

**COMPANIES ACT 2006**

**A-Z HEADLINE SUMMARY OF CHANGES**

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This summary of key changes has been prepared by Bristows' Corporate Group for general guidance only. If you require further information on the Companies Act 2006, or on any other area of company law, please contact the Partner or team member with whom you normally deal.

## **Accounts**

The following provisions came into effect on 6 April 2008:

- All companies are still required to circulate their annual accounts and reports (or summary financial statements) to members, debenture holders and to persons entitled to receive notice of general meetings [s. 423], but only public companies are obliged to lay their accounts and reports at a general meeting [s. 437]. Private companies need to circulate accounts before the accounts are filed [s. 424].
- The deadline for filing annual accounts and reports with the Registrar is now: nine months after the end of the relevant accounting reference period for private companies, and six months for public companies [s. 442].
- Quoted companies are required to make their full annual accounts and reports available on their websites. The annual accounts and reports must remain available on the website until the next year's report and accounts are published on the website [s. 430].
- Directors must not approve the accounts of the company unless they themselves are satisfied that the accounts give a true and fair view of the assets, liabilities, financial position and profit or loss of the company or, in the case of consolidated accounts, of the entire group [s. 393].
- The good news for directors (a so-called 'safe harbour') is that a director will only be liable to the company (and not investors) for misleading information in the directors' report or directors'

remuneration report (or summary financial statement to the extent derived from such report(s)), AND that director will only be liable if he knew or was reckless as to whether any statement was untrue or misleading or knew the omission to be dishonest concealment of a material fact [s. 463]. This came into force on 20 January 2007.

- Main market listed companies should take note that the company itself could be liable to compensate investors for false or misleading information in its financial information under proposed changes to FSMA. This liability will only arise if a person discharging "management responsibility" in respect of the published information knew of, or was reckless as to, the falsity of the statement, or knew an omission amounted to dishonest concealment [s. 1270] – see 'Periodic Financial Reporting' below.

## **Allotment of Shares**

From 1 October 2009:

- The process has been simplified in relation to private companies with only one class of shares. Directors no longer need prior authority from their members to allot shares (the old s. 80 resolution) unless their articles of association require it [s. 550]. Transitional provisions provide that companies incorporated before 1 October 2009 must pass an ordinary resolution in order to take advantage of the powers in s. 550.
- In all other cases the previous law is restated so that directors may only allot shares if they have been given prior authorisation by an ordinary resolution or by the articles of association

[s. 551]. The old definition of “relevant securities” has been abolished, and the Act distinguishes between shares and rights to subscribe for, or convert into, shares. Consequently, the content of shareholder resolutions (granting or renewing share authorities) has changed. An ordinary resolution will suffice, even if it overrides a provision in the company’s articles [s. 551(8)].

- Transitional arrangements mean that any s. 80 authority which was in place prior to 1 October 2009 continues to have legal effect.
- In addition to being required to deliver a return of allotments to the Registrar, within one month of an allotment of shares, companies must also register the allotment within two months of the allotment [s. 554, 555 and 556].
- The return of allotment by a limited company must be accompanied by a statement of capital (which is essentially a snapshot of the subscribed for capital at a particular point in time) [s. 555].
- The 1985 Act rules on pre-emption rights have been substantially re-enacted [s. 561-577 (inclusive)] although the definition of equity shares now expressly refers to ordinary shares [s560].

### **Annual General Meetings**

The following provisions came into effect on 1 October 2007:

- Only public companies (and in rare circumstances a private company which is a traded company) are required to hold AGMs. An AGM must be held within six months of the year end [s. 336], and a minimum of 21 clear days’ notice given.
- Transitional arrangements mean that express provision for an AGM in the existing articles of private companies continues to have effect. Consequently, if a private company wishes to dispense with holding AGMs it will need to amend its articles.
- A private company may, but is not required to, hold an AGM. If it does, at least 14 days’ notice (rather than 21 days’ notice) is required [s. 307(1)], although the rules governing short notice apply – see ‘General Meetings’ below.
- It is no longer necessary to produce the register of directors’ interests at the start of a company’s AGM, nor for it to remain open and accessible during the meeting.
- Notices can be given, and proxies returned, by email if shareholders agree – see ‘Electronic Communication’ below.
- From 3 August 2009, shareholders holding 5% of the voting rights in a main market listed company can require the company to include particular matters on the agenda for an AGM [s. 338A and s. 340A]. This was introduced under The Companies (Shareholders’ Rights) Regulations 2008/9 (“SRR”) which implemented the European Shareholder Rights Directive.

### **Articles of Association**

The following provisions came into effect on 1 October 2009:

- The principal constitutional document of companies is the articles of association (“articles”). The memorandum of association of a newly formed company has little significance after formation and (subject to rules for charitable companies) companies incorporated after 1 October 2009 are deemed to have unrestricted objects, unless their articles specifically restrict them [s. 31]. Consequently, if an existing company wishes to have unrestricted objects it will need to amend its articles so as to remove any existing restrictions.
- There are model form articles for public companies, private companies limited by shares and private companies limited by guarantee. The model private company articles are shorter and simpler than the current Table A. For example, they do not include any provisions in relation to shareholder meetings as it is anticipated that most private companies will pass the majority of their resolutions in writing rather than in general meeting. As was previously the case, companies can adopt all or as many of the provisions of the model articles as they choose. The final version of the model articles were published in December 2008 and the model article regulations were introduced from 1 October 2009.
- If the articles of an existing company refer to the current, or earlier, form of Table A then these will continue to apply to that company, unless that company chooses to update its articles.
- The general principle remains that a company may amend its articles by special resolution [s. 21(1)].
- It is no longer possible to entrench provisions absolutely (i.e. provisions that may not be altered or deleted) on formation.

It is, however, still possible to strengthen the rights of certain shareholder(s) by ‘conditionally’ entrenching provisions in the articles [s. 22].

- The benefit of this is that the conditions or procedure for amendment of such entrenched provisions can be more restrictive or onerous than a special resolution [s. 22(1)]. This is subject to the overriding principle that any amendment of the articles can be made by the unanimous agreement of all the members or court order [s. 22(3)].
- Transitional provisions preserve any existing absolute entrenchment provisions.
- Companies may only adopt entrenched provisions on their formation or with the unanimous agreement of all shareholders [s. 22(2)].

#### **Auditors: General**

- As under the previous law, the auditor of a private company is appointed by ordinary resolution or by the directors in the case of the first auditor or to fill a casual vacancy. There is a new provision under which auditors are deemed to be automatically re-appointed [s. 487(2)] unless certain conditions apply, including where members holding at least 5% of the shares (or less if prescribed by the articles) object to the re-appointment [s. 488]. These provisions came into effect on 1 October 2007.

