

## The Companies Act 2006: Listed Companies

The Companies Act 2006 received Royal Assent on 8 November 2006. The Act will be fully implemented by October 2009, although some parts come into force earlier than that. This briefing introduces the key changes in the Act which will be of particular relevance to companies listed on the Official List and indicates when these changes became or will become effective. We have prepared similar briefings for private companies, private equity firms and companies listed on AIM, all of which are available on our website at [www.traverssmith.com](http://www.traverssmith.com).

### Provisions to facilitate electronic communications with shareholders

The Act facilitates the more efficient use of electronic communications. Under the 1985 Act shareholders had to elect positively to receive company information electronically and the company had to send information in hard copy to anyone who had not so elected. For most listed companies, website publication is the most convenient way of sending annual reports and accounts and notices of meetings to shareholders. Under the new rules in the Act, shareholders must be asked individually if they agree to receive information from the company in this way, but if they do not reply within 28 days, they may be deemed to agree if the shareholders have passed a resolution to permit website communications with shareholders, or if the company's articles authorise website communications. There are similar requirements for holders of debt securities. The company must then notify shareholders and debenture holders each time information is placed on the website, giving the website address and instructions on how to find the information on the site. The rules for using email to communicate with shareholders are slightly different as shareholders must provide an email address for this purpose (although corporate shareholders may be deemed to have done so if the company has an email address for them because they have, for example, returned a proxy form by email).

These statutory requirements took effect subject to any electronic communications requirements in the new FSA Disclosure and Transparency Rules (also effective from 20 January 2007). As the new rules on electronic communications came into force in January, companies may wish to obtain the necessary shareholder approval at their 2007 AGM, and send out the forms of election to shareholders at the same time.

### There will be greater use of websites

From 1 October 2007, quoted companies are required to publish, on a website, the results of poll votes, including the number of votes cast for and against each resolution. From 6 April 2008 quoted companies will be required to publish their annual report and accounts on a website (although many already do so).

### Shorter deadline for filing accounts and holding an AGM

From 6 April 2008, the Act reduces this to 6 months after the end of the accounting reference period, from 7 months. However, the FSA's Disclosure and Transparency Rules, which implement the EU Transparency Directive, already further reduced the filing period for companies with financial years beginning on or after 20 January 2007, to 4 months. A public company's AGM will be required within six months of the day following its accounting reference date.

### Directors will be subject to new statutory duties

The Act contains new statutory duties for directors which will apply to executive and non-executive directors alike and, in some cases, to former directors. The statutory duties are based on, and will replace, the existing common law duties, and are designed to make the law more accessible for directors.

The new statutory regime includes familiar concepts such as duties to exercise reasonable skill and care and not to accept benefits from third parties. However, some of the new statutory duties go beyond the common law equivalent. For example, there is a new core duty of directors to promote the success of the company for the benefit of its members and in doing so, directors must have regard to the interests of the company's employees, its business relationships with its customers, suppliers and others, and the impact of its operations on the wider community and environment. This new duty goes hand in hand with the new Business Review requirements on corporate reporting. Until the new law has bedded down, there will be uncertainty as to how the courts will interpret it.

Also, the new rules on conflicts of interest are widely drawn and there are new rules on the manner in which interests may be declared. Directors could authorise a conflict if permitted to do so by their constitution.

The new statutory duties came into force on 1 October 2007, apart from the new rules on conflicts, which will not come into force until October 2008 (to give companies more time to change their constitution to accommodate the new conflicts regime).

## **Claims against directors**

The Act also provides a framework for shareholders to bring a claim on behalf of a company against directors who are in breach of duty or have been negligent. Shareholders will need the consent of a court to bring a claim, and damages will be owed to the company, rather than to the shareholders themselves. These limitations should ensure that only deserving claims are pursued, but the statutory procedure may make it easier for shareholders to bring actions against directors.

The new procedure came into force on 1 October 2007, at the same time as the new statutory duties for directors came into force. Directors of high-profile companies may need to consider whether to minute key board decisions with extra care to demonstrate that they have complied with their statutory duties, particularly in potentially contentious situations. However, the Government is keen to discourage a box-ticking approach and provided the directors have understood and applied the new statutory requirements to business decisions, using their good faith business judgment, the absence of a paper trail should not necessarily be taken to mean they have not complied with their duties.

