

# Companies Act 2006

## 1 October 2008: the next 'D-Day'

The next part of the Companies Act 2006 (the Act) comes into force on 1 October 2008. This briefing note highlights the key changes coming into effect on 1 October 2008 and briefly summarises the main provisions of the Act that are already in force.

### 1. Directors' conflicts of interest

The Act increases the scope of the existing duty to avoid conflicts of interest. Under the existing regime, directors who encounter a conflict of interest with their company need to take steps to mitigate that conflict. This generally involves declaring the conflict to the board and, in some cases (depending on the provisions of their company's articles of association) absents themselves from the board meeting at which the conflict is discussed. With effect from 1 October 2008, directors will be required to:

- avoid situations where they have, or could have, a direct or indirect interest that conflicts, or could possibly conflict, with the interests of their company;
- declare an interest in any existing transaction or arrangement with their company;
- declare an interest in any proposed transaction or arrangement with their company; and
- avoid accepting benefits from third parties.

The "no conflicts" provision is particularly broad, and is likely to cover not only those situations where a director pursues a matter for his/her own benefit but also where he/she acts for the benefit of another party (e.g. another company of which he is a director).

Directors of private companies may relax these duties (e.g. by allowing the board to authorise conflicts of interest), but this will only be possible where the members pass a resolution authorising the relaxation.

Companies should therefore consider existing directorships, other positions and transactions with the company in the context of the new requirements and ensure that these requirements are complied with for future appointments and transactions.

### 2. No more financial assistance for private companies

The current prohibition on private companies offering financial assistance in connection with the purchase of their shares will be abolished on 1 October 2008. Accordingly, the statutory "whitewash" procedure (which allows private companies to give financial assistance with members' approval, a statutory declaration of solvency and an auditors' report) will also disappear. This change

should allow many transactions, in particular acquisition financings, to be carried out more quickly and cost effectively.

Private companies proposing to give financial assistance after 1 October 2008 should still consider the benefit of the assistance to the company and ensure that the requirements as to the maintenance of the company's capital are complied with. Directors will need to ensure that they comply with their statutory duties prior to approving the giving of any financial assistance by their company.

### 3. Reduction of capital

From 1 October 2008, private companies will be allowed to reduce their share capital where the members pass a special resolution (i.e. with a 75% majority) to that effect and the directors make a solvency statement.

This represents a significant change from the current position, under which private companies are only permitted to reduce their share capital after obtaining the Court's approval.

In making a solvency statement, each of the directors will have to swear that he has formed the opinion that (i) there is no ground on which the company could be found to be unable to pay its debts and (ii) the company will be able to pay its debts as they fall due for the following year. In forming these opinions, each director will need to take account of all of the company's liabilities and all current and prospective liabilities.



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### 4. Composition of boards

From 1 October 2008, boards must comprise at least one "natural" person (i.e. it will not be possible to have a board comprised of entirely corporate directors). This is likely to be of particular relevance to companies that are members of groups. There is, however, a grace period until October 2010 for any company which had a board comprised entirely of corporate directors on 8 November 2006.

In addition, a new prohibition on minors acting as directors takes effect on 1 October 2008: from this date, individuals will need to be at least 16 before they are eligible to become directors. Any existing directors who

are under the minimum age will automatically cease to be directors on 1 October 2008.

## 5. Provisions already in effect

By way of reminder, the following key provisions of the Act have already taken effect:

- A statutory statement of **directors' duties** (which requires directors, amongst other things, to act in a way which they consider in good faith would be most likely to promote the interests of the company and its members as a whole) has replaced the old common law rules that governed directors' duties.
- Members have an enhanced right to bring **actions against company directors** ("derivative actions") on behalf of the company. However, there is a two-stage process to prevent speculative claims: Court approval will be required before a shareholder can proceed with a claim.
- There is no longer a requirement for private companies to have a **company secretary** (although they may still choose to have one).
- Private companies are no longer required to hold **annual general meetings**.
- The **notice period** for all extraordinary general meetings has been standardised at 14 days.
- **Written resolutions** now require the same majority as shareholder meetings (75% majority for the passing of a special resolution and over 50% majority for the passing of an ordinary resolution), not the approval of all members.
- The period for **filing annual accounts** has been reduced from ten months to nine months from the end of the accounting reference period.
- Directors (except those of "small" companies) must include a **business review** in their annual report. A director will be liable if he or she knowingly or recklessly produces false or misleading statements or dishonestly conceals a material fact.
- **Electronic communications**, including emails and websites, must contain details of the company's name, place of registration, registered office and the registered number. Arrangements can be made so that communications to/from a company's members can be sent and received electronically.
- **Auditors may limit their liability** by agreement with companies (although such agreements will only be legally enforceable to the extent that they are fair and reasonable).

If you would like to know more about the Companies Act 2006 or to discuss any other corporate issues, please contact:

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