The following provisions came into effect on 6 April 2008:

- The law on appointment of auditors of public companies is generally restated so that auditors are appointed by ordinary resolution at the general meeting at which the accounts are laid and there is no deemed re-appointment for auditors of public companies [s. 489].
- Auditors of quoted companies will always have to deposit at the company's registered office a statement of the circumstances connected with the firm ceasing to hold office [s. 519(3)], whereas unquoted companies retain the existing right for its auditors to submit a statement that there are no circumstances surrounding the resignation that need to be brought to the attention of members [s. 519].
- There is a new provision [s. 527] under which shareholders of a quoted company (who hold either at least 5% of the voting rights or are at least 100 in number and hold shares on which there has been paid up an average sum per shareholder of at least £100) are able to demand that the company publishes on its website statement(s) raising questions, about the audit of the accounts or about a departure of an auditor, that those shareholder(s) propose to bring up at the next annual general meeting. The company may only refuse to do so where it can be satisfied that the right is being abused.
- The statement required by [s. 528(4)(a)] must be made available on the company's website within three working days of the company receiving it and must be kept available until after the general meeting to which it relates [s. 528(4)(b)].
- Whilst the law is principally restated on the resignation or removal of auditors, the removal of an auditor by ordinary

resolution [s. 288(2)(b)] is one of the two resolutions that still must be passed at a meeting (and cannot be by written resolution) – see 'Written Resolutions' below.

### **Auditors' Liability**

The following provisions came into effect on 6 April 2008:

- One of the most significant changes is that auditors are able to limit their liability by agreement with a company provided that:
  - the agreement is fair and reasonable;
  - it relates to the audit of a specific financial year; and
  - the agreement has been authorised by an ordinary resolution of the shareholders of the company.
- Use of liability limitation agreements is still rare although the provisions have been in force for some months.
- The rules differ for private and public companies. For a private company, the ordinary resolution (which can be in writing) may waive the need for authorisation entirely, approve the principal terms of the agreement before it is entered into or approve the whole agreement after it has been entered into. The differences for a public company are that the ordinary resolution must be passed in general meeting and must either approve the principal terms in advance or approve the whole agreement afterwards (the authorisation cannot be waived). A company's articles may prescribe a higher threshold than an ordinary resolution. A company will be obliged to disclose any liability

limitation agreement in accordance with regulations which may require disclosure in a company's annual accounts or its directors' report [s. 534 to 538 (inclusive)].

- There is a new criminal offence where an auditor knowingly or recklessly causes an auditor's report to be materially misleading, false or deceptive. The offence can be committed by an individual auditor or a director, member, employee or agent of the audit firm [s. 507].

## **Authorised Share Capital**

From 1 October 2009:

- The concept of authorised share capital has been abolished. See 'Allotment of Shares' above on the rules governing whether directors have the authority to allot shares.
- The authorised share capital of an existing private company will continue to operate as a restriction on the company's articles. However, transitional arrangements mean that shareholders wishing to remove the deemed restriction from the articles are able to do so by ordinary resolution rather than by special resolution.

## **Board Meetings**

The following provisions came into force on 1 October 2007:

- Board processes need to demonstrate that for each decision, the directors have applied their minds to the listed factors which directors must have regard to in order to fulfil their duties to

promote the success of the company for the benefit of the members as a whole [s. 172] – see 'Directors' Duties' below. Practice in relation to board minutes may therefore be revised accordingly.

- See also 'Declaration of Directors' Interests' below.

## **Business Review**

The following provisions came into effect on 1 October 2007:

- For all companies (other than those subject to the small company's regime) the directors' report must contain a business review element [s. 417].
- Main market listed companies are required to include in the Business Review "the main trends and factors likely to affect the future development, performance and position of the company's business" and information about environmental matters, the company's employees and social and community issues [s. 417].
- Sensibly, the directors are able to omit from the Business Review information about impending developments or matters in the course of negotiation, where, in their opinion, disclosure would be seriously prejudicial to the interests of the company [s. 417(10)].

## **Companies Limited by Guarantee**

- In general terms, the law remains the same for companies limited by guarantee, save that the protection offered to holders

of a class of shares is extended to members of a company without a share capital where different classes of members exist. Consequently, class rights of members can only be varied by a special resolution or written consent of at least three-quarters of the members of the class. The extension of class rights to companies limited by guarantee was introduced on 1 October 2009.

### **Company Formation**

- The principal change is that a single person can form any type of company (and not just a private company) [s. 7]. This provision came into effect on 1 October 2009.
- A public company however must still have at least two directors [s. 154(2)]. This provision came into effect on 1 October 2007.
- It is now possible to incorporate a company on-line using the Companies House software filing service.
- Good news for directors is that they are now protected from disclosing their home address if they wish – see 'Directors' below.

### **Company Name**

The following provisions came into effect on 1 October 2009:

- Whilst it is still possible to change a company's name by special resolution, a company now has the flexibility to prescribe a different procedure in its articles (e.g. ordinary resolution, by resolution of the directors) [s. 77].

- Similar restrictions remain in relation to prohibited names and sensitive words and expressions [s. 54 to 57].

### **Consolidation and Sub-Division of Shares**

The following provisions came into effect on 1 October 2009:

- It is now possible to consolidate or sub-divide shares by ordinary resolution (whether or not the articles permit it) [s. 618], although it is possible to exclude or restrict this right in the articles [s. 618(5)].
- As is the case with other filings, when notice is given to the Registrar (within one month) of the sub-division or consolidation, it must be accompanied by a statement of capital [s. 619].

### **Corporate Representatives**

- From 3 August 2009, under the SRR, multiple corporate representatives appointed by a corporate nominee are able to vote in different ways from each other as long as they are voting in respect of different blocks of shares [amended s. 323]

### **Declaration of Directors' Interests**

These provisions came into effect on 1 October 2008:

- The Act requires a director to declare the nature and (additionally to the previous law) the extent of his or her interest to the other directors, although there will be no need to disclose where the matter cannot reasonably be regarded as giving rise

to a conflict or where the directors know or ought reasonably to know about it. This duty to declare is divided into:

- the duty to declare his/her interests in transactions or arrangements that are proposed but have not yet been entered into by the company [s. 177]; and
  - the duty to declare his/her interests in relation to existing transactions or arrangements that the company has already entered into [s. 182].
- Best practice in relation to recording the declaration (e.g. in board minutes) will need to change to accommodate the “extent” point, and helpfully the Act eliminates the need for any declaration in the case of a sole director.
  - In terms of procedure, declarations may be made at a board meeting, by written notice or by general notice (effectively ‘deemed’ notice) [s. 182(2), 184 and 185], and must be made as soon as is reasonably practicable [s. 182(4)].