## **Additional contents requirements for the Business Review**

The Act expands the disclosures to be made in a quoted company's annual Business Review (which replaced the abandoned OFR) by requiring the inclusion of information on the trends affecting the company's business, environmental matters, employees and social and community issues. A controversial late amendment, designed to address the growing corporate social responsibility agenda, is a requirement also to include information on persons with whom the company has contractual or other arrangements which are essential to the company's business. However, disclosure is not required if it would, in the directors' opinion, be seriously prejudicial to the person and contrary to the public interest. It remains to be seen how these further disclosure obligations will be interpreted but larger quoted companies, in particular, who do not rely heavily on one or more customers or suppliers may not have contracts which meet the "essential" test. These new requirements came into force on 1 October 2007 and will apply for financial years beginning on or after that date.

## **Confidentiality for directors' home addresses**

The rules which currently allow directors to keep their home addresses off the public register, which only apply to directors who can show they are at risk of violence or intimidation, are to be extended so that they will apply to all directors from 1 October 2009, whatever the nature of the company's activities. All directors will file a service address (which can be the company's registered office) and their home addresses will be kept on a separate, protected, register by both the company and Companies House. Details of existing directors' home addresses on the register at Companies House will not be expunged automatically. Directors who can show they are at risk of violence or intimidation will be able to apply to the registrar to remove such details, under Regulations which have yet to be published.

## **Auditors will be able to agree limits on their liability**

After much debate, the Government has decided to allow auditors to agree, from 6 April 2008, contractual limits on their liability with their audit clients. Companies will need to consider how to approach requests from their auditors for liability limitation agreements. The Act provides that the limit must reflect a "fair and reasonable" proportion of the liability bearing in mind the role and responsibility of the auditors.

## **All share certificates may be de-materialised**

The Government has reserved powers to make Regulations requiring all share certificates to be de-materialised.

## **Authorised share capital is to be abolished**

Companies will no longer have to have an authorised share capital (i.e. a limit on the maximum amount of share capital which can be allotted) after October 2009. However, shareholder approval for share issues will continue to be required for public companies. Transitional provisions are expected to treat an existing authorised share capital clause in a company's memorandum as a restriction in the articles on the number of shares the directors can allot, so this deemed "restriction" will need to be removed from the articles before new share issues exceeding the authorised share capital can be made.

## **Model Articles of Association**

The Government published a new draft of the Model Articles of Association for public companies in August 2007. Existing companies will need to consider what effect the Act and the Model Articles will have on their existing articles. The Act contains provisions, which come into force in October 2009, which will affect a company's constitution (for example, the disappearance of the Memorandum of Association) even if its articles are not actually amended. There are also new provisions in the Model Articles relating to directors' meetings (such as the ability for a majority of the board to take decisions by written resolutions) which companies may wish to reflect in their articles.

## **Access to register of members**

From October 2007, anyone wanting access to a company's register will have to disclose the purpose for which the information is to be used. Companies will have the ability to go to court if they wish to refuse a request. The court may order that access should not be granted if satisfied that access is being sought for an improper purpose. Similar provisions apply, with effect from 20 January 2007, in the case of the register of interests in shares although it is the applicant rather than the company who has to go to court.

## **Exercise of members' rights**

From 1 October 2007 indirect investors (retail and institutions) who hold their shares through intermediaries are able to exercise certain membership rights if the company's articles allow it. Whilst this has been welcomed, the Act also allows members to nominate others to receive shareholder information and allows beneficial as well as registered members to exercise requisition rights, relating to the circulation of information relevant to general meetings, which could prove complex and costly.

## **New statutory rights for proxies**

From 1 October 2007, proxies, for the first time, have statutory rights to speak at meetings and vote on a show of hands. Companies may wish to update their articles to reflect this.

## **New requisition rights for shareholders**

Members now have new rights, as from 1 October 2007, to requisition resolutions at the AGM, and also, from 6 April 2008, to require the company to publish on its website a statement of members' concerns about the audit prior to the meeting at which the accounts are to be laid (usually the AGM). The usual threshold for the entitlement to make a requisition will apply in both cases (5% of the voting rights or at least 100 members holding shares on which an average sum per member of at least £100 has been paid) and there are provisions to protect companies from defamatory, vexatious or frivolous resolutions or statements.

## **Shareholders will be able to require an independent report on the conduct of a poll**

Shareholders of quoted companies meeting the threshold requirements set out above will be able to require the directors to obtain an independent report on any poll taken at a general meeting. This new power became effective on 1 October 2007. The independent assessor must examine the procedures followed, including the counting of the votes and how proxies were dealt with.

If you would like more information on any of the topics discussed in this Note, or on what you should do to prepare for the changes, please contact your usual contact at the firm. We will be providing further guidance for clients before the Act is fully implemented.

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