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Companies Act 2006 – New Regulations

A number of Statutory Instruments dealing with company charges, company records and share capital have been issued which come into force on 1 October 2009.

- **Company Charges.** SI 2008/2996 “The Companies (Particulars of Company Charges) Regulations 2008” specifies the particulars that must be provided when charges are created or assets acquired that are subject to existing charges.
- **Company Records.** SI 2008/3006 “The Companies (Company Records) Regulations 2008” specifies the places where company statutory records, to which third parties have a right of access, may be kept and the procedures for accessing such records. SI 2008/3007 “The Companies (Fees for Inspection of Company Records) Regulations 2008” specifies the fees that may be charged for access.

A private company must make its records available for two hours between 9am and 5pm on a working day. The date and time can be specified by a person wishing to inspect the records.

Notice must be given by the person seeking access. It must be at least 2 working days notice where the information relates to a General Meeting or Written Resolution and at least 10 working days notice in all other cases.

Similar rules apply to Public Companies.

The prescribed fee for providing access is £3.50 for each hour in respect of which the right of inspection has been exercised.

- **Share Capital.** SI 2009/388 “The Companies (Shares and Share Capital) Order 2009” prescribes the particulars of the rights attached to shares which must be delivered to the Registrar of Companies. It deals with:
 - the information to be filed when an unlimited company allots a new class of share or on request by a shareholder;
 - the information to be contained in a return of an allotment of shares;
 - the form of and information to be contained in a directors statement where a private company makes a payment out of capital for the redemption or purchase of its own shares; and
 - the meaning of “cash consideration” which applies in determining whether shares in a company are deemed to be paid up in, or allotted for, cash.

Trading Disclosures

SI 2009/218 “The Companies (Trading Disclosures) (Amendment) Regulations 2009” come into force on 1 October 2009. They amend the 2008 Regulations (which came into force on 1 October 2008) by providing 2 further exemptions from the requirement for a company to display its registered name at all its business premises:

- Insolvency Practitioners holding appointment as liquidators, administrators or administrative receivers of a company will not have to display those companies names at their own offices; and
- Companies where every director is one whose residential address cannot be disclosed to a credit reference agency (see below) only have to display their name at their registered office or inspection place for the company’s records.

Disclosure of Directors’ Addresses

SI 2009/214 “The Companies (Disclosure of Address) Regulations 2009” come into force on 1 October 2009. They specify the conditions for disclosure of directors’ residential addresses to public authorities and credit reference agencies.

They also make provision for applications to the Registrar of Companies under section 243 of the Companies Act 2006 (the “Act”) to refrain from disclosing a director’s usual residential address to a credit reference agency, and under section 1088 of the Act for addresses on the register to be unavailable for public inspection.

Sections 162-167 of the Act come into force on 1 October 2009 and these require companies to file both a service address and the usual residential address of each director. The service address is put on the public record for public inspection. Section 243 of the Companies Act 2006 provides for the usual residential address to be disclosed by the Registrar only to specified Public Authorities and credit reference agencies under specified conditions.

The Regulations extend the previous Confidentiality Orders under the Companies Act 2005 to removing addresses on public record prior to the granting of the Order. Holders of the previous Confidentiality Orders at 30 September 2009 will automatically be entitled to the higher protection afforded by these new Regulations.

The grounds for application for removal of addresses are that the individual or persons living with him or her will be subjected to violence or intimidation as a result of the activities of a company of which he or she is a director.

New form 64-8

HMRC published a new version of form 64-8 in March 2009 which replaces the previous version. This allows you to type details directly onto the form on screen. It still needs to be printed and sent to the client for signature before posting to HMRC to process. The new form can be found at www.hmrc.gov.uk/news/revised64-8.htm

HMRC Interest Rates on underpaid/overpaid tax

Following the recent bank rate cuts the current HMRC interest rates are:

- 2.5% on unpaid corporation tax not due by instalments and income tax on company payments;
- 1.5% on unpaid corporation tax due by instalments;
- 0.25% on overpaid corporation tax;
- 2.5% on unpaid income tax, CGT, NIC, stamp taxes;
- 0% on overpaid income tax, CGT, NIC stamp taxes;
- 0% on IHT payable or receivable;
- 2.5% on unpaid VAT and other duties;
- 0% on overpaid indirect taxes.

Definition of “Major Audit”

Audits of the following entities are within the scope of the work of the Audit Inspection Unit (AIU) of the Professional Oversight Board in 2009/10.