### **Derivative Claims and Proceedings by Members**

The following provisions came into effect on 1 October 2007:

- This has been an area of contention as the Act widens the circumstances in which a derivative action may be brought by a member (and hence increases the potential exposure of directors). Significantly, it expressly enables claims to be brought for breach of duty by a director even if that director has not personally benefited from the breach.

- s. 260(3) provides that a derivative claim may be brought in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of a company.
- The Act clearly states that derivative claims can only be brought against the director(s) or another person for negligence, default, breach of duty, breach of trust or unfair prejudice [s. 260(2)(3)].
- Any derivative claim would have to be brought by a member of the company in respect of a cause of action vested in the company and the relief must be sought on behalf of the company [s. 260(1)].
- The safeguards, to prevent vexatious or frivolous claims, are that:
  - there is a two stage process to bringing a claim – the first stage of which is for an applicant to show a prima facie case;
  - in addition, the court is granted the power to make a costs order against an applicant [s. 261];
  - the court is required to consider various factors in deciding whether to let the claim proceed, including whether any breach is likely to be ratified [s. 263(3)]; and
  - the court should take into account views (if expressed) of members of the company who have no personal interest in the matter [s. 263(4)].

- Directors should check their D&O insurance covers derivative actions.

### **Directors**

- As of 1 October 2008, it is no longer possible to only have corporate directors as at least one director needs to be an individual [s. 155(1)]. Private companies still only need to have one director [s.154(1)].
- It is still compulsory for public companies to have at least 2 directors [s.154(2)] but the 70 year age limit has been repealed.
- The good news for directors is that the government has listened to recent concerns and directors no longer have to provide their usual residential address. Instead the company must provide a service address for each director which can be its registered office. There is also no need to include details of other directorships held [s. 163]. This provision came into effect on 1 October 2009.
- Every company is required to keep a register of the usual residential addresses of directors [s. 165] but this register will not be open to public inspection. This provision came into effect on 1 October 2009.

### **Directors' Conflicts of Interest**

The following provisions came into effect on 1 October 2008:

- This is an area where the new law introduces cause for concern as it goes further than the previous law. The new law is very widely drafted in that a director has a duty to avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. Please see the commentary on the duty to avoid conflict of interests and independent director authorisation of conflicts of interest under the heading 'Directors' Duties' below.
- Nominated Directors of joint venture companies, in particular, need to be aware of this and the articles of such companies will need to be drafted in such a way as to take account of the new law.
- See also 'Directors' Transactions with the Company' below.

### **Directors' Duties**

The provisions concerning directors' duties were introduced on 1 October 2007 except in relation to 'conflicts of interest' which were introduced on 1 October 2008. This was to provide companies with time to prepare (e.g. amend their articles of association).

- An area of considerable debate is the new statutory statement of duties that a director owes to the company. Some of these replicate the existing common law duties and others introduce new areas of consideration (especially the requirement to consider a list of factors in endeavouring to promote the success of the company). The statement of directors' duties (as set out below) will be interpreted and applied with regard to the corresponding common law rules and equitable principles [s. 170(4)]:

- Duty to act within powers [s. 171].
- Duty to act in a way which he/she considers in good faith would be most likely to promote the success of the company for the benefit of its members as a whole [s. 172]. In doing so, he/she must have regard to a new non-exhaustive list of factors:
  - the likely consequences of any decision in the long term;
  - the interests of the company's employees;
  - the need to foster the company's business relationships with suppliers, customers and others;
  - the impact of the company's operations on the community and the environment;
  - the desirability of the company maintaining a reputation for high standards of business and conduct; and
  - the need to act fairly as between members of the company.

Note that directors of charitable companies must consider the above in the context of achieving the charitable purposes.

- Duty to exercise independent judgment [s. 173].
- Duty to exercise reasonable care, skill and diligence [s. 174].

- Duty to avoid conflicts of interest [s. 175]. This applies particularly to the exploitation of any property, information or opportunity [s. 175(2)].
- Duty not to accept benefits from third parties [s. 176].
- Duty to declare interest in proposed transactions or arrangements [s. 177] – see 'Declaration of Directors' Interests' above.
- Breach of these duties will still make a transaction voidable and it will continue to be possible to avoid this and ratify any breach by an ordinary resolution of members [s. 239] although this may be more difficult – see 'Directors' Liabilities' below.
- An important addition in relation to potential conflicts of interest is that the other independent directors are entitled to authorise a director's potential conflict of interest (without seeking the consent or approval of members) [s. 175(4)(b) and 180(1)]. If public companies wish to take advantage of this, their articles will need to be amended to expressly enable the directors to provide such authorisation [s. 175(5)]. Consideration will need to be given to the scope of such authorisation bearing in mind, of course, the view of institutional shareholders.
- Transitional arrangements require existing companies to seek approval of their members if they want to permit independent director authorisation of conflicts of interest.

### **Directors' Liabilities**

The following provisions came into effect on 1 October 2007:

- In terms of exposure, on the positive side directors should not be liable to individual investors or third parties for negligent mis-statement in the 'narrative reports' – see 'Accounts' above. Of concern, however, is the codification of directors' duties, particularly in relation to the need to promote the success of the company, the so-called principle of 'enlightened shareholder value' – see 'Directors' Duties' above.
- The underlying principles governing liability for negligence, default, breach of duty or trust are maintained. Consequently, companies can still not exempt or indemnify directors for such liabilities [s. 232] but can continue to buy D&O indemnity insurance [s. 233] and indemnify directors against third party claims including paying defence costs (subject to repayment if unsuccessful) [s. 234] – this is now called a QTPIP or 'Qualifying Third Party Indemnity Provision'. In addition, a company is allowed to indemnify a director of an occupational pension trustee company against liabilities incurred by him or her in connection with that company's activities as trustee [s. 235] – known as QPSIPs or 'Qualifying Pension Scheme Indemnity Provisions'. The exclusions under the previous law are restated for QTPIPs and QPSIPs so companies must not provide any indemnity against any liability of the director to pay a fine imposed in criminal proceedings, or sum payable to a regulatory authority by way of a penalty in respect of non-compliance or any liability incurred by the director in defending criminal proceedings in which he is convicted [s. 234(3) and 235(3)].
- QTPIPs and QPSIPs will need to be disclosed in the directors' report [s. 236] and a company will need to ensure that copies of all QTPIPs and QPSIPs are kept and made available for

inspection by members for at least one year from the date of termination or expiry [s. 237].

