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### **Companies Act 2006 Implementation**

A number of sections of the Companies Act 2006 came into force on 1 October 2008. The principal changes are:

- ***Company Name (Sections 69-74)***

From 1 October 2008, objections to a company's name can be made to a Company Names Adjudicator on the grounds that it is the same as one in which the applicant has goodwill (e.g. a trademarked name or an established trading name) or it is likely to mislead by suggesting a connection between the company and the applicant. The Adjudicator is part of the UK Intellectual Property Office and further details can be found at [www.ipo.gov.uk/cna](http://www.ipo.gov.uk/cna)

- ***Display of Company Name (Sections 82-85)***

These changes were covered in Technical Factsheet No. 25.

- ***Company Directors (Sections 155-159)***

Companies incorporated on or after 8 November 2006 (the date of Royal Assent of the 2006 Act) have to have at least one natural person as a director from 1 October 2008.

Companies which had only corporate directors as at 8 November 2006 have until 1 October 2010 to comply with the requirement to have at least one individual as a director.

From 1 October 2008, the minimum age of a company director is 16.

- ***Directors conflict of interest (Sections 175-177) and declaration of directors interest (Sections 188-187)***

The remaining sections relating to directors duties came into force on 1 October 2008 and are considered further below.

- ***Reduction of Capital by Private Companies (Sections 642-644, 654, 641(i)(a) & (2)-(6), and 652(1) & (3))***

From 1 October 2008 a private company can reduce its share capital without having to apply to Court. Instead of the Court's protection for creditors, creditors will be protected by a Solvency Statement by the directors.

The new procedures are also much simpler than those for purchase of own shares out of capital and whilst these procedures remain, it is unlikely they will be as widely used as before.

There are a number of advantages in using the Solvency Statement route over the purchase of own shares out of capital route, namely:

- no auditors whitewash is required
- no publicity in the Gazette is required.

- shareholders and creditors cannot apply to the Court for cancellation of the resolution to reduce capital.

The reduction of capital cannot take effect any later than the date on which the special resolution for the reduction of capital will take effect. The resolution does not take effect until the Solvency Statement and a statement of capital as reduced by the resolution have been registered by the Registrar of Companies.

The Solvency Statement is a statement that each of the directors has formed the opinion that, at the date of the Statement the company is able to pay or otherwise discharge its debts and will be able to do so for 12 months after that date.

In forming their opinion, the directors must take into account all the company's liabilities (including any contingent or prospective liabilities). This definition is wider than that in Insolvency Legislation and in the old Financial Assistance and Purchase of Own Shares Out of Capital Rules.

Making a Solvency Statement without having reasonable grounds for the opinions expressed is a criminal offence. It is therefore likely the directors will seek some reassurance from the company's auditors/accountants.

The Solvency Statement cannot pre-date the special resolution by more than 15 days and must be available for inspection at the meeting voting on the resolution, or must be sent or submitted to members at or before the time the proposed written resolution is sent to them.

The Capital Redemption Reserve arising on the reduction of capital is distributable according to the Order bringing this into force. Guidance is expected from ICAEW/ACCA on this point since this is contrary to current guidance.

A public company that is not quoted or listed will be able to re-register as a private company in order to take advantage of these Rules.

- ***Financial Assistance (Section 677 – 683)***

From 1 October 2008 a private company will not be subject to financial assistance rules, except where it gives assistance for the acquisition of shares in its public holding company. Public companies will remain subject to the financial assistance rules.

As the underlying offence of financial assistance will go for private companies, so will the whitewash procedure.

Whilst, for private companies there will no longer be a criminal offence of financial assistance, the directors should not necessarily assume that a 'financial assistance' transaction can be entered into without further thought. Directors will still need to consider whether a proposed arrangement is in the best interests of the company and could be personally liable if they act in bad faith. Matters which the directors may still need to consider include:

- corporate benefit
- undervalues and preferences
- unlawful return of capital
- director's statutory and fiduciary duties
- unfair prejudice

It would be inadvisable to provide financial assistance where the previous "whitewash" would not be possible. It is therefore likely that some directors will seek some reassurance from the company's auditors/accountants.

A private company is prohibited from giving financial assistance in respect of the acquisition of shares in a public holding company.

