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Companies Act 2006 — 1 October 2008 Provisions

Background

This note highlights the principal changes introduced by The Companies Act 2006 (the "2006 Act") that are to come into effect on 1 October 2008 and the practical consequences for companies.

The remaining provisions of the 2006 Act will come into force on 1 October 2009 and we will produce a note in respect of such changes at that time.

Main Provisions

1. Directors

There are a number of significant changes in relation to the appointment of, and the duties imposed on, directors. These include:

(a) Directors' General Duties

The following statutory duties are introduced on 1 October 2008 in addition to the statutory duties which came into effect on 1 October 2007:

(i) Duty to avoid conflicts of interest

A director must avoid situations in which he has, or can have, a direct or indirect interest that conflicts with, or may conflict with, the company's interests. This duty does not apply to a conflict of interest arising in relation to a direct transaction or arrangement between the director and the company (these simply need to be declared to the board of directors). The duty is not breached if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter is authorised by the board. Such board authorisation may be given in a private company where the constitution does not invalidate the authorisation, or, in a public company, where the constitution specifically allows the board to authorise the matter being proposed. This represents a

change to the previous requirement of shareholder approval for such conflicts of interest of directors.

(ii) Duty not to accept benefits from a third party

A director must not accept any benefit from a third party which is conferred because of his being a director or his doing or not doing anything as a director. This duty is not breached if acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest. Benefits conferred by the company, its holding company or subsidiaries and benefits given under the director's service contract are excluded. A director obtaining a benefit from a third party can only be authorised by the shareholders of the company, rather than by the board.

(iii) Duty to declare an interest in a proposed transaction or arrangement with the company

Directors must declare to the rest of the board the nature and extent of any interest, direct or indirect, in a proposed transaction or arrangement with the company. Such declarations must be made before the company enters into the transaction or arrangement. Similar provisions of the 2006 Act deal with existing transactions and arrangements between directors and companies.

Companies should therefore review their Articles and consider whether they need to update them to reflect the new provisions of the 2006 Act in relation to directors' duties — in particular, in the case of public companies, whether they should now allow the board to authorise directors' conflicts. Companies' procedures for the disclosure and management of conflicts will also need to be considered — a director is no longer able just to abstain from discussions of matters where he has a conflict of interest

— simply allowing a potential conflict to arise may itself put him in breach of his duties.

(b) *Appointment of Directors*

All companies are now required to have at least one director who is a natural person. The 2006 Act also introduces a minimum age of 16 years for directors of all companies. Existing directors who are under 16 years of age on 1 October 2008 will automatically cease to be directors.

Companies should therefore ensure that, from 1 October 2008, they have the requisite number of natural persons as directors — two in the case of a public company and one in the case of a private company.

2. *Financial Assistance*

The 2006 Act abolishes the prohibition on a private company providing financial assistance for the acquisition of its own shares or shares in its private holding company, although the prohibition on public companies providing financial assistance remains in force from 1 October.

This should reduce the time and costs of the “whitewash” procedure that private companies are currently required to follow if they wish to provide financial assistance.

3. *Share Capital Reduction*

(a) *Solvency Statement Procedure*

A company may reduce its share capital for various reasons, such as returning surplus capital to shareholders or removing accumulated losses that prevent the payment of dividends. In addition to the existing court-approved procedure for a share capital reduction, a private limited company will now also be permitted to reduce the amount of its share capital by passing a special resolution supported by a solvency statement made by all of its directors. This should provide a simpler and less expensive option for companies than the court-approved procedure.

A company using the new solvency statement procedure will not be able to reduce

its share capital to zero. There must be at least one member of the company holding at least one non-redeemable share. If a company wishes to reduce its share capital to zero, it must use the court approved procedure.

(b) *Distribution of Reserves*

Whilst there is no requirement in the 2006 Act to create a statutory reserve following a reduction of share capital, in these circumstances companies often create an accounting reserve to “balance the books”. Section 654 of the 2006 Act provides that, except in certain specific situations (including where a private company reduces its share capital using the solvency statement procedure and there is no application to court) such a reserve will not be distributable.

4. *Company Name Objections*

Any person or company may now object to a company name being registered at Companies House which they believe is the same as, or sufficiently similar to, one connected with them and in which they have goodwill or reputation. The relevant provisions are designed to combat the practise of “opportunistic registration”, whereby a company name is registered for the purpose of extracting money from another person who already has goodwill or reputation invested in that name or to prevent another person from registering that name. The application of these new provisions is retrospective and will, therefore, apply to companies registered before 1 October 2008.

The Company Names Tribunal is a new tribunal which will act as the adjudicator of disputes in relation to these provisions. The Tribunal is empowered to order that a company change its name and, if the company refuses to comply with such an order, select a new name for that company.

5. *Trading Disclosures*

The *Companies (Trading Disclosures) Regulations 2008*, made pursuant to the 2006 Act, sets out the places and manner in which a UK company must disclose its registered name and other registra-

tion details. The Regulations require a company to display the following details in all business letters and order forms and on its website — registered name, place of registration, registered number and registered office address.

In addition, a company is required to display its registered name at its registered office and its inspection place, wherever it carries on business (except where such location is primarily used for living accommodation) and at any location where it keeps records available for inspection. A dormant company is, however, exempt from the requirement to display its registered name at its registered office.

6. *Annual Return*

Annual returns made up to a date on or after 1 October 2008 will only require companies that are admitted to trading on a regulated market (which includes the Main Market of the London Stock Exchange but not AIM) to include shareholders’ addresses in the annual return and then only in respect of shareholders holding more than 5% of the company’s issued share capital.

7. *Other Provisions*

This note is only an overview of the principal provisions of the 2006 Act that come into force on 1 October 2008. Other provisions that come into effect on that date include:

- Parts 15 and 16 (accounts and audits of limited liability partnerships);
- Part 37 (power of court to grant relief in certain cases);
- Part 43 (restoration for personal injury claims of companies dissolved prior to 16 November 1969); and
- Part 44 (power of Treasury or Secretary of State to make certain regulations).

If you would like to discuss further any of the matters covered by this note, please contact James Green, Jennifer Lovesy or James Williams at this Firm.