Measures affecting all companies

CONTENTS:

Governance

Directors (Part 10)

As from 1st October 2007, there is a statutory statement of directors' duties, including the controversial 'enlightened shareholder value' duty and changes to the provisions on directors' conflicts of interest.

A minimum age limit of 16 for directors, and provisions relating to natural and corporate directors, will be introduced; the Government is consulting as to whether this should be from 1 October 2009 or earlier.

Engaging with indirect/beneficial shareholders who hold through a nominee (Part 9)

From 1 October 2007, the Act introduced a process for enabling indirect investors to receive information and participate in corporate actions, but does not go as far as giving them voting rights (as was originally proposed by the Lords) as this would have been unworkable and expensive. Shareholder engagement is instead promoted by allowing any company to permit members to nominate one or more persons (to cater for where a nominee holds on behalf of more than one person) as proxies, who can then exercise all of the rights attaching to the shares (save for selling the share). However, only the member can enforce those delegated rights by bringing an action against the company.

Constitution (Part 3)

A company's constitutional documents will change. The company memorandum will become a formal document recording the position at the point of registration, with just the articles being the continuing constitutional document. Companies will also no longer be required to specify their objects.

Resolutions, meetings and administration

See Specific legislative changes affecting private companies for the deregulatory measures for private company meetings and written resolutions, and Measures affecting **quoted** PLCs, including those applicable to all PLCs for the requirements for quoted companies to publish poll results on their website.

Easier electronic communication with shareholders

From 20 January 2007, electronic communications with shareholders by email, or via a website with notification, are permitted provided the individual shareholder consents. If consent is requested but no response is received, consent to website communication (with notification) can be implied if the articles or shareholder resolution authorise such implied consent. Shareholders always have the right to subsequently request a hard copy.

Other company administration

From 10 October 2009, the register of directors held for public inspection by the company may contain service addresses, provided the company keeps a private register of their residential addresses. Details of other directorships no longer need to be included, and a register of directors' interests in no longer required.

Improved rules for company names (Part 5)

From 1 October 2009, company names will be easier to change, allowed to contain symbols, and opportunistic registration or 'cyber squatting' made more difficult.

Retention of records (ss 121,248 and 355)

Records of board and shareholder resolutions and meetings will need to be retained for ten years (rather than indefinitely).

Accounts (Part 15)

For financial years commencing on or after 6 April 2008, directors will have a new general obligation not to approve accounts unless they give a true and fair view of the financial position of the company - this requirement has been introduced to address investor concerns about the perceived "watering down" of the true and fair concept in accounts.

For financial years commencing on or after 6 April 2008, annual accounts and reports need not be sent to persons for whom the company has no current address.

From October 2009, there is also no longer a requirement for the accounts filed with the registrar to be signed, to reflect the move towards electronic filing at Companies House.

Narrative reporting requirements

On 20 January 2007, a new statutory liability regime was introduced (s 417), effectively incorporating a safe harbour for information in directors' reports and directors' remuneration reports. This provides that a director is liable only for untrue/misleading statements if the director knew or was reckless that it was so or if an omission was a dishonest concealment.

For financial years beginning on or after 1 October 2007, the directors' narrative reporting requirements (s 473) are revised to include a new statutory purpose for the directors' business review, which is to inform shareholders and allow them to gauge how well the directors have performed their 'enlightened shareholder value' duty (see directors' duties above).

There are no statutory reporting standards for the business review but the ASB has issued Reporting Statement 1 which contains non-statutory guidance, and the auditor's review is limited to whether it is consistent with the accounts.

Accounting records

A company's duty to keep accounting records (ss 386-389) has been re-worded to be a requirement to keep 'adequate accounting records', although the definition of 'adequate accounting records' restates the existing requirements. The requirement on auditors also now uses "adequate" instead of "proper" (s 498).

Audit (Part 16)

There are new provisions allowing companies to agree to limit their auditor's liability, and companies should note that they, as well as the auditors, will have notification duties when they change auditors, i.e. there is a double notification regime. More on Audit

Companies House/registrar

From 1 January 2007, filings with the registrar can mostly be made electronically (s 1068 (5)).