A public company can give financial assistance in respect of the acquisition of shares in its private holding company but not in itself.

A private company subsidiary of a public company can give financial assistance for the acquisition of its shares or the shares of a private intermediate holding company.

A public company will be able to re-register as a private company in order to give financial assistance. This may be useful where a takeover bid of a public company is financed by debt and the bank wants security over the target's assets.

- **LLP's**

The sections of the 2006 Act relating to Accounts and Audit of limited companies that came into force on 6 April 2008 will come into force for LLPs on 1 October 2008.

The only exception is the rules for filing of accounts. These came into force for LLPs for accounting periods commencing on or after 6 April 2008. Thus an LLP with a year commencing on 1 May 2008 will have 9 months i.e. until 31 January 2010 to file its accounts at Companies House.

- **Annual Return**

From 1 October 2008 an unlisted company will no longer need to provide the names and addresses of its members in an Annual Return made up to a date after 30 September 2008. A listed company will have to provide details of members holding 5% or more of any class of securities listed.

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## **Directors Duties**

### ***Conflicts of Interest***

From 1 October 2008, section 175 of the Companies Act 2006 codifies the previous common law rules on avoiding conflicts of interest with some important modifications.

Section 175 codifies the strict duty to avoid situations in which a director has, or can have, an interest that conflicts or may conflict with the company's interests. Such situations could arise from the director's duty as a director of another company with whom the company trades or from their personal interests. The duty applies in particular to the exploitation of any property, information or opportunity, even if the company is not itself in a position to take advantage of it.

The GC 100 group has published a questionnaire designed to help directors identify conflicts of interest at [www.practicallaw.com/6-378-7923](http://www.practicallaw.com/6-378-7923)

There will be no breach if the conflict is duly authorised by the non-conflicted directors.

- For private companies already in existence on 1 October 2008, authorisation by non-conflicted directors will be permitted only if the Articles contain nothing to the contrary, and the members pass an ordinary resolution permitting authorisation by the non-conflicted directors. The resolution must be filed at Companies House.
- Private companies incorporated on or after 1 October 2008 will be treated as permitting such authorisation unless their Articles specify otherwise.

- For public companies, even those incorporated on or after 1 October 2008, authorisation by the non-conflicted directors will be possible only if the company's Articles specifically allow it.

*All companies should consider passing resolutions or making provision in their articles for matters that are ancillary to the approval process.*

Where any director considers that he may have a direct or indirect interest that conflicts or possibly may conflict with the interests of the company, he should notify the board in writing of the nature and extent of the interest as soon as possible, explaining, where necessary, how the interest may create a conflict. For example, where a conflict might arise by accepting another directorship, notification should be made before the director agrees to take up the other appointment. The board should take the following action in respect of situational conflicts. The position in respect of transactional conflicts is considered later in this article:

- Once a notification has been received, the interest should be considered at the next board meeting or, if necessary at an earlier specially convened one. The director concerned (and any other director with a similar interest) cannot count towards the quorum while the conflict is considered and must not vote on any resolution authorising the conflict. It will normally be appropriate for him to be excluded from the meeting whilst the matter is discussed.
- The rest of the board should consider carefully whether authorising the conflict would be consistent with their own duties to the company: in particular, the duty to promote the success of the company and the duty to exercise reasonable skill, care and diligence. They may decide that the conflict makes the conflicted director's position untenable – in which case his options are either to resign or to seek shareholder approval.
- As well as considering whether to authorise the conflicted director to continue in office, the non-conflicted directors should decide if he should be permitted not to do certain things he would otherwise be required to do (for example, disclose to the company information that is of use or value to it, having regard to its business). They may wish to impose restrictions or conditions – for example, that the director should be excluded from those parts of board meetings where the matter is discussed, and should not be provided with board papers or other documents that relate to the matter. The authorisation could be indefinite or for a fixed period of time – but in either case, the board should be able to revoke the authorisation at any time.
- The board will need to be satisfied that it has the power to give authorisation on the terms it wants to and the company's Articles should be checked.

An up-to-date record should be kept of the interests of each director, and all authorisations sought and given. Both the conflicted director and the rest of the board should review the situation from time to time, and, whenever there is any material change of circumstances, to decide whether the terms of the authorisation should be extended, tightened up or revoked.

