

news

Companies Act 2006 – The Next Wave

October 2008 sees the next wave of sections under the Companies Act 2006 (the Act) come into force. Occupational pension schemes with corporate trustees will no doubt already be familiar with provisions of the Act which have already surfaced (such as those relating to the protection of directors from liability¹). Here we focus on changes on the immediate horizon.

The Act

A quick reminder

- Essentially a consolidation, the Act is the UK's largest ever Act of Parliament.
- The Act draws together existing company law requirements (as well as introducing new ones) relating to directors' duties and the conduct of private companies.
- After a few delays in implementation, the Act is now due to be fully in force by October 2009.

Duty to avoid conflicts

From 1 October 2008

The authorisation life jacket

- The Act places a duty on directors of a trustee company to avoid a conflict of interest (whether actual or potential).²
- The good news though is that a conflict can be authorised (allowing a trustee director to continue to act) either by the board of directors or via the company's articles of association.³
- Authorisation should ideally be given as soon as the potential for conflict arises.
- The wording of the transitional regulations means that (in an existing trustee company) the trustee board's power to authorise conflicts needs to be approved by the trustee company's shareholders.

Declaring an interest

From 1 October 2008

- A trustee director will have to declare the nature and extent of any interest in an existing or proposed transaction to the rest of the trustee board.
- This requirement will apply to a trustee director who is also a member of the pension scheme.
- Routine declarations could be set out in a register of interests, provided that this is regularly brought to the trustee board's attention.

¹ See our Alert: "The Companies Act 2006 – Exonerations and Indemnities" dated 8 August 2007

² This applies in addition to existing trust law requirements

³ Such authorisation can set out the ways in which a potentially conflicted director is permitted to act by dealing, for example, with attendance and voting at meetings

Benefits from third parties

From 1 October 2008

- Directors must not accept benefits from third parties.
- Aimed primarily at bribes and secret commissions, but employers and trustee companies should check that arrangements for remunerating trustee directors do not breach this duty.
- Although payments made by associated companies will not be caught (as they are not “third parties”), problems could arise where a sponsoring employer remunerates directors of a trustee company which is not part of the same group as the sponsor.

Execution of deeds

Since 1 April 2008

- Provisions of the Act already in force provide greater flexibility for executing documents (including deeds), either by:
 - affixing the company’s common seal;
 - the signature of two authorised signatories (i.e. directors or the secretary, if any); or
 - a single director in the presence of a witness who attests the signature.

The flotsam and jetsam

Already in force

- Private companies no longer have to appoint a company secretary (although trustee companies are likely to continue to need someone to fulfil this role).
- The process for passing written resolutions of shareholders has changed.
- The period for submitting reports and accounts to Companies House for private companies has been reduced to nine months (from ten).

Action points

- Civil or criminal sanctions may apply to non-compliance with certain duties under the Act.
- Trustee companies should therefore discuss those provisions coming into force from 1 October with their advisers as soon as possible.
- Down the line, a trustee company’s articles may need to be updated to reflect the Act’s requirements (including those due to dock in October 2009).