This also constitutes the list of “major audits” for the purposes of audit inspection and the requirement placed on audit firms under Regulation 3.15 of the ICAEW Audit Regulations and Guidance 2008 to notify new “major audit” appointments to the relevant Audit Registration Committee. This list is different from the meaning of the term “major audit” for the purposes of the statutory requirements placed on audit firms and companies, under sections 522 to 525 of the Companies Act 2006, to notify changes of auditors to the Appropriate Audit Authority – see <http://www.frc.org.uk/pob/regulation/notification.cfm> and Technical Factsheet No.23:

- All UK incorporated companies with listed equity and / or listed debt or a member of a group containing such a company;
- AIM or Plus-quoted companies incorporated in the UK with a market capitalisation in excess of £50 million. For change of auditor purposes, any change on an AIM or Plus-quoted company must be notified;
- Unquoted companies, groups of companies, limited liability partnerships or industrial and provident societies in the UK which have either:
 - a) Group turnover in excess of £500 million; or
 - b) Group long term debt in excess of £250 million and turnover in excess of £100 million.

For change of auditor purposes, only companies need notify;

- Unquoted companies or groups which are subsidiaries of foreign parent companies where the turnover of the UK group or company is in excess of £1,000 million;
- Private sector pension schemes with either more than £1,000 million of assets or more than 20,000 members. Changes of auditor do not have to be notified;
- Charities with income exceeding £100 million. For change of auditor purposes, only Charitable Companies need notify;
- Friendly Societies with total net assets in excess of £1,000 million. Changes of auditor do not have to be notified;
- Building Societies with assets exceeding £1,000 million. Changes of auditor do not have to be notified;

- UK Open-Ended Investment Companies and UK Unit Trusts managed by a fund manager with more than £1,000 million of UK funds under management;
- Mutual Life Offices whose "With-Profits" fund exceeds £1,000 million. Changes of auditor do not have to be notified.

UK incorporated companies exclude companies incorporated in the Crown Dependencies and the monetary amounts referred to will apply as at the date of the last published set of accounts.

Limitation in professional negligence claims

A recent Commercial Court decision, in AXA Insurance Ltd v Darby Solicitors and others, emphasises that limitation in many professional negligence claims will be virtually the same in tort as it is in contract – 6 years from the date of advice.

On the face of it, limitation for claims in tort only runs from when the claimant first suffers damage. Claimants often use this fact to their advantage by asserting that they did not suffer loss until long after they received negligent advice, effectively giving them more time to bring a claim.

Yet the decision of the Commercial Court has added to a number of recent decisions that have variously held that immediate loss is suffered:

- on contracting to meet potential future liabilities, even though such liabilities may never arise;
- on entering into a contract that contains less protection than it should have, even if the event that should have been protected against might not occur;
- on entering into an investment involving greater risk than was acceptable, even though the investment might have performed well;
- on buying shares that unnecessarily resulted in exposure to tax liabilities, even though such liabilities might never have accrued; and
- on issuing indemnity insurance in respect of risks greater than expected, even though payments under the policies might never have been required.

Accordingly, where a professional gives advice in relation to a transaction, loss is likely to be suffered when the claimant enters into the transaction and gets less than expected or faces unexpected risks. This will be the case despite the fact that the actual loss being claimed might not have crystallised until later.

The consequences of this are:

- the time limit for bringing claims against professionals in tort is becoming very similar to the time limit for bringing claims in contract;
 - professionals and their advisers should carefully consider limitation in respect of any claim issued more than 6 years after advice was given; and
 - unless able to rely on s. 14A (in respect of damages they were unaware of), claimants should think very carefully before delaying the issue of proceedings more than 6 years after the date of advice.
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How to Reduce Fraud Risk

A business can protect itself from fraud by:

- being wary of false accounting, particularly where there are close relationships between the sales team and customers or the buying team and suppliers;
- ensuring bonus structures are fair, transparent and aligned to the behaviour you wish to reinforce;
- ensuring proper control and management attention over remote locations;
- using zero based budgeting rather than relying on trends over recent years;
- paying attention to “service areas” of the business like maintenance or advertising to reduce risk of procurement fraud;
- assessing IT vulnerability. Appropriate administrative controls and passwords, preventing installation of unauthorised software, restrictions on USB ports and use of effective anti-virus and anti-spyware protection can reduce the fraud risks;
- not overlooking over-performance. If something is too good to be true it is probably because it is!
- reviewing changes to supplier and customer master-file data to ensure they are valid;
- monitoring the lifestyle of managers including cars, clothes, jewellery, holidays to ensure it is commensurate with their salary;
- following up references on recruitment;
- paying attention to morale. Fraudsters are often dissatisfied with their work; and
- investigating high staff turnover and performing exit interviews. It is often easier to leave than whistleblow.

Directors’ fiduciary duties: Inactivity may be a breach of duty

In a recent case, Lexi Holdings PLC (in administration) v Lugman and others, the Court of Appeal has ruled that, where a director commits fraud, his or her fellow directors are in breach of their own duties to the company in allowing the fraud to happen, and cannot defend themselves on the grounds that the fraudster would have deceived them if they had tried to prevent the fraud. The case reiterates an earlier judgement where it was said that it is in itself a breach of duty by the remaining directors to allow themselves to be dominated or bamboozled by one of their number.

