immaterial whether the company can take advantage of the property, information or opportunity. The duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

The duty is not infringed if:

- the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
- the matter giving rise to the conflict has been authorised by the directors (in accordance with the procedure set out in section 175).
Currently only shareholders can give this authorisation.

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 a provision enabling directors to authorise the matter. Public companies will therefore need to amend their articles to permit authorisation by directors if they wish to benefit from this new regime.

If Board authorisation is not permitted by the company's constitution, authorisation must be obtained from the members. Section 180 (4) preserves any current ability of the members of a company to authorise conflicts that would otherwise be a breach of this duty.

Duty not to accept benefits from third parties (section 176)

A director must not accept a benefit from any third party unless *"the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest"*.

The problem with this duty is where to draw the line between a benefit that is not likely to give rise to a conflict and one that does. There is no *de minimis* threshold. Companies may need to adopt a formal policy setting out what is acceptable both in terms of the level of benefits and whether a benefit should be accepted at all (many listed companies will already have such policies in place).

The acceptance of a benefit giving rise to an actual or potential conflict of interest will fall within the duty to avoid conflicts of interest (section 175) as well as this duty. However under this duty the board does not have power to authorise or approve receipt of the benefit. In the explanatory notes, the Government clarified that any current ability of the members of a company to authorise the acceptance of benefits which would otherwise be a breach of duty is preserved by section 180(4).

Duty to declare interest in proposed transaction or arrangement (section 177)

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 position in section 317 of the Companies Act 1985.

The declaration must be updated if it proves to be, or becomes, inaccurate or incomplete.

There is no need to declare an interest:

- if the director is unaware of the interest (but he will be treated as being aware of matters of which he ought reasonably to be aware);
- if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
- if the other directors are already aware of it; or
- if it concerns the terms of his service contract that have been or will be considered by a board or committee meeting.

Conflicts of interest

The one area in which the Government intended to change to the existing law on directors' duties is in relation to conflicts of interest. The new Act covers three separate situations in which a director has an actual or potential conflict of interest:

- a conflict of interest arising in relation to a transaction or arrangement 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);
- a conflict of interest arising in relation to a transaction or proposed arrangement where the company will be a party; and
- a conflict of interest arising in relation to a transaction or existing arrangement where the company is a party.

This briefing has already considered the first two situations which are part of the general duties of a director. The third is covered in section 182 of the new Act. The new Act makes it clear that references to conflict of interest include a conflict of interest and duty and a conflict of duties.

Conflicts - arrangements where the company is not a party (section 175)

See above for a discussion of the duty to avoid conflicts of interest.

Conflicts - proposed arrangements where the company will be a party (section 177)

See above for a discussion of the duty to declare interests in proposed transaction or arrangement.

Conflicts – existing arrangements where the company is a party (section 182)

The third situation is covered in section 182 of the new Act. Where a director 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 conflicts of interest. This provision does not apply if the interest has already been declared when the transaction was proposed under section 177 – see above. If and when the declaration proves or becomes inaccurate or incomplete it must be updated and any declaration must be made as soon as is reasonably practicable. Any failure to comply with this section is a criminal offence.

No declaration is needed if:

- a director is unaware of the interest (but he will be treated as being aware of matters of which he ought reasonably to be aware);
- if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
- if the other directors are already aware of it; or
- if it concerns the terms of his service contract that have been or will be considered by a board or committee meeting.

This is broader than the current requirement under section 317 as the declaration must be updated and must cover the extent of the interest rather than the existence of the interest alone.

Articles of Association which contain provisions dealing with conflicts of interest

Section 180(4) provides that where a company's articles contain provisions for dealing with conflicts of interest, the general directors' duties are not infringed if a director acts in accordance with those provisions. However the scope of such provisions is limited to "*such provision as has previously been lawful for dealing with conflicts of interest*" (section 232(4)). We expect that provisions similar to Regulations 85 and 94 of Table A will continue to be included in articles of association and assume that they will be regarded as having been previously lawful.

Breach of duty – What could happen?

