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Corporate

Companies Act 2006: the next instalments

This article is one of a series that we have published on the implementation of the Companies Act 2006 (**"2006 Act"**) and focuses on the provisions due to come in to force on 6 April 2008. Before looking at these, we comment on two significant changes that have been made in respect of other provisions already in force.

Changes to provisions already in force

(1) Elective resolutions

With effect from 1 October 2007 most elective resolutions were dispensed with. This led to uncertainty for those companies required under their Articles of Association to hold AGMs but which also had an elective resolution under section 366A Companies Act 1985 (**"1985 Act"**) in place. The position has now been clarified so that such a company, with an elective resolution in place immediately prior to 1 October 2007, does not need to hold AGMs.

(2) Chairman's casting vote

On 1 October 2007 the new definition of "ordinary resolution", contained in section 282 Companies Act 2006, came into effect. The wording of this section was such that it appeared to conflict with and override the ability to provide the chairman of a shareholders' meeting with a casting vote. The second amendment to the interim Table A regulations confirmed this by removing the chairman's casting vote from the new Table A and clarifying, in the guidance notes, that there was indeed a conflict between the existence of the chairman's casting vote and the new legislation. The resulting position was that any Article which purported to provide the chairman with a casting vote was void, regardless of when the company was incorporated. Naturally this would have had serious consequences on those companies which relied on the chairman's casting vote to resolve a deadlock in the case of an equality of votes.

The Fifth Commencement Order under the 2006 Act has gone some way to reinstating the status quo by allowing a company's Articles, which contained provision for a chairman's casting vote immediately prior to 1 October 2007, to remain valid regardless of the new legislation. Any companies which have changed their Articles to remove the casting vote since 1 October 2007 may also validly reinstate this. However, the chairman's casting vote will not be available to companies formed after 1 October 2007, which means that new companies will need to consider alternative methods for preventing a deadlock where an equality of votes is a possibility.

This provision came into effect on 14 January 2008.

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New provisions due to come into force on 6 April 2008

(1) Accounts

Under the 2006 Act, much of the previous legislation relating to accounts and reports remains the same or contains only minor amendments, the most noteworthy changes being as follows:

Time limit for filing accounts
The time limit for the filing of accounts of both public and private companies has been reduced. Private companies have 9 instead of 10 months and public companies have 6 instead of 7 months from the end of the relevant accounting period to file their accounts.

Abolition of 'medium sized' group exemption
The 'medium sized' group exemption, which exempted the parent company of a medium sized group from preparing group accounts, has been abolished.

Financial thresholds for determining small and medium sized companies and groups
The financial thresholds for determining small and medium sized companies and groups have been revised as follows:

Small company
Thresholds from 6 April 2008
- Turnover of not more than £6.5 million
- A balance sheet total of not more than £3.26 million
- Not more than 50 employees

Small group
Thresholds from 6 April 2008
- Aggregate turnover not more than £6.5 million net (or £7.8 million gross)
- Aggregate balance sheet total of not more than £3.26 million net (or £3.9 million gross)
- Aggregate employees not more than 50

Medium sized company
Thresholds from 6 April 2008
- Aggregate turnover not more than £25.9 million
- A balance sheet total of not more than £12.9 million
- Not more than 250 employees

Medium sized group
Thresholds from 6 April 2008
- Aggregate turnover of not more than £25.9 million net (or £31.1 million gross)
- Aggregate balance sheet total of not more than £12.9 million net (or £15.5 million gross)
- Aggregate employees not more than 250

New directors' duty to ensure accounts give true and fair view
Directors now have a specific duty not to approve a company's accounts unless they are satisfied that they give a true and fair view of the assets, liabilities, financial position and profit and loss of the company. Prior to this amendment, the accounts were required to provide a true and fair view but there was no specific duty upon the directors. Directors will now need to ensure that they are satisfied that this requirement has been fulfilled before they sign off the accounts. A breach of this duty will result in an offence being committed by every director who knew or was reckless with regard to the duty.

Obligation for quoted companies to publish accounts on website
There is a new obligation on quoted companies to publish their annual accounts and reports on their website. The accounts must be uploaded onto the website 'as soon as practicable'. Access to the website must be unrestricted, continuous and free of charge and the information must remain on the website until replaced with the following year's figures.

(2) Auditors

Under the 2006 Act, the majority of the previous legislation is restated except for a few additions and changes. Two of the most notable of these are the deemed reappointment of auditors of private companies in the absence of a new appointment and the ability of an auditor to limit his liability.

Deemed reappointment
Where a private company fails to appoint a new auditor or to renew the auditor's appointment, the current auditor will be deemed reappointed unless:

- the auditor was appointed by the directors;
- the Articles of the company require re-appointment;
- members with 5% or more of the voting rights resolve that the auditor should not be reappointed; or
- the directors resolve that no auditors are to be appointed for the next financial year

Where a company has passed an elective resolution to dispense with the annual appointment of auditors and that resolution was in force immediately prior to 1 October 2007, the auditors will be reappointed in accordance with that resolution, despite the provision preventing the deemed reappointment of auditors who have been appointed by the directors.