- As stated above, shareholders are able to ratify, by ordinary resolution (subject to the articles requiring a higher majority or unanimity), a director's conduct amounting to negligence, default, breach of duty or breach of trust [s. 239]. A significant change, however, which may make the process harder for smaller, or deadlock 'JV' companies, is that the resolution must be passed without votes of the director (as shareholder) or any member 'connected with' him [s. 239(5)(d)] as these will be disregarded.

### **Directors: Loans to Directors**

The following provisions came into effect on 1 October 2007:

- The previous regime prohibited loans and quasi-loans to directors save in certain limited circumstances. The Act takes a different approach and instead [s. 197] permits all companies (public and private) to make loans with the prior approval of shareholders. These provisions continue to be drafted widely to include 'vanilla' loans, quasi-loans and guarantees or other security given by the company in connection with a third party loan to a director.
- There are exceptions where shareholder consent will not be required for a 'loan' and these are where the loan or security is given for one of the following purposes:
  - Expenditure on company business provided it does not exceed £50,000 [s. 204].

- Expenditure on defending proceedings or in connection with regulatory actions or investigations. These exceptions are restricted to expenditure in defending criminal or civil proceedings, or defending an investigation by a regulatory authority, or against an action proposed to be taken by a regulatory authority, in connection with any alleged negligence, default, breach of duty or breach of trust by the directors in relation to the company [s. 205 and 206].
- Minor and business transactions up to £10,000 and credit transactions up to £15,000. There is also an exception (without a financial limit) where the credit transaction is in the ordinary course of the company's business and is not on more favourable terms than would be offered to an unconnected person of the same financial standing [s. 207].
- Intra-group transactions. This exception is largely unchanged, save that it now applies to all companies (public and private) [s. 208].
- Loans and quasi-loans by money lending companies in the ordinary course of their business also continue to be allowed (without any need for shareholder approval). The caps on maximum amounts have been removed and a new term 'home loans' introduced to cover loans made to facilitate the purchase of an only or main residence [s. 209].
- Where shareholder consent is required, a written memorandum setting out the nature of the transaction or arrangement, the amount and purpose of the loan, guarantee or credit transaction and the extent of the company's liability connected with it needs to be provided to shareholders when the proposed resolution is

circulated to them or before their approval is sought at a general meeting [s. 197(3), 200(4) and 201(4)].

#### **Directors: Removal of a Director**

The following provisions came into effect on 1 October 2007:

- The Act restates the previous law so that a director can still be removed by ordinary resolution of the shareholders on 'special notice' [s. 168 and 169]. It is important to note that this cannot be done by written resolution – see 'Written Resolutions' below.

#### **Directors' Report**

- See 'Business Review' above.

#### **Directors' Service Contracts**

The following provisions came into effect on 1 October 2007:

- The Act imposes a tougher regime as shareholder approval is required for directors' service contracts in excess of two (rather than the current five) years [s. 188]. In addition, there is now a statutory definition of service contract [s. 227].
- Companies need to keep a copy of all directors' service contracts available for inspection by members at (usually) the company's registered office for at least a year after termination or expiry of each contract [s. 228].

- A new provision stipulates that shareholders have the right, on payment of a fee, to request a copy of a director's service contract [s. 229].

### **Directors' Transactions with the Company**

The following provisions came into effect on 1 October 2007:

- Certain changes were introduced to the regime regulating transactions between the company and its directors. These are set out below and also see 'Substantial Property Transactions'.
- In this context, the definition of "connected persons" in relation to a director was extended to include [s. 252 and 253]:
  - his/her civil partner;
  - his/her children or step-children who are over 18 years old;
  - persons living with the director in an enduring family relationship (other than a grandparent, grandchild, sister, brother, aunt, uncle, nephew or niece);
  - children or step-children of the director's unmarried partner who live with the director and are under 18; and
  - his/her parents.
- Directors' compensation payments for loss of office now cover compensation for loss of employment in connection with the management of company affairs as well as for loss of office as director [s. 215(1)] and such a payment will not be able to be

made unless it is first approved by the shareholders. Shareholder approval is also required for payments to connected persons and for payments made by another person at the direction of or on behalf of the company [s. 215(3) and (4)]. A resolution approving a payment cannot be passed unless the shareholders are provided with a memorandum setting out the particulars of the proposed payment [s. 218(3)]. Shareholder approval is not required, however, where the aggregate payments do not exceed £200 [s. 221].

- The prohibition on directors and their families buying options on the shares, debentures or debenture stock of their company or another group company if the shares or debentures are listed on any stock exchange has been repealed.

### **Disclosure of Major Shareholdings – All listed companies**

- New rules on notification of major shareholdings have been introduced [s. 1266 to 1268 (inclusive)] and are contained in DTR Rule 5 and new sections 89A to 89N of FSMA. These replace the provisions on disclosure of interests in shares in the 1985 Companies Act and apply to all UK listed companies whether listed on the main market, AIM or PLUS.
- A general point to note is that the regime now applies to shares carrying 'voting rights' rather than the 1985 Act rules relating to 'interests in shares'. This therefore includes persons who indirectly hold shares and can acquire voting rights. In contrast, "interest in shares" remains as the basis for a public company's right to investigate shareholdings (the old Section 212 regime) – see 'Public Company Investigations into Interests in its Shares' below. This is likely to make life more complicated for investing

institutions as they will have to comply with different provisions depending on the type of disclosure.

- For shareholders, the general rule remains that they must notify the company if they acquire or dispose of shares (carrying voting rights) exceeding or falling below 3% or any whole percentage above 3% (DTR 5.1.2). The change is that certain non-material interests which previously only had to be disclosed at a 10% threshold now have to be disclosed at 5% and 10% (DTR 5.1.5). Different rules apply to non-UK registered companies.
- The shareholder must notify the company within two trading days of learning of any notifiable acquisition or disposal and must also file a copy of the notice with the FSA (DTR 5.9.1).
- In addition, there are more detailed obligations on listed companies to keep the market informed of changes in their share capital, of acquisitions and disposals of their own shares and of any new loan issues, for example:
  - All listed companies have to announce the number of issued shares carrying voting rights at the end of every month where there has been a change (DTR 5.6.1).
  - UK main market listed companies must notify the market by the end of the trading day after it receives a notification of a major shareholding.
  - Main market listed companies (registered overseas), AIM and PLUS listed companies must notify the market by the

end of the third trading day after it receives such a notification (DTR 5.8.12).

