



# Company secretarial update

**Jonathan Gibson**

+44 (0)20 7213 8038

[jonathan.s.gibson@pwclegal.co.uk](mailto:jonathan.s.gibson@pwclegal.co.uk)

**Charlotte Thackrah**

+44 (0)20 7213 8152

[charlotte.thackrah@pwclegal.co.uk](mailto:charlotte.thackrah@pwclegal.co.uk)

**Mark Cleland**

+44 (0)20 7804 3532

[mark.cleland@pwclegal.co.uk](mailto:mark.cleland@pwclegal.co.uk)

**Alison Dowling**

+44 (0)121 265 5150

[alison.dowling@pwclegal.co.uk](mailto:alison.dowling@pwclegal.co.uk)

**Marc Boston**

+44 (0)20 7212 1015

[marc.boston@pwclegal.co.uk](mailto:marc.boston@pwclegal.co.uk)

**Kate Elsdon**

+44 (0)20 7212 5103

[kate.elsdon@pwclegal.co.uk](mailto:kate.elsdon@pwclegal.co.uk)

## New financial climate equals greater visibility of risk to directors

The current financial climate coupled with the recent codification of directors' statutory duties under the Companies Act 2006 has brought the risks attached to breaching directors' duties into sharper focus...[click here](#)

## Branches and Places of Business with effect from 1 October 2009

With effect from 1 October 2009, there will be only one type of registration available for overseas companies with a presence in the UK...[click here](#)

## Changes to Companies House filings relating to share capital/new Companies House forms

From 1 October 2009, companies will be required to file a statement of capital at Companies House...[click here](#)

## Changes to the Model Code on directors' share dealing

With effect from 6 March 2009, the Listing Rules changed to allow persons discharging managerial responsibility (PDMRs) to enter into Trading Plans so that they can acquire or sell shares during prohibited periods...[click here](#)

## Revisions to the Takeover Code

The Takeover Code (the Code) now includes changes to the way companies can communicate with investors and shareholders during a takeover...[click here](#)

## Review of the Combined Code

On 18 March 2009 the Financial Reporting Council (FRC) announced it would review the effectiveness of the Combined Code on Corporate Governance (the Combined Code) in light of the current financial crisis...[click here](#)

## Data protection agenda for 2009

Data protection is currently high on the Government's agenda and organisations should be moving it up their agenda for 2009 as well...[click here](#)

## Senior accounting officer

The recent Budget announced the introduction of legislation requiring the senior accounting officer (SAO) of large companies and groups to report to HMRC...[click here](#)

## New financial climate equals greater visibility of risk to directors

The current financial climate, coupled with the recent codification of directors' statutory duties under the Companies Act 2006, has brought the risks attached to breaching directors' duties into sharper focus and made them more visible.

It is important that directors make themselves fully aware of the potential risks and personal liabilities that could affect them in the new financial world that they now find themselves in.

In particular, directors should consider how best to manage their personal liabilities and risks, by looking at:

- How apathy in the boardroom could lead to a breach of duty;
- What the duties of a director of a company in financial difficulties are; and
- Ensuring their company's accounts are filed within the statutory timeframe.

See also our articles in the *Company secretarial update* of July and October 2008 for further details relating to the new directors' conflicts of interest provisions.

### [Apathy in the board room could lead to a breach of duty](#)

Every individual who accepts the appointment of a company director should be aware that the statutory and fiduciary duties that come with the appointment are inescapable personal responsibilities of which he should be aware at all times when acting in his capacity as a director.

Any person who accepts the position of director must ensure that they fully participate in the decision-making process of the company. In particular, directors must ensure they exercise independent business judgement and should be prepared to challenge others on the board. If they disagree with a board decision they should ensure that this is evidenced in the minutes of the meeting. Merely accepting decisions, which later are deemed to be fraudulent, could lead to a claim for breach of duty.

If a director commits fraud, his fellow directors could be in breach of their own duties to the company for allowing the fraud to happen. It will not be an acceptable defence to a claim for breach of duty that the individual concerned played no active part in the company's management.

### [Action points for directors:](#)

- Familiarise yourselves with, and participate in, all elements of the decision-making process of the business.
- Understand the personal liabilities and risks that are attached to a breach of the statutory duties.
- Be confident in challenging fellow board members and ensure any challenges or disagreements are noted in the company's board minutes.

### [The duties of a director of a company in financial difficulties](#)

If it becomes clear to the directors of a company in financial difficulty that insolvent liquidation is likely to be unavoidable and that either a liquidation, administration, receivership or company voluntary arrangement is likely to occur, then those directors must be aware of the impact of this on their duties.

When a company is solvent a director owes duties to their company, however, once a company is within a period where insolvent liquidation is likely, under the Companies Act 2006 directors have an additional legal duty to protect the interest of the creditors. This means directors should avoid the company acquiring greater liabilities or future financial loss, even though shareholders may want to try and trade out of the difficult financial period. Under these circumstances directors should take particular care to avoid disposing of company property at less than market value, or showing preference to one creditor over another.