Limitation of liability
Auditors may now limit their liability for negligence, default and breach of duty or trust in relation to the auditing of a company's accounts. Any limitation must be recorded in a limitation of liability agreement, the terms of which will be governed by the Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2007, which are also due to come into force on 6 April 2008.

The limitation of liability can only go so far as is fair and reasonable having regard to the auditor's responsibilities under the 2006 Act, the nature and purpose of their contractual obligations to the company and the professional standards expected.

It is likely that auditors will take advantage of this ability to limit their liability and companies may see an increase in such agreements being a condition of an auditor's agreement to be appointed.

(3) Distributions

Part 23 of the 2006 Act (sections 829 to 853) will replace Part VIII of the 1985 Act (sections 263 to 281) and certain common law rules in relation to distributions. The key change is the resolution of uncertainties in connection with intra-group transfers of assets for book value, where book value is less than market value. The generally accepted principle was that such a transfer constituted a distribution in kind and the question was how to value the distribution and so determine whether or not it was lawful as being covered by the appropriate level of distributable profits. The majority of practitioners took the view that where the transferring company had positive distributable reserves (at least £1) the distribution should be calculated by reference to the asset's book value. On the other interpretation, the transferring company would have needed to have distributable reserves equal to the difference between the market value of the asset and the book value actually received for it. The 2006 Act now clarifies the issue.

Section 845 of the 2006 Act provides that if a company has profits available for distribution and disposes of a non-cash asset:-

(i) for consideration of not less than book value, the amount of the distribution will be taken to be zero;

(ii) for consideration of less than book value, the amount of the distribution will be taken to be the excess of the book value over the amount or value of the consideration.

Section 845 only applies to determine the amount of the distribution where the transferring company has distributable reserves sufficient to cover the distribution. It is suggested that in the case of sub-paragraph (i) above distributable profits of £1 will suffice, and for the purposes of that sub-paragraph the company's profits available for distribution will be treated as increased by the amount (if any) by which the amount or value of the consideration exceeds the book value.

In the case of sub-paragraph (ii) the company would need to have distributable profits equal to the amount of the relevant excess. If in either case the transferring company did not have the requisite level of distributable profits the amount of the distribution in kind would be determined by reference to the company's relevant accounts in the normal way.

Section 845 preserves the position in the Aveling Barford case that where a company has no distributable profits a distribution of assets at an undervaluation will be unlawful.

It is thought that after 6 April 2008 few companies will feel deterred from transferring assets intra-group at book value.

(4) Company secretaries

Section 270 of the 2006 Act will replace Section 283(1) of the 1985 Act, so that a private company will no longer be required to have a secretary. A private company may still choose to have a secretary and all public companies will remain obliged to appoint one.

Any private company whose Articles of Association in force immediately before 6 April 2008 require it to have a company secretary will be considered a company "with a secretary", so that the Articles would need to be altered if the company no longer wished to have a secretary.

Any appointment of a secretary of a private company in force on 6 April 2008 will not be affected by Section 270 but will continue in force until brought to an end in the usual manner, e.g. by resignation or a resolution of the directors. At that stage, if permitted by its Articles, the company may elect not to appoint a new secretary.

In the case of a company "without a secretary" anything authorised or required:-

- to be done by or to the secretary may be done by or to a director;
- to be given or sent to, or served on, the company by being sent to its secretary may be given or sent to, or served on, the company itself and, if addressed to the secretary, shall be treated as addressed to the company.

It is difficult to say how many private companies will take advantage of the exemption from the requirement to have a secretary. Perhaps in practice many will prefer to retain a nominated officer to carry out the specific duties that have traditionally been the role of the secretary.

(5) Transfer of shares and debentures

New provisions have been brought in regarding the registration of shares and debentures. The legislation relating to each is designed to mirror the other to ensure uniformity.

Companies now have to register transfers and allotments made after 6 April 2008 as soon as practicable and in any event within two months from the allotment being made or the transfer being lodged. If a company refuses to register a transfer or allotment, it must provide the transferee with reasons for refusal.

(6) Signature provisions

Changes have been made to the way in which a company can sign documents. These are mainly to cater for the fact that private companies no longer need to have a company secretary.

A document will be validly signed if it is signed by two authorized signatories or one director in the presence of a witness who attests the signature. 'Authorized signatories' are defined as directors and where applicable the company secretary. The main consequence is that a single director will now have the power to execute documents and deeds provided his signature is duly witnessed. This applies regardless of the number of directors or whether the company has appointed a secretary.

Emma Healey, Solicitor ehealey@phb.co.uk
Diana Haines, Solicitor dhaines@phb.co.uk

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