#### **Dissemination of Regulated Information – Main market listed companies only**

- New rules apply to main market listed companies (contained in DTR 6) and were introduced on 20 January 2007 which require them to disclose certain ‘regulated information’. The main points to note are:
  - If a company wants to amend its constitution, it must notify the FSA and the market (DTR 6.1.2).
  - If a company uses electronic means to communicate with shareholders, there are certain procedures it must comply with (DTR 6.1.8) – e.g. the decision to use electronic means, must be taken in general meeting.
  - A company must disclose without delay any change in the rights attaching to its various classes of shares (DTR 6.1.9) and any new loan issues (DTR 6.1.11).
  - At the same time as disclosing regulated information, the company must also file it with the FSA (DTR 6.2.2).

#### **Dissolution and Restoration to the Register**

The following provisions came into effect on 1 October 2009:

- The existing “strike off” regime is maintained, and a lot of the previous law restated in the Act, so there continues to be two

ways to strike a company off the Register: (1) by the Registrar who can strike off defunct companies; and (2) by application from the directors – this now includes public as well as private companies [s. 1003].

- Other points to note are that a new ‘administrative’, out-of-court, restoration procedure has been introduced [s. 1024], although it is likely to be of little practical significance as it is only available in certain limited circumstances where a company has been carrying on business at the time of its striking off [s. 1025]. In addition, there is one uniform court procedure for applying to have a company restored to the register (rather than the previous two separate procedures) [s. 1029 to 1032 (inclusive)].

### **Distribution of Profits and Assets**

The following provisions came into effect on 6 April 2008:

- The Act maintains the general principle that a company may only make a distribution out of available profits [s. 830] with the same categories, including bonus issues and purchase of own shares, being excluded from the definition of ‘distributions’ for this purpose.
- The Act clarifies the law on ‘distributions in kind’ and sets out new rules for determining the amount of distributable profits a company must have when it is transferring assets intra-group. It codifies the common law rule established in *Aveling v Barford* that a company which does not have distributable profits cannot lawfully make an intra-group asset transfer at an undervalue as such a transfer will constitute an unlawful distribution [s. 845 to 847].

- Section 845 confirms that where the transferor company has positive distributable reserves, the amount of any ‘distribution’ arising from the transfer of a non-cash asset, to a shareholder, should be calculated by reference to that asset’s book value. Consequently, if it transfers the asset at book value and the market value is higher than book value, the value of the distribution would be considered to be zero and the distribution would be lawful [s. 845(2)(a)].
- If, however, the asset is transferred at less than book value, the amount of the distribution is equal to the difference between its book value and the actual consideration given for it, and must be covered by the company’s distributable profits [s. 845(2)(b)].
- The model form articles for public companies contain a similar procedure as existed under the 1985 Act for declaring dividends, namely, that the directors recommend the dividend and then the members at the AGM actually declare it with the proviso that they cannot vote to pay themselves more than the directors have recommended.
- As private companies will no longer be required to hold an AGM, the model articles for private companies allow directors of a company to declare and pay dividends to shareholders without the need for an ordinary resolution.

### **Elective Resolutions**

- The elective regime is no longer required (and is effectively repealed by the Act).

### **Electronic Communication**

- The Act has removed the need for 'hard copies' and new provisions enable companies simply to use their website and email to communicate with their shareholders (subject to shareholder approval). The detail is set out in Schedule 5. These provisions came into force on 20 January 2007.
- For example, if the company specifies an email address in a notice calling a meeting or in an instrument of proxy or proxy invitation, shareholders are entitled to respond to that address [s. 333 and Part 3 of Schedule 4]. Written resolutions may be circulated by email.
- See also 'Trading Disclosures' below on the information that must be included on emails etc. to customers and suppliers.

### **Execution of Documents**

The following provisions came into effect on 6 April 2008:

- The Act restates the previous law, and see comment under 'Secretary' below.
- All company directors will automatically qualify as authorised signatories, as will company secretaries [s. 44(3)].

### **Exercise of Members' Rights**

The following provisions came into effect on 1 October 2007:

- The Act introduces a new concept whereby a member is able to nominate another person (anticipated to be the beneficial owner of the shares) to enjoy various rights attaching to the shares even though he/she/it is not the registered holder and has no rights under the current law. These are split into 'information rights', which will apply automatically, and 'active rights', which will only be available if the articles are amended to allow them.
- Shareholders of main market listed companies are able to nominate another person to enjoy "information rights" [s. 146]. These 'information rights' are the right to receive a copy of all communications that the company sends to its members generally or to any class of its members that includes the person making the nomination, the right to require copies of accounts and reports and the right to require a hard copy version of a document or information provided in another form [s. 146(3)]. This right is automatic.
- In respect of 'active rights', all companies may amend their articles to permit members to nominate another person(s) to enjoy or exercise certain of their rights as a member [s. 145] – for example, to receive notices of meetings, written resolutions, copies of accounts and to require a general meeting to be called. It is important to note that it is still only the registered member who will be able to enforce its rights against the company and validly transfer shares [s. 145(4)] – the rules have not changed in this respect.
- It will be interesting to see whether market practice evolves to allow shareholders of such companies to enjoy the full benefit of these new provisions.

### **Financial Assistance**

- From 1 October 2008, private companies are free to provide 'financial assistance' for the purchase of their own shares as the Act abolishes the previous prohibition and the accompanying approval ('whitewash') procedure. Directors, however, will still need to justify the proposed transaction with regard to their new statutory duties – see 'Directors' Duties' above and note that lenders may still insist on an auditors' report confirming the solvency of the company and/or a form of confirmation of solvency from directors of the company providing the financial assistance (in a similar form). However, it remains to be seen how market practice will develop.
- The prohibition is retained, however, for public companies (as a result of an EC directive) and includes: (i) public and private company subsidiaries of a public holding company providing financial assistance for the purchase of shares in the public holding company [s. 678]; and (ii) public company subsidiaries of a private holding company providing financial assistance for the purchase of shares in the private holding company [s. 679]. The previous categories of financial assistance are retained [s. 677] as are the principal purpose exceptions and the other exceptions e.g. employee share schemes [s. 681 and 682]. These provisions came into effect on 1 October 2009.
- Note that the position has been complicated by a concern as to the legal effect of the removal of the statutory prohibition, particularly whether the common law maintenance of capital rules may outlaw actions that are currently capable of being rendered lawful by virtue of the whitewash procedure. The good news is that the Government has introduced a saving provision

to confirm that repeal of the statutory prohibition will not make unlawful any act that could have been lawfully undertaken using the whitewash procedure.