The boards of listed and high profile companies should be prepared to explain to their shareholders (for example, in the corporate governance report) how they have dealt with conflicts, and to justify the terms of any authorisations that have been given.

If all the directors are or may be conflicted, only shareholder approval will do. There may be other reasons for by-passing the board: in a 50:50 joint venture, for example, the shareholders may want the matter to be put to shareholders rather than left with the board.

Where an interest is disclosed to the board some time after it has arisen, and in the meantime the director has been in a position where that interest potentially or actually conflicted with the interests of the company, the breach of duty cannot be cured by the non-conflicted directors (although they could authorise the director to continue in office). Depending on the circumstances, it may be possible to get shareholders to ratify the breach of duty, although ratification will not be effective if the company is insolvent or if the shareholder resolution would not have been passed without the votes of the director concerned and his connected persons.

It is possible for the company's articles to confer standing authorisation of certain conflicts that would otherwise be in breach of section 175.

The section 175 duty does not apply to a director's conflict of interest arising in relation to a proposed transaction or arrangement involving the company (a transactional conflict). Instead he has a fiduciary duty under section 177 of the Companies Act 2006 to declare the nature and extent of his interest, and to make further declarations if a declaration turns out to be inaccurate or incomplete. Unless the company's constitution provides otherwise, the transactional conflict ceases to be an impediment to the director if he duly complies with the section: he will then not have to account to the company for benefits derived from his interest, and the transaction will not be liable to be set aside.

Where the company has already entered into a transaction or arrangement in which the director is interested, he is required to disclose to the board the nature and scope of his interest as soon as reasonably practicable (section 182) and to make further declarations if a section 182 declaration turns out to be inaccurate or incomplete. This is not a fiduciary duty, and failure to comply is a criminal offence. Section 182 could come into play where the director has neglected to comply with section 177 or where the director acquires an interest after the transaction (for example, by investing in one of the company's suppliers).

Declarations must be made at a board meeting or by means of a written notice that is put before the board.

### ***Benefits from third parties***

From 1 October 2008 section 176 of the Companies Act 2006 will impose a duty on a director not to accept a benefit from a third party that is conferred by reason of his being a director or by reason of his doing or not doing something in his capacity as a director. This means benefits of any description, including non-financial benefits. Although the duty is designed principally to prevent directors accepting bribes or other inducements from suppliers and others, it is wide enough to catch all forms of corporate hospitality.

- The duty does not apply to benefits received from the director's company or another group company (or someone acting on their behalf).
- The duty will not be breached if accepting the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest. In practice this is likely to be an important caveat. But because it is an objective test, the director concerned, and the other directors, should consider whether a reasonable observer, looking at the commercial context, would think that there was a real, sensible possibility that the benefit might create a conflict.
- Unlike section 175, section 176 does not allow the rest of the board to authorise a director to receive a benefit that can reasonably be regarded as likely to give rise to a conflict of interest. That sort of benefit must be refused unless acceptance of it is specifically authorised by the company's shareholders. The Articles could sanction the acceptance of certain benefits, but the degree of specificity required to make this effective would limit the scope and flexibility of the provision.
- As a matter of risk management, a company may well want to have in place internal guidelines on the size and nature of benefits that can be accepted by directors and employees, and a transparent system of logging benefits offered and whether they have been accepted. Although this is not guaranteed to protect a director from being in breach of section 176, it might have some influence on the Court's decision as to whether a particular benefit is caught, and, if it is, whether the Court should exercise its discretion (under section 1157 of the Companies Act 2006) to relieve him from liability for breach of duty.

**Trading disclosure requirements for insolvent companies**

From 1 October 2008, the requirement for companies in administration, liquidation, administrative receivership, receivership or subject to a moratorium to disclose their status on hardcopy invoices, orders for goods and business letters will also apply to electronic letters and order forms, and any company websites. The requirements have also been extended to orders for services (whether electronic or hardcopy). An anomaly in the existing law, which only requires disclosure when the company's name appears in the document, has also been removed. Disclosure now has to be made whether or not the company's name appears on the electronic or paper document.

The new rules are contained in SI 2008/1897 'The Companies (Trading Disclosures) (Insolvency) Regulations 2008'.

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