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COMPANIES ACT 2006

COMPANY LAW UPDATE
NEW PROVISIONS IN FORCE FROM
1 OCTOBER 2007

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The Companies Act 2006 (“the 2006 Act”) received Royal Assent on 8 November 2006 and is intended to benefit businesses by modernising and simplifying company law. The provisions of the 2006 Act are being brought into force over a two year period with the Department for Business, Enterprise and Regulatory Reform seeking to fully implement the 2006 Act by October 2008. The 2006 Act will supersede the Companies Act 1985 (“the 1985 Act”).

Whilst not intended to be a comprehensive guide, this guidance note has been produced to highlight the changes in company law which will take place on 1 October 2007.

1. Directors’ Duties

The 2006 Act introduces a statutory statement of directors’ duties which is intended to codify and develop the existing duties of company directors which had evolved through common law and equitable principles.

From 1 October 2007, company directors have a statutory duty to:

- Act within their powers (in accordance with the company’s constitution and shareholder resolutions);
- Promote the success of the company;
- Exercise independent judgement and
- Exercise reasonable care, skill and diligence.

For further information on directors’ duties please refer to our guidance note “*Directors’ Duties – Companies Act 2006*” published in April 2007. If you require a further copy, please contact a member of our corporate team and we will arrange for a copy to be sent to you.

2. Derivative Claims

The 2006 Act introduces the statutory right for a shareholder to bring a claim against a company director (or directors) for a breach of a director’s duty (a derivative claim or action). All derivative claims will be made on behalf of and in the name of the company.

A shareholder seeking to bring a derivative claim will require the court’s permission to continue with a claim. This provision requires the shareholder to prove that he has a case and to provide such evidence that the court may require to ensure that the claim is not vexatious. If the court is satisfied that there is a case and evidence to support a claim on behalf of the company, the court will give the shareholder permission to bring the derivative claim.

The 2006 Act provides that a derivative claim may be brought against a director 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 by a director of the company”

s260(3) Companies Act 2006

3. Written Resolutions

The provisions within the 2006 Act will make it easier for private limited companies to obtain shareholder consent without the need to call a general meeting. Prior to 1 October 2007, a written resolution required unanimous shareholder consent to be valid. Under the new provisions, a written resolution will require the same level of shareholder consent to be passed as if the resolution was tabled at a general meeting. A written resolution to pass an ordinary resolution will require a simple majority to be valid (over 50%) whilst a special resolution will require the consent of 75% of those eligible to vote.

As with the 1985 Act, the 2006 Act does not allow a public company to use written resolutions as a means of obtaining shareholder consent.

4. Notice of Ordinary and Special Resolutions

The 2006 Act has reduced the period of notice that a company must give to its members for special resolutions. From 1 October 2007, a private limited company will only need to provide its members with 14 clear days' notice of an AGM or general meeting held for the purpose of passing a special resolution. The notice period for public companies has also been reduced to 14 clear days' in the case of general meetings, but any special resolution tabled at an AGM will still require 21 clear days' notice (see Notice of Meetings below).

The notice periods for ordinary resolutions by private and public companies of 14 clear days' remain the same, although ordinary resolutions which require special notice (for example for the removal of a director) continue to require 28 clear days' notice.

5. Annual General Meetings (AGM) and General Meetings

5.1 Requirement to hold an AGM

Under the 2006 Act, there is no obligation for private limited companies to hold an AGM. However, if a company's memorandum or articles of association include an express requirement to hold an AGM, the company must continue to do so. A company's decision to dispense with calling an AGM does not affect a member's ability to demand a general meeting.

As with the 1985 Act, the 2006 Act places an obligation on public companies to hold an AGM.

5.2 Notice of Meetings

The general notice period under the 2006 Act for a private limited company to call an AGM or general meeting is 14 clear days. A private company may also call a general meeting or AGM on short notice provided that 90% of the company's members have given their consent. This reduces the 95% threshold contained in the 1985 Act, although the company's articles of association may still specify that a 95% of the company's members are required to give their consent.

A public company must give 21 clear days' notice when calling an AGM and 14 clear days' notice when calling a general meeting. A public company will require unanimous shareholder consent to call an AGM at short notice and the consent of

95% of the company's shareholders if it wished to call a general meeting at short notice.

5.3 Calling an AGM or General Meeting

As with the 1985 Act, the 2006 Act provides that the company directors, and in certain circumstances, the company members can call a general meeting.

5.4 Proxies

The 2006 Act permits a member to appoint multiple proxies (members must be informed of this right in any notice of AGM or general meeting) and grants proxies the right to speak at meetings. A proxy has the same right as a member of a company to demand a poll and will count towards the company's quorum (although when the quorum is set at two, two proxies will not count as the quorum if they represent the same member).

6. Exercise of Members' Rights

The 2006 Act has introduced new provisions which recognise the role of indirect investors. Companies may now include provisions in their articles of association to allow a registered shareholder to appoint another person as being entitled to exercise the registered shareholders rights in the company. These rights include: the right to receive notice of general meetings, the right to receive proposed written resolutions and the right to require that the company directors call a general meeting.

In addition, the registered shareholders of traded companies (companies whose shares are traded on a regulated market within the EEA, for example the London Stock Exchange or AIM) can appoint the beneficial owners of shares (for example, investors in the registered shareholder) to enjoy 'information rights'. Information rights include the right for the appointed beneficial owner to receive copies of all communications sent out by the company to the registered shareholders. This administrative burden will need to be carefully considered by companies and their Registrars.

7. Political Donations

As with the 1985 Act, the 2006 Act provides that companies will need prior shareholder approval (an ordinary resolution unless a company's articles of association specify otherwise) before making any political donation or contribution.

Final word

From 1 October 2007, directors must abide by a new set of statutory duties and shareholders will have a new statutory right to take action in the name of the company should those duties be breached. Directors should familiarise themselves with what these new duties entail and be clear about what these duties will mean for them in practice.

The 2006 Act also introduces new provisions relating to company procedure. With changes to the use of written resolutions and the ability to dispense with AGMs, it is anticipated that private limited companies will increasingly be 'governed on paper'. In addition, directors of both private and public companies must take steps to ensure compliance with the new notice requirements and that shareholders are informed of their new rights regarding the appointment of proxies. Directors must review and

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implement these procedural changes when calling an AGM or general meeting after 1 October 2007.

Need to know more?

Ask us. Joelson Wilson's experienced team of lawyers undertake a wide range of corporate and commercial transactions for private limited companies and listed clients in both the UK and overseas, please contact:

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This document is not intended to be a comprehensive review of all developments in the law or practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publications to specific issues or transactions.

Joelson Wilson LLP

September 2007