### **General Meetings**

- This is one of the principal areas in which the Act endeavours to simplify the regime for private companies. From 1 October 2007, it dispensed with the need for private companies to hold general meetings as instead decisions may be taken by written resolution (there are two exceptions – see 'Written Resolutions' below). General meetings are still required for public companies, and additional provisions apply to listed companies. Under the SRR, introduced on 3 August 2009, it is also possible for members to attend, speak and vote at general meetings over the internet [s. 360A]. Details on how this will work in practice is awaited.
- From 1 October 2007, the notice period for general meetings is:
  - at least 14 days for a private company in all cases (if it chooses to hold them) [s. 307(1)]; and
  - at least 14 days for public companies save the AGM which will still require at least 21 days [s. 307(2)]. Note, however, that in order to continue to take advantage of the 14 day notice period for general meetings (other than AGMs) after 3 August the company will need to:
    - obtain shareholder approval for the shorter period of 14 days (rather than 21 days); and

- offer the facility for members to vote by electronic means accessible to all members [s.307A].
- General meetings can still be called on short notice with the “requisite percentage” in nominal value of the voting shares which is:
  - 90% for private companies (rather than 95% as is currently the case) unless the articles specify a higher percentage (up to 95%) [s. 307(6)(a)]; and
  - 95% for public companies [s. 307(6)(b)].
- From 3 August 2009, shareholders holding 5% of the voting rights of the company can requisition a general meeting [amended s.303(2)]. Shareholders can include in their request the text of a resolution to be moved at the meeting [s. 303(4)(b)].
- Under the SRR, provisions were also introduced on 3 August 2009 to make it mandatory for main market listed companies to answer questions put by a shareholder at a general meeting [s. 319A].
- Members of both private and public companies have the right to appoint a proxy to attend, speak and vote at meetings on their behalf [s. 324(1)]. Each member is able to appoint more than one proxy in relation to a meeting, provided that each proxy is appointed to exercise the rights attached to a different share or shares held by him/her, or (as the case may be) to a different £10, or multiple of £10, of shares held by him/her [s. 324(2)]. These provisions came into force on 1 October 2007.

- When the SRR was introduced on 3 August, proxies were given the same voting rights at meetings as the shareholder(s) (or beneficial owner(s)) they represent would have if it voted in person [substituted s. 285, new s. 285A and new s. 323(2)]. See also ‘Corporate Representatives’.
- Provided a company alters its articles, it will also be permissible for shareholders to vote and/or demand a poll through the post and by electronic means. These provisions were introduced on 3 August 2009 [s. 322A].

### **Memorandum of Association**

The following provisions came into effect on 1 October 2009:

- The memorandum of a company formed under the Act will look very different as it will only contain details of the initial subscribers for shares [s. 8]. It will, therefore, have no relevance after registration (and it will not be possible, or necessary, to update or amend it) and several of the provisions which were previously included in the memorandum will now be included in the articles.
- The question of whether a proposed activity is within the scope of a company’s objects will be less significant – see commentary on ‘unrestricted objects’ in ‘Articles of Association’ above.

**Periodic Financial Reporting – Main market listed companies only**

- One of the aims of the Transparency Directive is to improve the quality, quantity and timeliness of periodic financial information. Part 43 of the Act (s. 1265 onwards) sets out the new transparency rules and, in turn, introduces amendments to FSMA. DTR Rule 4 implements these provisions and applies, broadly, to any company listed on the main market which has its registered office in the UK. Consequently, this rule does not apply to AIM companies.
- The new rules on periodic financial reports came into force on 20 January 2007 but only apply to financial periods starting on or after 20 January 2007 and so for companies with a 31 December year end, the rules did not have an impact until 2008.
- The major changes are:
  - Amended timing requirements for financial reports – Annual reports must be published within four months of the end of the financial year and must be made available for at least five years, and half yearly reports must be published within two months of the end of the first six month period of the financial year and must be made available for at least five years.
  - Amended content requirements for financial reports – (i) Annual reports: should include audited financial statements, a management report and responsibility statements and must contain a fair review of the business and describe the principal risks and uncertainties; (ii) Half yearly reports: must include a condensed set of financial statements, an interim management report and responsibility statements, it must indicate whether it has been audited or reviewed by auditors and must include details of any important events in the relevant period, the principal risks and uncertainties for the remaining six months and details of related party transactions.
- Annual and half yearly reports must now include responsibility statements for the first time. Such statements will be similar to the CEO and CFO responsibility statements required under the US Sarbanes-Oxley Act.
- A new requirement for interim management statements. Management must release a statement during the first and second six month period of any financial year explaining material events and transactions that have taken place since the start of the relevant period and describe the financial position and performance during that time.
- Companies may be liable to compensate investors who suffer loss as a result of any untrue or misleading statement in, or omission from, reports and statements. Liability, however, will only be incurred if AND only if a person “discharging managerial responsibilities” for the publication knew that the statement was wrong or misleading, was reckless as to whether it was, or knew any omission was, a dishonest concealment of a material fact [s. 1270 and new s. 90A FSMA].

### **Public Company Investigations into Interests in its Shares**

- The old rules ('Section 212' notices) are substantially re-enacted in the Act [s. 793], although a company will be able to serve notice in electronic form as well as in writing. A public company may issue a notice to any person it knows, or has reasonable cause to believe has, an 'interest in shares' (this definition continues to apply) to confirm or deny such interest. The right has been extended to enable companies to discover the identity of those with voting rights (direct or indirect) that fall below the thresholds for automatic disclosure and to ascertain the underlying beneficial owners. These provisions came into force on 20 January 2007.

### **Records**

The following provisions came into effect on 1 October 2007:

- A record of directors' meetings, shareholders' resolutions and minutes of such meetings must now be kept for ten years from the date of the meeting, resolution or decision (as the case may be). This replaces the previous requirement to keep such records indefinitely [s. 248 and 355].
- A company is also required to keep records of shareholders' resolutions, decisions and meetings available for inspection at its registered office for the same ten year period [s. 358]. Failure to do so, in both instances, could result in a fine for the officers in default.

