Legal Update: The Companies Act

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10 KEY THINGS YOU NEED TO KNOW - COMPANIES ACT 2006

Is it in force?
Key Date: 1 October 2009

On 1 October this year further provisions of the Companies Act 2006 (the "Act") came into force and the Act, which has been introduced in stages, will be fully implemented. Ten key provisions introduced by the Act relevant to private equity firms (relating to private companies) are set out below with some practical advice on how to deal with the changes and take advantage of the provisions of the Act.

1. Directors' Duties: Codification and Introduction of New Duties

The Act introduced additional directors' duties to supplement and codify the existing law. The new duties include the duty '*to promote the success of the company for the benefit of the members as a whole*' and to '*avoid conflicts of interest*', amongst others. Directors who sit on the Board of more than one company will need to be particularly aware of the new conflict provisions. The consequences and application of the duties are yet to be seen from case law. *For further information on conflicts of interest see Article: Nominee Directors: Inherent Conflict.* ***Point for Action: Alterations to Articles and/or shareholder approval may be required. Update internal procedures (including minute keeping) and review and update training for directors.***

2. Meetings and Resolutions: Simplified Procedures and No Requirement for AGM

Written resolutions of the members of a company no longer require unanimity and can be passed by more than 50% of the members entitled to vote on a matter for an ordinary resolution and not less than 75% of the members entitled to vote for a special resolution. This should be utilised to prevent the need for general meetings when appropriate. Private companies are no longer required to hold an AGM and may wish to dispense with this. ***Point for Action: Update Articles to utilise new provisions.***

3. Increased Electronic Communications with Shareholders

The Act introduced provisions whereby a shareholder and the company can communicate via electronic means (including through the use of the company's website). For example,

provided that the correct procedures are followed, a company can provide their annual accounts by way of electronic means rather than by post. This provision is intended to save companies time and money and to increase communication between companies and their shareholders. ***Point for Action: Update Articles and follow procedures set out in the Act to obtain consent from shareholders.***

4. Financial Assistance: Abolition of Prohibition for Private Companies

The prohibition on financial assistance by private companies for the purchase of their own shares was repealed on 1 October 2008 along with the corresponding 'whitewash' procedure. The Act retains the prohibition on the giving of financial assistance by public companies and financial assistance given by a private company subsidiary in the acquisition of shares in its public company parent. Directors must keep in mind the common law rules on capital maintenance, insolvency legislation (if applicable), corporate benefit and their directors' duties. ***Point for Action: Take appropriate advice when required and update training for directors on directors' duties and corporate benefit.***

5. Abolition of Requirement for Authorised Share Capital and Statutory Approval of Allotment of Shares

As a result of the changes brought in on 1 October 2009 companies no longer need to have an authorised share capital and where a company only has one class of shares shareholder approval will no longer be required for the allotment of shares unless the company's Articles require this. These provisions of the Act may, depending upon the terms of your Articles, make it easier for directors of companies with one class of shares to allot shares. Transitional provisions are expected to treat the existing level of authorised share capital of a company as a restriction in the Articles on the allotment of shares by directors. ***Point for Action: Review anti-dilution provisions in Articles/ Shareholders Agreement to ensure your position is protected.***

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6. Claims Against Directors or 'Derivative Actions'

The changes introduced by the Act relating to 'derivative actions' (that is, actions raised by a shareholder against a company) were introduced in order to increase the circumstances under which a shareholder could bring a claim in respect of a wrong committed against the company. A derivative action can be brought by a shareholder in respect of directors who are in breach of duty or have acted negligently. Any damages awarded as a result of the claim will be awarded to the company rather than to the shareholder raising the claim. ***Point for Action: Review D & O insurance cover and ensure record keeping/ decision making procedures are sufficient and up to date.***

7. Directors' Loans: Removal of General Prohibition

The general prohibition on the loans to directors by a company has been removed under the Act and replaced with a requirement of shareholder approval for any such loans (subject to some exceptions, including when the loan is £10,000 or less). All companies are now permitted (subject to the terms of their Articles and any shareholders agreement) to make loans to directors of the company or any holding company, or give guarantees or security for loans, with shareholder consent. ***Point for Action: Ensure that directors are fully aware of and complying with their directors' duties if any such loan is made and any decision to make any loan is properly documented.***

8. Limits on Liability for Auditors

Under the Act companies can contractually agree to limit an auditor's liability to the company for negligence, default or breach of duty or trust which represents a change to the position under the Companies Act 1985. The limit on liability must be "fair and reasonable" in all the circumstances bearing in mind the auditor's responsibilities to the company. ***Point for Action: Consider how to deal with requests from auditor's to limit their liability and update auditor insurance appropriately.***

9. Home addresses of Directors to be Confidential

When incorporating a new company directors will now be asked to provide their home address and a service address. Only the service address (which may be the company's registered office) will be put on the public register by Companies House. Details of directors' current addresses on the Companies House database will not be removed or updated automatically although directors can have their details removed if they can demonstrate that they are at risk of violence. ***Point for Action: Consider appropriate location of service address and the removal of home address from current register, if required.***

10. Abolition of Company Secretary

It is no longer a requirement that private companies appoint a company secretary and consideration should be given to whether or not this is required. One advantage of having a company secretary is that one person is appointed to carry out the required secretarial functions and removing the company secretary does not remove the need to deal with these matters. ***Point for Action: Remove company secretary if appropriate and update Articles if required.***

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This note is written as a general guide only. It is not intended to contain definitive legal advice which should be sought as appropriate in relation to a specific matter.

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