Remedies

The remedies for breach of duty have not been codified. Instead the Act states that the consequence of a breach is the "*same as would apply if the corresponding common law or equitable principle applied*" (section 178). The duties (with the exception of the duty to exercise reasonable care, skill and diligence) are enforceable in the same way as any other fiduciary duty owed to a company by its directors.

A breach of a fiduciary duty can give rise to a number of potential remedies including paying damages or compensation to the company for the loss and accounting to the company for any profit made by the director. The new Act specifically states that the duty to exercise reasonable care, skill and diligence is not a fiduciary duty and as a result the remedy for breach of that duty is damages only.

Ratification

All breaches of duty, trust, acts of negligence or default by directors in relation to the company can be ratified by a resolution of the members of the company (section 239). However any votes in favour cast by the director (if he is a shareholder) or any member connected with him must be disregarded.

The principle contained in *Re Duomatic* [1969] 2 Ch. 365 is not affected as section 239 (2) makes it clear that section 239 does not affect the validity of a decision taken by unanimous consent of the members of the company.

In view of the new codified duties and derivative claims regime (see below) 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 (see also "Directors Defence Costs" and "Directors Indemnities" below).

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 a 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. Key points to note are that:

- there is no requirement that the director must have benefited from his conduct;
- there is no shareholding qualification so a claim can be brought by any member holding any number of shares;
- a derivative claim may be brought in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust on the part of a director; and
- an action can be brought even if the member bringing the action was not a member at the time of the alleged wrongdoing.

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 or special interest groups seeking to demonstrate that directors have not had proper regard to certain factors when promoting the success of the company.

However, a number of hurdles have been introduced to protect directors from unjustified claims including:

- the need to obtain the court's permission to pursue a derivative claim;
- the need to demonstrate a clear case against the defendant; and

- the possibility of being responsible for the costs of an unsuccessful action.

The court cannot give permission to continue with the derivative claim if:

- a person acting in accordance with the duty to promote the success of the company (section 172 – see above) would not seek to continue the claim; or
- if the act or omission which is the subject of the claim has been authorised or ratified by the company.

If neither of these hurdles apply, then in considering whether to give permission the court must take into account:

- whether the claimant is acting in good faith;
- the importance that a person acting to promote the success of the company would attach to continuing the claim;
- the likelihood of the act giving rise to the claim being authorised or ratified after it occurs;
- whether the company has already decided not to pursue the claim; and
- whether the member could pursue the claim in his own right.

In considering whether to give permission the court is also required to have particular regard to any evidence before it as to the view of members of the company who have no personal interest in the matter.

Transactions with directors

Directors' long-term service contracts (sections 188-189) and disclosure requirements

The new Act reduces the maximum guaranteed term allowed in a director's service contract without prior members approval from five years to two years. This differs from corporate governance best practice as the Combined Code on Corporate Governance states that "*Notice or contract periods should be set at one year or less*" (Provision B.1.6).

The definition of "service contract" will also be wider than before and includes letters of appointment and consultancies and will also apply when a personal services company is engaged to supply the services of a director.

A new provision has been introduced which requires copies of service contracts to be retained by the company for at least one year from the date of termination or expiry of the contract. Copies of those contracts must be available for inspection during that time (section 228).

Shareholders will still be able to inspect copies of directors' service contracts and they will also be able to request a copy of a service contract on payment of a fee (section 229). Copies must be provided within seven days after the request is received by the company.

The exemption in section 318 (5) of the Companies Act 1985 relating to contracts requiring a director to work wholly or mainly outside the UK and the exemption in section 318 (11) of that Act dealing with contracts with less than 12 months to run have not been carried over into the new Act.

The existing prohibition on tax free payments to directors under section 311 of the Companies Act 1985 is being repealed with effect from 6 April 2007.

Substantial property transactions (sections 190-196)

These sections apply to transactions or arrangements under which a company buys from or sells "*a substantial non-cash asset*" to a director of a company or its holding company or a person connected with such a director. A company will not be able to enter into this type of transaction or arrangement without the approval of the shareholders of the company and, if the person entering into the transaction is a director of the holding company, approval of the shareholders of the holding company.