### **Redeemable Shares**

The following provisions came into effect on 1 October 2009:

- A private company no longer needs to be authorised by its articles of association to allot redeemable shares, although it can exclude or restrict the issue of redeemable shares by making an appropriate amendment to its articles. A public company still needs to be authorised by its articles to allot redeemable shares [s. 684]. Directors of both private and public companies will be able to determine the terms and conditions of redemption if they are authorised to do so in the articles.
- The rule remains that redeemable shares may only be issued if there are already shares in issue which are not redeemable [s. 684(4)].
- A change is that it is now possible for payment for the redemption to be made after the shares are redeemed [s. 686(2)], although note that the rules on financing the redemption remain the same (i.e. out of the proceeds of a fresh issue, distributable profits etc.) [s. 687].
- A company is still required to give notice of any redemption of shares to the Registrar within one month of such redemption and such notice must be accompanied by a statement of capital [s. 689].

### **Redenomination of Share Capital**

The following provisions came into effect on 1 October 2009:

- A company limited by shares may, by ordinary resolution, redenominate its share capital into a foreign currency at a rate of exchange specified in the resolution. Redenomination will not affect any existing rights, e.g. to dividends [s. 622].
- Notice of redenomination will need to be given to the Registrar within one month, accompanied by a statement of capital [s. 625].
- If the redenomination results in a fraction (e.g. US\$1.01), a company may reduce its share capital, by up to 10%, by special resolution so that the shares will have a 'sensible' nominal value, e.g. US\$1 [s. 626]. Alternatively, if the company has distributable reserves it may, instead, capitalise the reserves to increase the nominal value of the shares affected.
- The amount by which the share capital is reduced will be transferred to the "redenomination reserve" [s. 628].
- Notice of the reduction will need to be filed within 15 days of passing the resolution, together with a copy of the special resolution, a statement of capital and a statement by the directors confirming that the reduction does not exceed the 10% cap [s. 627].
- The requirement that a public company must have an 'authorised minimum' capital of £50,000 (with at least one-quarter paid up [s. 91] remains but it is capable of being satisfied in pounds sterling or its euro equivalent.

### **Reduction of Share Capital**

The following provisions came into effect on 1 October 2008:

- A new procedure has been introduced to enable private companies to reduce their share capital (without going to court) by a special resolution supported by a solvency statement. A company using this new procedure is not able to reduce its share capital to zero (so there needs to be at least one issued, non-redeemable, share) [s. 641(2)].
- The solvency statement will need to be made by each of the directors not more than 15 days before the date on which the special resolution is passed [s. 642(1)], and a copy of the solvency statement must be provided to the members of the company [s. 642(2) and (3)].
- Within 15 days of the passing of the special resolution, the solvency statement, an accompanying statement of capital, the special resolution, and a statement (confirming compliance with the above rules) must be filed with the Registrar [s. 644]. It is important to note that the resolution to reduce the share capital only takes effect on registration of these documents [s. 644(4)].
- In addition, the current court approved procedure remains in place [s. 645(1) and 646 to 649 (inclusive)].
- A specific authorisation in a company's articles to reduce its share capital is no longer required. A company is permitted to reduce its share capital unless there is a specific prohibition or restriction in its articles [s. 641(6)].

### **Register of Members**

The following provisions came into effect on 1 October 2007:

- Persons seeking to inspect or to be provided with a copy of the register of members first need to specify their name and address, the purpose for which the information will be used, and, if the information will be disclosed to any other person, the same information relating to them [s. 116].
- The good news for companies in potentially sensitive sectors is that a company can apply to the court for relief from this obligation. If the court is satisfied that the access to the register of members is not sought for a proper purpose, it will relieve the company of the obligation to meet the request [s. 117].
- To give this new protection some 'bite' it is an offence (punishable by imprisonment) if a person gives false information in relation to an application to inspect the register and/or to disclose the information to another person, or to fail to do anything with the result that the information is disclosed to another person, knowing or having reason to suspect that that person may use the information for an improper purpose [s. 119].

### **Re-registration**

The following provisions came into effect on 1 October 2009:

- The most common re-registrations relate to taking a public company private and vice versa. A lot of the previous law is

repeated but there are a couple of practical changes [s. 90-111 (inclusive)] which are set out below.

- Private to public: together with its application for re-registration, the company will need to provide the Registrar with a statement of its proposed secretary (if it does not have one) and a statement of compliance with the requirements for re-registration [s. 94 and 95]. If it is a new company formed under the Act, substantive changes are likely to be required to its articles, as the new model form private company articles are very different from the public company model form.
- Public to private: once again, a statement of compliance with the re-registration requirements must be delivered to the Registrar. If member(s) holding not less than 5% of issued shares, or at least 50 members, object to the re-registration they will be required immediately to give notice of such application to the Registrar at the same time as, and as well as, applying to court to cancel it [s. 99(1)].

### **Secretary**

The following provisions came into effect on 6 April 2008:

- Private companies are no longer required to have a company secretary, although they may choose to do so [s. 270]. Public companies must have a secretary [s. 271].
- No transitional arrangements have been made for existing private companies and consequently private companies will need to amend their articles if they no longer wish to have a company secretary and their articles require them to do so.

- From 1 October 2009 the register of secretaries is permitted to contain a service address (commonly this is likely to be the registered office) rather than the secretary's usual residential address [s. 277(5)].
- Note that the position remains that where a provision requires an act by, or signature of, a director and the secretary, it cannot be satisfied by the same person acting in both capacities [s. 280].

### **Share Buybacks (or Purchase of Own Shares)**

The following provisions came into effect on 1 October 2009:

- It is no longer a requirement that a specific authorisation is included in the articles to permit a company to be able to purchase its own shares. A company will only be prevented from doing so if its articles include a specific prohibition or restriction [s. 690].
- Most of the previous law is restated but one important change is that a company is able to enter into a contract for an 'off-market' purchase of own shares conditional on obtaining shareholder approval (rather than obtaining prior approval) [s. 694(2)]. This could save time.
- A return must be filed within 28 days and a notice of cancellation of the shares will need to be accompanied by a statement of capital [s. 707 and 708].
- The rule remains that the member holding the shares cannot vote on the resolution approving the purchase or (as the case

may be) sign the written resolution [s. 695]. The rules on financing a buy-back remain the same (as is the case with 'Redemption' – see above) [s. 692].

### **Shareholder Resolutions**

The following points are relevant from 1 October 2007:

- It is anticipated that most private companies will pass the majority of their resolutions in writing rather than in general meeting – see 'Written Resolutions' below.
- The Act removes the current definition of "relevant securities" and it distinguishes between shares and rights to subscribe for, or convert into, shares. Consequently, the wording of various shareholder resolutions will need to change, e.g. granting directors authority to allot shares – see 'Allotment of Shares' above.
- See also 'General Meetings' and 'Written Resolutions'.