## New financial climate equals greater visibility of risk to directors – cont'd

The conduct of directors during this period will be carefully scrutinised by the insolvency practitioner overseeing the administration or liquidation. Any breaches of duty may result in directors facing personal liabilities and a director's personal lack of awareness of the company's pending insolvency will not be a defence.

### Action points for directors:

- If concerned about the solvency position of the company, this should be raised with other board members and these concerns should be minuted. If these concerns are ignored, then directors should consider taking independent legal advice.
- If a director of several group companies, then directors should be wary of conflicts of interest, as duties to a parent company do not override the duties to a subsidiary and its creditors.
- Be aware of the extra risk to personal liabilities and claims if your company gets into financial difficulties.

### Preparing and filing annual accounts in the current financial climate

There has been recent evidence of a marked increase in the speed and frequency at which the Registrar of Companies is taking action against companies and their directors, if found to be in default in relation to the filing of annual accounts. In times where going concern statements are being closely scrutinised by directors and auditors, especially if a company is in the process of refinancing, the preparation of annual accounts can become more onerous and time consuming, resulting in them not being filed within the statutory deadline.

The risks that directors and companies face in not filing annual accounts within the given deadline include:

- The company being removed from the register;
- The company being liable for an automatic civil penalty of up to £7,500 for a public limited company and £1,500 for a private limited company (doubling if accounts were also filed late the previous year);
- Criminal prosecution for the directors, leaving them liable on summary conviction to a fine of up to £5,000; and
- The court ordering directors to comply with their filing duties.

### Action points for directors:

- Think ahead: if a delay to the preparation of annual accounts is likely, an application may be made to the Registrar of Companies to gain an extension to the filing deadline of 28 days. The Registrar of Companies has limited discretion to grant such extensions in exceptional circumstances. Such applications must be made prior to the existing filing deadline for the accounts.
- If there are any concerns regarding the going concern statement, directors should firstly consider the financial position of the company. If insolvent liquidation is likely to be unavoidable they should consider their duties carefully, as set out above.
- If annual accounts have not been filed by the deadline, maintain regular contact with Companies House. The Registrar of Companies has limited discretion to defer prosecution action for a short amount of time if, for example, unforeseen circumstances have prevented the annual accounts from being prepared and filed on time.
- Ensure that your other statutory filings, such as the annual return, are filed on time.

## Branches and places of business with effect from 1 October 2009

### What are the changes?

With effect from 1 October 2009, there will be only one type of registration available for overseas companies with a presence in the UK. This will replace the existing branch and place of business regime. The new registration will be called a 'UK Establishment' and will be akin to the existing branch registration.

On or after 1 October 2009, the de-minimus level of activity needed to trigger registration of a UK Establishment would be that currently required of an overseas company with a place of business in Great Britain.

### What do I need to do if I have an existing place of business or branch?

Transitional provisions will allow both existing UK registered branches and places of business of an overseas company to become a registered UK Establishment on 1 October 2009. However, in order to meet the requirements of the new regime, existing places of business will be required to provide some additional information to the Registrar by 31 March 2010. The additional information required is the same information that would be provided if an existing place of business were to change their registration from a place of business to a branch, following an increase in the level of activity by the overseas company in Great Britain.

In addition to this information, if the overseas company has not already filed a set of accounts with the Registrar, the company will need to file a set of accounts with a certified translation (if applicable). These accounts must be filed by 1 October 2010, or by the date that the first accounts would ordinarily have been due under the existing rules, whichever falls first.

#### Action points;

- Contact your company secretarial providers to obtain advice in relation to the additional information that is required to be filed by an existing place of business.
- Ensure that suitable accounts are being prepared to meet the new requirements.
- Ensure that the information that you currently have registered at Companies House for existing branches and places of business is up to date.



## Changes to Companies House filings relating to share capital/new Companies House forms available from July

### Statement of capital

From 1 October 2009, companies will be required to file a statement of capital at Companies House where an alteration of share capital affects:

- The total number of shares allotted;
- The aggregate nominal value of those shares;
- The value of the individual shares which have been allotted; or
- The amount (if any) unpaid on those shares.

In practice, this means that companies will be required to file a statement of capital after nearly every alteration of capital (except on a variation of class rights which does not affect the aggregate subscribed capital). The statement of capital will be required in addition to the usual Companies House filing requirements, for example the return of allotment form for the allotment of new shares.

A statement of capital will also need to be filed with applications for incorporations of new companies limited by shares (private and public).

In addition, companies limited by shares will be required to send members a statement of capital on request.

### What is a statement of capital?

A statement of capital is a statement of a limited company's issued share capital on a particular date and should reflect the issued capital following the latest transaction.

A statement of capital must show:

- The total number of shares of the company;
- The aggregate nominal value of those shares; and
- For each class of shares:
  - the prescribed particulars of rights attached to the shares, including voting rights, dividend rights, capital rights and redemption rights;
  - the total number of shares of the class;
  - the aggregate nominal value of shares of that class; and
  - the amount paid up and the amount (if any) unpaid on each share.