Approval is only required where the non-cash asset exceeds 10% of the company's asset value (based on its last set of annual accounts) and is more than £5,000 or exceeds £100,000. The minimum value of what amounts to a substantial non-cash asset has been raised from £2,000 to £5,000.

The new Act makes some other changes to the existing regime, including:

- a contract for the sale or purchase of a substantial non-cash asset can now be conditional on shareholder approval and this contrasts with the current position which requires approval before the contract is signed. The company is not liable under a conditional contract if approval is not forthcoming;
- payments under a director's service contract and payments for loss of office are not covered by this provision;
- an exception for a company which is being wound up or which is in administration; and
- the aggregation of non-cash assets forming part of an arrangement for the purposes of calculating the financial thresholds.

Loans, quasi-loans, credit transactions and related transactions (sections 197-214)

The new Act abolishes the absolute prohibition on loans, quasi-loans credit and related transactions and replaces this with a requirement for members approval provided that disclosure is made in advance of:

- the nature of the transaction;
- the amount of the loan/quasi-loan (or value of the credit transaction);
- the purpose of the loan/quasi-loan (or credit transaction); and
- the extent of the company's liability under any transaction connected with the loan/quasi-loan/ credit transaction.

There will no longer be any criminal penalties for breach of these provisions.

All companies are subject to the provisions relating to loans. Only a public company and a company associated with a public company are subject to the provisions relating to quasi-loans and credit-transactions.

There are numerous exceptions in the new Act to the requirement for members approval and many of the financial limits that already apply will be increased in many cases, so that members approval will not be required for:

- loans and quasi-loans to an aggregate of £10,000 (increased from £5,000);
- credit transactions in the ordinary course of business;
- intra-group transactions;
- small credit transactions to a value of £15,000 (increased from £10,000); and
- ordinary lending by banks and similar institutions – no limit (£100,000 under the current regime is removed).

In addition, the existing exemption which permits a company to provide a director with funds to meet expenditure incurred by him for the purposes of the company has been extended so that there is no need for shareholder approval provided the aggregate value of does not exceed £50,000 (section 204).

Payments for loss of office (section 215-222)

The new Act defines "*payment for loss of office*" to include payments made:

- by way of compensation for loss of office as a director;
- by way of compensation for loss, while a director of the company, of any other office or employment in connection with the management of the affairs of the company or any subsidiary undertaking;
- as consideration for or in connection with a director's retirement from his office as director; or
- as consideration for or in connection with a director's retirement, while a director of the company, from any other office or employment in connection with the management of the affairs of the company or any subsidiary undertaking (section 215).

The new Act also covers payments by any person to a director for loss of office in connection with a business sale (section 218) and in connection with a transfer of shares in the company resulting from a takeover bid (section 218). Takeover bid is not defined in this section.

All these payments are now possible provided the payment has been approved by a resolution of the members of the company.

The existing provisions have been extended so that they now capture payments to connected persons and payments to former directors.

Approval by members is not required, however, for:

- payments made in good faith in discharge of an existing legal obligation;
- payments made in good faith by way of settlement or compromise of any claim arising in connection with the termination of a person's office or employment; or
- small payments not exceeding £200.

Directors' Liabilities

Directors' Defence Costs (section 205-206)

A company will still to be allowed to lend money to help fund defence costs of a director in legal proceedings without needing members' approval. However, any loan can only be in relation to proceedings brought in connection with any alleged negligence, default, breach of duty or trust by a director in relation to the company or associated company (section 205).

A new provision has been introduced which permits a company to provide defence funding for directors in relation to an investigation by a regulatory authority or any action proposed to be taken by a regulatory authority (section 206).

Directors' indemnities (sections 234-235)

The directors' indemnity provisions introduced by the Companies (Audit, Investigations and Community Enterprise) Act 2004 are largely unchanged in the new Act (section 234). The new Act does extend the scope of the possible indemnity to include a director of a company that is a trustee of an occupational pension scheme against liability incurred in connection with that company's activities as a trustee of the scheme (section 235).