Directors' and shareholders' service addresses

From October 2009, there will be an option for all directors (s 165-168) and shareholders to file a service address on the public record rather than a private address. These rules will not help those whose current home addresses appear on the record. However, additional regulations are expected which will allow an address already on the record to be removed in certain circumstances. Subject to court approval, a company will also be able to refuse public access to information relating to its shareholders (including home addresses) if the request is not for a 'proper purpose'. As a further response to concerns regarding activist groups and 'boiler room' scams, the Government has indicated that, subject to consultation, it will exempt a public company from having to disclose publicly details on shareholders who hold less than 5% of shares and will exempt a private company from having to disclose shareholders' addresses.

Share capital and distributions (Parts 17 and 23)

The concept of 'authorised share capital' is abolished

From 1 October 2009, a company will no longer need to have an authorised share capital. Instead, shares in a limited company must have a fixed nominal value. On application to register the company, a statement of share capital and initial holdings, including details of the total number of shares and their aggregate nominal value, will need to be made. (The default position for a private company with one class of shares will be that its directors can allot up to any number of shares unless its articles provide otherwise. For other companies, authority will need to be given by the articles or shareholders and, as before, a ceiling will need to be placed on the maximum number of shares which can be allotted.)

Redenomination (ss 622-628)

From 1 October 2009, there will be a new mechanism under which companies can redenominated their share capital in a different currency, without needing to cancel and reissue shares.

Deferred redemption payment (s 686)

From 1 October 2009, companies will be able to redeem shares on deferred terms, effectively facilitating shareholder loans to the company.

Share premium (ss 610-616)

From 1 October 2009, the uses for the share premium account are tightened up and (other than bonus issues) it can only be used to absorb costs in respect of the particular shares on which the premium arose.

Aveling Barford - Intra-group transfers at undervalue (s 845)

From October 2009, the Act codifies the common law rule (established in *Aveling Barford)* that a company which does not have any distributable profits is making an unlawful distribution if it makes an intra-group transfer of an asset at an undervalue (i.e. at less than market value). It also clarifies that where a company has distributable profits, the amount of any distribution resulting from an intra-group transfer of a non-cash asset is calculated by reference to the book value of the asset. If it is transferred at book value, the amount of the distribution is zero and, if it is transferred at less than book value, it is equal to the difference between the book value and the consideration paid. If the difference is covered by distributable profits, the distribution is lawful. If a company wishes to make an intra-group transfer of assets and does not have any distributable profits, its directors will need to be satisfied (with an expert's valuation, if necessary) that the transfer will be made at market value.

Capital maintenance reform

The Institute was disappointed that the reform power for distributions provisions was removed from the Bill at a late stage. We will continue to urge the DTI to consult on an alternative regime as a matter of urgency as we believe that this is an unacceptable burden on business. Unfortunately, any such reform will need to be implemented by primary legislation and so there needs to be a very persuasive case for change and therefore business needs to engage with the DTI to discuss the problems they face under the current regime. The Act does include a reserve power (s 654) to enable the Government to legislate that surpluses arising on capital reductions are realised and distributable, which is a measure we lobbied for as this may assist companies to augment distributable profits in the meantime before more fundamental reforms can be implemented. Any such fundamental reform would be limited to private companies until the EU changes their rules for public companies, which the EU has recently consulted on, and commissioned a study from KPMG. Also relevant is a recent FEE paper looking at possible alternatives, including a solvency based regime:

- FEE Discussion Paper on Alternatives to Capital Maintenance Regimes

Other

Indemnities for directors of corporate trustees of pension schemes

A company will now be able to indemnify a director of a company (including a director of an associated company) that is a trustee of an occupational pension scheme for liability incurred in connection with the company's activities as a trustee of that scheme, including liability incurred in civil proceedings against the director and the costs of defending himself or herself in those proceedings irrespective of their outcome. This addresses an anomaly following the relaxation on directors' indemnities in the Companies (Audit, Enterprise and Community Enterprise) Act 2004.

Flexibility of company law

The Government withdrew the general reform power that had been intended to simplify updating the law.