

*The Companies Act 2006:
Private Companies*



The Companies Act 2006 received Royal Assent on 8 November 2006. The Act will be fully implemented by October 2009, although some parts have come into force prior to that. This briefing summarises the changes in the Act, that are of particular relevance to private equity firms and indicates when these key changes came or will come into force. We have prepared similar briefings for investee companies and for listed companies, which are available on our website at www.traverssmith.com.

Directors subject to statutory duties

The Act contains statutory duties for directors, which apply to executive and non-executive directors alike, and in some cases, to former directors. The statutory duties are based on, and replace, the previous common law duties, and are designed to make the law more accessible. The statutory regime includes familiar concepts such as duties to exercise reasonable skill and care and not to accept benefits from third parties.

The Act has introduced codified rules on directors' conflicts of interest. A conflict of interest or potential conflict of interest involving a director (other than in relation to a transaction with the company) can be authorised by the non-interested directors, save where the company's articles prohibit them from doing so. Directors must also still declare their interests in transactions with the company, but the declaration may be made in writing rather than in person at a board meeting.

The statutory duties come into force on 1 October 2007, apart from the new rules on conflicts, which came into force in October 2008.

Directors' service contracts

Since October 2007, shareholder approval has been required for directors' service contracts exceeding two years.

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 procedure came into force on 1 October 2007, at the same time as the statutory duties for directors came into force. Directors of high-profile companies should consider whether to minute key board decisions with extra care to demonstrate that the directors 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.

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Directors' home addresses may be kept confidential

From 1 October 2009 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 (although there are circumstances in which this information may need to be disclosed to specified public bodies). 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 register to remove such details.

Companies' memorandum and articles are to be simplified

The Government has published new Model Articles of Association, which will be effective from 1 October 2009. These articles are shorter and simpler than Table A and are written in plain language. Table A will remain in force, so existing companies with Table A-based articles will not need to adopt new articles, but many are expected to amend their articles in due course to reflect the new model articles and to take advantage of other new freedoms in the Act itself. Also, the memorandum of association will be much simplified, and will no longer restrict the scope of the company's activities unless it has a restricted objects clause in its articles.

Private companies will no longer have to have a company secretary

The requirement for a private company to have a company secretary was abolished, with effect from 6 April 2008; however, private companies can retain a company secretary if they wish (provided they continue to file details of the secretary at Companies House), and many larger private companies are expected to do so. Directors of private companies who have chosen to do without a secretary will need to ensure those duties undertaken by the company secretary prior to 6 April 2008 are taken care of, and should also check their articles and key contractual arrangements for references to the company secretary.

No statutory prohibition on financial assistance for private companies

The statutory prohibition on financial assistance was abolished in relation to acquisitions by private companies of shares in private companies with effect from 1 October 2008, the "whitewash" procedure in the 1985 Act is no longer of relevance.

Written resolutions will no longer require unanimity

Since October 2007, under the Act, private companies are able to pass written resolutions without needing the consent of all shareholders. It is now possible for any resolution to be approved by shareholders in writing with simple majority for an ordinary resolution and a 75% majority for a special resolution. This should avoid the need to convene a general meeting to pass shareholders' resolutions in most cases.

AGMs will no longer be required

Since 1 October 2007, private companies no longer need to hold AGMs unless they positively elect to do so. However, the transitional provisions preserve any express requirement in a private company's articles for an AGM to be convened, so any such requirement will need to be removed by special resolution before a company can dispense with the obligation to hold an AGM.

Authorised share capital is to be abolished

From 1 October 2009, companies will no longer be required to have an authorised share capital (i.e. a limit on the maximum amount of share capital which can be allotted). Shareholder approval for share issues will also cease to be a statutory requirement unless the company has more than one class of shares (or is a public company). This will mean that, from October 2009, the directors of a private company with only one class of shares will be free to allot shares up to an unlimited amount (subject to statutory pre-emption rights on cash issues), unless the company introduces restrictions in its articles or elsewhere on share issues taking place without shareholder approval. However, the transitional provisions 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.

Reductions of capital permitted without court approval

From 1 October 2008, private companies will be able to reduce share capital or cancel all or part of their share premium account without having to go through the lengthy court process which is currently required. The reduction will be based on a solvency statement made by the board and approved by shareholders.

Shorter time period for filing accounts

With effect from 6 April 2008, the time period for filing private companies' annual reports and accounts has been reduced from 10 months to 9 months after the year end (for reports and accounts relating to financial years commencing after that date).

Auditors may agree contractual limits on their liability

After much debate, with effect from 6 April 2008, the Government decided to allow auditors to agree 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 limit must reflect a "fair and reasonable" proportion of the liability bearing in mind the role and responsibility of the auditors. To date we are not aware that any investee companies (or any listed companies for that matter) have entered into such LLAs.

Companies are able to communicate with shareholders electronically

From January 2007, the Act has facilitated greater use of electronic communications between companies and their shareholders. Many listed companies have been taking advantage of this regime to send meeting notices and annual reports and accounts to shareholders by e-mail or by publishing them on the company's website. Certain private companies with a large shareholder base have chosen to do the same. To use e-mail, shareholders must provide an e-mail address for this purpose. To use the website, shareholders must be asked individually if they wish to receive information in this way, but if they fail to respond within 28 days, they may be deemed to have agreed provided the shareholders as a body have passed a resolution approving the use of website communications, or the articles authorise website communications.

Execution of Deeds

From 6 April 2008, in addition to the existing execution formalities for deeds, which shall continue to apply, deeds may be signed by a director in the presence of a witness. This will apply to all companies, not just to those companies that have sole directors.

If you would like more information on any of the topics discussed in this Note, please contact your usual contact at the firm.

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