However, directors need to be aware that such indemnities would not protect them from a successful derivative claim as the beneficiary under a claim is in fact the company (see **Claims against directors – the statutory derivative claim**).

Other provisions

Directors' home addresses (sections 240-246)

There will no longer be an obligation for the home addresses of directors to be made available on the public register held at Companies House. The new Act allows directors to provide a service address for the public register rather than their home address which can be the company's registered office. This represents a significant step forward from the existing regime which only benefits a director who can demonstrate that the availability of his usual residential address on the public register is likely to create a serious risk that he will be subjected to violence or intimidation (see section 723B Companies Act 1985).

Unfortunately, directors who already have their residential address filed at Companies House will not be able to force Companies House to remove it from the records. Therefore the new provisions have limited affect on existing directors until they move house.

Directors must provide their usual residential address to the company which must maintain a register of directors residential addresses (section 165). However this register is not open to public inspection.

Notification of directors' interests

The obligations under section 324 and related sections of the Companies Act 1985 including the requirement to keep a register are being repealed with effect from 6 April 2007. However directors of listed companies and companies admitted to AIM and PLUS Market are subject to Chapter 5 of the Disclosure and Transparency Rules (for further details see our briefing "**Disclosure and Transparency Rules – Implementation of the Transparency Directive**").

Age Limits

The existing maximum age limit (70 years) for directors of a public company is to be repealed with effect from 6 April 2007. However a new minimum age requirement of 16 years old will be introduced by the new Act (section 157).

Natural persons (section 155)

The minimum number of directors for public and private companies will remain unchanged. However there is a new requirement in section 155 that all companies should have at least one director who is a natural person.

Conclusion

The codification of the general directors' duties and the change in treatment of directors' conflicts of interest must be regarded as one of the more significant changes introduced by the new Act affecting directors. However, these should not have a profound effect on the way in which a responsible director as part of a properly functioning board of directors behaves. The remainder of the changes, whilst numerous, are straightforward and armed with the necessary information a director should grasp the changes with ease.

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 **Maggie Mitchell** (0117 902 7791) (maggie.mitchell@burges-salmon.com)(Professional Support Lawyer).

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 www.opsi.gov.uk).
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 www.dti.gov.uk/files/file36130.doc).
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 at www.dti.gov.uk/files/file36201.doc).
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. The trading disclosures should therefore appear on all business emails and not just hard copy business letters.
20 January	The following provisions of the new Act came into force: <ul style="list-style-type: none">- the company communication provisions (sections 1143 to 1148 and schedules 4 and 5) including provisions facilitating electronic communication;- 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.

2007 continued...

Date	Event
	<ul style="list-style-type: none">- 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. <p>The existing provisions relating to the disclosure of major shareholdings in sections 198 to 211 of the Companies Act 1985 were repealed and replaced by the new Disclosure and Transparency Rules (which also commenced on 20 January). The new Disclosure and Transparency Rules are available at www.fsa.gov.uk/pages/handbook.</p>
February	Government expected to launch a consultation on its detailed implementation plans.
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">- authentication of documents (section 41);- maximum age limit for directors of a public company (sections 293 and 294);- prohibition on company paying a director remuneration free of income tax (section 311);- 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);- 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;- special provisions for banking companies etc in respect of loans to directors (sections 343 and 344);- company's power to close register (section 358);- power for the Secretary of State to bring civil proceedings on company's behalf (section 438);- certain companies, including insurance companies, to publish periodical statement (section 720); and- annual report by Secretary of State to Parliament in respect of matters within the Companies Acts (section 729).

2008

Date	Event
By October	All provisions to come into force

Companies Act 2006 – briefings

Other briefings in this series to date are:

- **Companies Act 2006 – Provisions coming into force in January 2007**
- **Companies Act 2006 – An overview**
- **Disclosure and Transparency Rules – Implementation of the Transparency Directive**

We intend to produce further briefings in due course looking at the issues relevant to public and quoted companies and also to private companies.

The briefings are available on our website and can be found at:

<http://www.burges-salmon.com/publications/index.htm>.

This briefing is not intended to be a complete coverage of the law in this area.
Legal advice should always be taken in any particular case.

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