### **Share Premium Account**

The following provisions came into effect on 1 October 2009:

- In line with the previous law, if shares are issued at a premium, the 'premium' must be transferred to the share premium account [s. 610]. Use of this account is further restricted so that, for example, the premium from an issue of shares may only be used to write off expenses etc. in relation to that issue of shares and not any issue (as is currently the case). The good news is that companies will still be able to use the share premium

account to pay up new shares to be allotted to members as fully paid bonus shares [s. 610].

### **Share Transfers**

The following provisions came into effect on 6 April 2008:

- Previously, the directors did not have to provide a reason for refusing to register a transfer (unless the articles required it). The law has changed, however, so that if a transfer is refused, the company must give its reasons for refusal as soon as practicable and, in any event, within two months. In addition, the company must also provide such further information as is reasonably requested (but not minutes of board meetings) [s. 771(2)]. Note the transferee's beneficial interest continues to be unaffected by a refusal to register within two months of the transfer being lodged with the company.

### **Substantial Property Transactions**

The following provisions came into effect on 1 October 2007:

- The principle remains that shareholder approval will be required where a company buys or sells a non-cash asset to or from a director or a director of its holding company (or a person connected with such director) – see 'Directors' Transactions with the Company' above which sets out the extensions to the definition of 'connected persons'. No approval is required if the asset is worth less than £5,000 (currently £2,000) [s. 191].

- Prior approval is no longer required which means that companies are allowed to enter into arrangements conditional upon getting shareholder approval [s. 190(1)].
- The exceptions, where shareholder approval will not be required, have been widened. For example, the following are exceptions:
  - Where a company is being wound up or in administration.
  - Payments under directors' service contracts or for loss of office.
  - Acquisition of assets from a director, who is a member, in his character as a member.
- Importantly, where transactions are ratified by the shareholders within a reasonable time (note: no period is specified), the transactions will no longer be capable of being avoided [s. 196].

### **Takeovers**

The following provisions were implemented on 6 April 2007:

- The Directive on Takeover Bids was implemented in the UK on 20 May 2006 by interim legislation, the Takeovers Directive (Interim Implementation) Regulations 2006 (the "Regulations"). Part 28 of the 2006 Act deals with takeover bids and now this is in force it has replaced the interim Regulations.
- Part 28 of the Act contains no real substantive changes to the provisions dealing with Impediments to Takeovers [s. 966 to

973 CA 2006] or to the provisions dealing with Directors' Reports [s.992], from the provisions contained in the Regulations.

- The changes to the compulsory acquisition procedures [s. 974 to 991 (inclusive)
- ] mean that there is only one compulsory acquisition procedure to be followed (rather than the two track regime previously in operation whereby offers for shares (carrying voting rights) in a main market listed target are governed by Schedule 2 of the Regulations and all other offers are governed by Sections 428-430F of the 1985 Act).
- This sole procedure broadly follows the procedure set out in Schedule 2 to the Regulations so that the right of an offeror to buy out a minority shareholder ("Squeeze-Out Right") [s. 979] and the right of a minority shareholder to be bought out by an offeror ("Sell-Out Right") [s. 983] is triggered on the satisfaction of a dual test. Hence, a bidder will need to have acquired or unconditionally contracted to acquire both 90% in value of the shares to which the offer relates and 90% of the voting rights in the company to which the offer relates to trigger its Squeeze-Out Right [s. 979(2) and (4)]. A minority shareholder will be able to exercise its Sell-Out Right if the bidder has obtained 90% of both the issued shares and the voting rights in the company [s. 983(2) and (4)].

### **Trading Disclosures – Company Information to be included in Electronic Communications**

- All UK companies are now required to include company information similar to that which was already required on all hard-copy company letters (i.e. company name, place of registration, registered number and address of its registered office) on their electronic communications such as websites and emails. This was introduced on 1 January 2007 by implementing the First Company Law Directive.

### **Unfair Prejudice**

The following provisions came into effect on 1 October 2007:

- The provisions for the protection of members against unfair prejudice are found in Part 30 of the Act and broadly restate the position under the 1985 Act.
- A member or the Secretary of State may apply to the Court for an Order under Part 30 of the Act [s. 994 and 995].

### **Variation of Class Rights**

The following provisions came into effect on 1 October 2009:

- The rules have not changed in relation to variation of class rights. Consequently, class rights may be varied in accordance with the articles or, where the articles make no provision, by special resolution or written consent of the holders of three-quarters of the issued shares of that class remains [s. 630(4)]. This is important as the articles can provide for a

more lenient regime (e.g. only 51%) if desired or, alternatively, a more onerous regime (e.g. 90%) [s. 631(3)]. In addition, class rights may be entrenched – see ‘Articles of Association’ above.

- The rule remains that shares will not be treated as a different class just because their rights to dividends are different in the first 12 months following their allotment [s. 629(2)].

### **Written Resolutions**

The following provisions came into effect on 1 October 2007:

- The written resolution regime is not available to public companies which must pass resolutions at a shareholder meeting (or class meeting).
- As stated above, it is anticipated that private companies will dispense with shareholder meetings and make decisions by written resolution. Consequently, there is a lot more detail on the procedure for the circulation of, and timing of the passing of, written resolutions [s. 290 to 300 (inclusive)].
- Written resolutions no longer need to be signed by all members. Instead, an ordinary ‘written resolution’ need only be signed by a simple majority of Eligible members [s. 282(2)] and a special resolution by a 75% majority [s. 283(2)].
- “Eligible members” are defined as the members who would be entitled to vote on the resolution on the circulation date of the resolution [s. 289].
- A written special resolution must state that it is proposed as a special resolution [s. 283(3)].
- Either the directors or the members are able to propose a written resolution of a private company [s. 288(3)].
- A company is required to circulate a written resolution and any accompanying statement once it has received requests to do so from members representing not less than 5% (or such lower percentage as is specified for this purpose in the company’s articles) of the total voting rights of all members entitled to vote on the relevant resolution [s. 292(4) and (5)].
- It is likely to become good practice to specify in the articles the period in which agreement must be given by members to the resolution. If not, the written resolution will lapse if it is not agreed to within 28 days of the circulation date of the resolution. The agreement by a member will therefore be ineffective if it is given after the requisite time period [s. 297].
- Provision is made for circulating, and signifying agreement to, written resolutions electronically [ss. 293, 296 etc.]. Further practical guidance will be provided in due course.
- Two matters are still not be capable of being passed by written resolution, even by private companies – removal of auditors and removal of directors [s. 288(2)].