The key point was “that any individual who undertakes the statutory and fiduciary duties of being a company director should realise that these are inescapable personal responsibilities”.

The decision emphasises that a court is highly unlikely to accept as a defence to a claim for breach of duty that the individual director concerned played no active part in the company’s management. In this case, Lexi correctly asserted that had 2 of the directors each fulfilled their fiduciary duties and common law duties as directors of Lexi the losses arising from the third director’s breaches of duty and misappropriations would have been prevented or not have occurred.

Those accepting positions as directors must ensure that they familiarise themselves with, and participate in, the business, particularly the decision making processes. Directors must exercise independent business judgement and be prepared to challenge others on the board – whoever they are. If they disagree with a board decision they should ensure this is evidenced in the company’s minutes. In the final analysis they may have to resign.

Partnership agreements: Liability of former partners to repay drawings

In a recent case, *Hammonds (a firm) v M. Dani Lunas and 13 others*, the High Court held that in the absence of an express provision to the contrary, the Partnership Accounts, which act as a profit and loss account, drawn up by a firm of solicitors for a particular year are binding on all former partners who left the firm before the accounts were prepared and delivered, but were partners at some time during that year.

If, based on anticipated profits, the former partners have ended up drawing profits which exceed their share of the final yearly profits subsequently outlined in the Partner Accounts, they will be liable to repay the difference.

Charities – New regulatory thresholds

The thresholds for various regulatory requirements and other issues for charities have been revised from 1 April 2009. The changes are made by SI 2009/508 "Charities Acts 1992 and 1993 (Substitution of Sums) Order 2009".

- Registered charities will be required to submit their annual accounts and Trustees Annual Report (TAR) to the Charity Commission if their income exceeds £25,000 (previously £10,000)
- Charities that are not companies will be required to prepare their accounts on an accruals basis for any financial year in which their gross income exceeds £250,000 (previously £100,000). Below this threshold, charities can opt to prepare their accounts on the receipts and payments basis.
- Charities will be required to have their accounts externally examined if their income exceeds £25,000 (previously £10,000).
- Charities with gross income in a financial year exceeding £250,000 (previously £100,000) but not exceeding £500,000 will be required to have their accounts for that year audited if their total assets are worth more than £3.26m (previously £2.8m).
- The consideration limit below which a charity can recover the costs of proving its title to a rent charge, is £1,000 (previously £500).
- The remuneration thresholds which determine whether certain persons are professional fundraisers are being increased. In future, a person will be a professional fundraiser if their relevant income exceeds £10 per day or £1000 per annum (previously £5 per day and £500 p.a.).
- Corresponding changes are made to the earnings limits which determine whether a person is required to comply with any of the fund-raising controls in s 60A of the Charities Act 1992.
- Under the 1992 Act, there are qualified rights of refund for donors who make payments of £50 or more in response to certain types of appeal (these include, for example, broadcast appeals). These provisions are to be amended so that only donors making payments of £100 or more in response to such appeals can benefit from these rights.

Auditors Reports for Charities

The APB have issued Bulletin 2009/1 "The Auditor's Reports – Supplementary Guidance for Auditors of Charities with 31 March 2009 Year Ends" supplementing Practice Note II "The Audit of Charities in the UK". It provides illustrative examples of auditors' reports for charities in England & Wales, in Scotland and in both jurisdictions for accounting periods starting on or after 1 April 2008 and ending before 6 April 2008 i.e. effectively for the year ending 31 March 2009.

This guidance only applies to accounting periods beginning in this 5 day period. Separate guidance will be issued for charities with accounting periods commencing on or after 6 April 2008 (when the Companies Act 2006 will apply) in due course. Charities with years starting before 1 April 2008 should use the old guidance.

Proceeds of Crime – Criminal Restraint Orders

A recent House of Lords judgement, King v Director of Serious Fraud Office, has confirmed the position that a restraint order (i.e. an order preventing dealing with specified property) brought under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181) cannot be made in respect of assets outside England & Wales.

The Order gives effect to provisions in the Proceeds of Crime Act 2002 that enable assistance to be given by our criminal courts to foreign authorities and courts to protect and/or seize property in support of criminal investigations or proceedings in the foreign country.

A restraint order can be granted when a request is made by an overseas authority to prohibit a party from dealing with property specified in the request, if there is reasonable cause to believe that the party has benefited from criminal conduct and proceedings for an offence or a criminal investigation have begun in that country. The House of Lords held that on the wording of the Order it was not possible to make a restraint order in respect of property outside England & Wales. This contrasts with civil proceedings where a worldwide freezing order can be made to preserve property.

As a result we are left with the unusual position that the civil courts, when assisting foreign litigation, can prevent dealing with and disposing of assets in any jurisdiction, whereas the criminal courts, when assisting foreign criminal proceedings, only have jurisdiction over assets in England or Wales. Time will tell whether the legislature decides to remove this discrepancy.

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