

COMPANIES ACT 2006 PROVISIONS COMING INTO FORCE IN OCTOBER 2007

As part of our project to bring to your attention the changes brought about by the Companies Act 2006, we set out below the most relevant changes for UK limited companies and their directors which came into force from October 2007 and refer you to our previous flyer regarding provisions that are already implemented.

- **Directors' Duties**

These include seven new duties, of which the following four were implemented in October 2007:

- 1. Duty to act within their powers**

This codifies the common law rules that directors should exercise their powers under the terms that were granted for a proper purpose. A director's powers are normally derived from the company's constitution, its memorandum and articles of association.

- 2. Duty to promote the success of the company**

The Act imposes a new duty to act in the way a director considers, in good faith, would be most likely to promote the success of the company. Although this duty is still owed to the company as a whole, when exercising this duty the director is required to have regard to a non-exhaustive list of factors including:

- (i) the long term consequences of the decisions;
- (ii) the interests of the employees;
- (iii) relationships with suppliers, customers;
- (iv) the impact of the decision on community and environment;
- (v) the desirability of maintaining a reputation for high standards of business conduct; and
- (vi) the need to act fairly as between members of the company.

Given the uncertainty in this area, it is important that detailed minutes are taken when exercising decisions and is one of the reasons that we recommend quarterly board meetings as a minimum to ensure this. If you would like us to attend and professionally minute your board meetings, please contact us.



3. Duty to exercise independent judgment

The Act imposes a positive duty on a director of a company to exercise independent judgment.

A director must first exercise a judgment and secondly he must exercise the judgment independently. Prima facie, this rule would impinge on so-called 'sleeping directors' who play no active role in the management and leave decisions to others. By analogy, this would impact on 'shadow directors'.

Arguably, if a director is to exercise independent judgment, then there will be no scope for shadow directors. However, the government has confirmed in debate in Parliament that a director will not be in breach of this duty if he exercises his own judgment in deciding whether to follow someone else's judgment on a matter.

In addition, this duty is not infringed upon if a director acts in accordance with an agreement that was duly entered into by the company. It remains to be seen how in practice this rule will impact on a director.

4. Duty to exercise reasonable care, skill and diligence

This section prescribes the degree of 'care, skill and diligence' expected from a director; that is: care, skill, diligence that would be exercised by a reasonably diligent person with:

a) The general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company;

and

b) The general knowledge, skill and experience that the director has

Provisions relating to directors' conflict of interest duties, directors' residential addresses, underage directors and the requirement for all companies to have one natural director will be in force from April 2008.

- **Derivative actions**

The Act introduces a new statutory right for shareholders to sue directors, in the company's name, to recover on its behalf loss it has suffered as a result of the directors' negligence, default, breach of duty or breach of trust. At present, shareholders have only very limited common law rights, subject to the fulfillment of strict conditions, to bring



actions in their company's name. Under the new provisions, shareholders will be able to bring proceedings in the company's name against the directors in a wider range of circumstances than at present. They will also be able to claim against third parties implicated in any breach (again, in the company's name).

In the light of this, we suggest that directors continue to seek advice if unsure and in the meantime overhaul their decision making process and companies' constitutions so as to minimize the risks of potential legal challenges and also to take advantage of the benefits introduced by the Act when the Act is fully brought into force in October 2009.

For more information on derivative actions, see our flyer entitled "Derivative Actions – Changes brought by Companies Act 2006".

- **Resolutions and meetings**

The law relating to shareholder meetings and resolutions is substantially changed by the 2006 Act and many relaxations are introduced for private companies including:

- a) A private company will no longer be required to hold an AGM unless required by its Articles of Association;
- b) The standard notice period for shareholder meetings is reduced to 14 days (even for a special resolution), except in the case of the annual general meetings of public companies.
- c) Other than resolutions to remove a director or auditor, all resolutions of private companies will be capable of being passed in writing and, instead of needing unanimity, an ordinary resolution will be capable of being passed in writing by a simple majority of the total voting rights of eligible members and a special resolution in writing by 75%.
- d) The Act also relaxes the rules on shareholder meetings, so that the percentage of shares or voting rights necessary to hold a meeting in a private company at short notice will be reduced from 95% to 90%, and Extraordinary General Meetings will only require 14 days' notice, even if a special resolution is proposed.

- **Information rights for underlying holders**

New provisions provide that shareholders of listed companies who hold shares on behalf of another person may nominate that person to have "information rights" – that is a right to receive all shareholder communications (as well as the member). The



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Government has stated that the commencement provisions in respect this part will be drafted so as to enable nominees to send indirect investors' requests to companies from 1 October 2007 so as to entitle indirect investors to enjoy information rights from 31 December 2007.

- **Access to share registers**

The sections on access to registers were brought into force on a staggered basis from 1 October 2007 rather than from 1 October 2008. Once a company has filed an annual return at Companies House made up to a date after 30 September 2007, it will be subject to the 2006 Act provisions relating to access to its register of members.

Under the 1985 Act any person may inspect or request a copy of a company's share register. In contrast, under the 2006 Act, a person seeking access to the register must state the purpose for which the information will be used and companies must then either comply with the request for access or can apply to the court to refuse access on the basis that the request is not being made for a "proper purpose".

The commencement of these provisions will be tapered according to the company's annual return's date, so that it will commence in relation to a company upon a submission of its first annual return after 30 September 2007.

If you want to become subject to these provisions sooner than you would via your usual annual return, please contact us.

We hope that this information proves to be useful. Should you require any further assistance, Company Law International can provide you with up to date legal advice and corporate compliance to ensure that your company is guided through the complex changes proposed under the Act.

Please note that this information is general guidance only and does not constitute legal advice. While every effort has been made to ensure the accuracy of its content, Company Law International Limited accepts no responsibility for the consequences of errors or omissions



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