### New Companies House forms

New forms will be required for use with effect from 1 October 2009. Companies House has announced that these will be available to access from its website <http://www.companieshouse.gov.uk/> from late July.

#### Action points;

- From 1 October 2009, companies limited by shares should ensure that the statement of capital is filed at Companies House when any changes to share capital are made.
- Check the Companies House website from July for new statutory forms that will be made available.
- Make arrangements with your software provider to ensure that the new forms will be catered for from 1 October 2009.

Cont'd

## Changes to the Model Code on directors' share dealing

With effect from 6 March 2009, the listing rules changed to allow persons discharging managerial responsibility (PDMRs) to enter into trading plans so that they can acquire or sell shares during prohibited periods.

### What is a trading plan?

Trading plans are defined as a written plan made between a PDMR and an independent third party, such as a broker, which sets out arrangements for the acquisition and/or disposal of securities. The plan should provide details of the quantity and price of the shares to be dealt and timescales for the dealings: alternatively it is possible to give discretion to the independent third-party to make such decisions. The PDMR is not permitted to exercise any influence over the dealings made under a trading plan and the plan can only be entered into or amended during an open period, with clearance to do so being attained in the usual way. It is possible to cancel a trading plan during a prohibited period, but only in limited circumstances. Any dealings made under a trading plan still require the PDMR to seek clearance to deal, including in a prohibited period, and must be notified to the issuer and the stock exchange.

The trading plan does not cover any other dealings, only acquisitions and disposals of shares. Therefore, grants of awards still need to be carefully considered.

### Action points;

Company secretaries should consider/deal with the following matters as soon as possible:

- Update your share dealing code to take account of the amendments to the Model Code.
- Review your share plans and consider if your PDMRs should set up trading plans: for example in relation to the vesting of a share award, which would allow a PDMR to sell all their vested shares during a prohibited period.
- If directors set up a trading plan, ensure that the objectives are clear, as it is difficult to amend plans once set up and they can only be cancelled in limited circumstances.
- Ensure that if a PDMR deals during a prohibited period under a trading plan, that the announcement made to the RIS clearly states that the dealing was made under a trading plan.
- Update your PDMRs to make them aware of the changes to the listing rules.

## Revisions to the Takeover Code

The Takeover Code (the Code) now includes changes to the way companies can communicate with investors and shareholders during a takeover.

The changes take advantage of the provisions contained in the Companies Act 2006 relating specifically to electronic communications and the ability for shareholders to nominate other persons to enjoy the same information rights as themselves.

For further information on the changes to the Code, go to <http://www.thetakeoverpanel.org.uk/>

What are the changes?

[Parties to set up a website to communicate with investors and shareholders](#)

The Code proposes that each party to a takeover set up a website specifically for the purpose of publishing documents, announcements and information in relation to the takeover.

[Three methods of communication](#)

The Code also proposes that if a document, announcement or any information is required to be sent to any person, it can be sent in hard copy, electronically or published on the relevant party's website, provided that the person is also sent notification that the information has been published.

[Documents in hardcopy](#)

A shareholder or investor has the right to request any information published electronically or on a website and request a hard copy of that information. Additionally, forms connected with an offer, such as acceptance and withdrawal forms and proxy cards will still be published in hard copy.

[Information rights of other persons](#)

In line with the provisions of the Companies Act 2006, a shareholder may nominate another person to receive a copy of all communications from the company in which they hold shares.

**Action points;**

- Ensure that the members of the board are fully briefed in relation to the changes to the provisions of the Companies Act 2006, in relation to electronic communications.
- Ensure that if your company is involved in a takeover or merger, that any communications take into account the new provisions relating to electronic communications and a shareholder's right to nominate another person to receive information.



## Review of the Combined Code

On 18 March 2009 the Financial Reporting Council (FRC) announced it would review the effectiveness of the Combined Code on Corporate Governance (the Combined Code) in light of the current financial crisis.

The review was announced by Sir Christopher Hogg, Chairman of the FRC, at a conference on corporate governance held by the Institute of Chartered Secretaries and Administrators. Sir Christopher commented that the financial crisis was the "*result of a massive failure of governance at every level...and that the time is now ripe to test the Combined Code's content against the fresh thinking that the financial crisis must provoke*".

A full report can be found at <http://www.frc.org.uk/press/pub1894.html>

### How will the FRC review the Combined Code?

The FRC is seeking views from listed companies, directors, investors and other interested parties in their experience of implementing the Combined Code. Comments are invited in a number of areas, listed below with findings expected to be announced by the end of 2009.

The FRC will also meet with company directors and investors, study a selection of corporate governance statements in annual reports and analyse existing and new research. The FRC will also work with Sir David Walker, who is leading a review to recommend measures to improve the corporate governance of UK banks, particularly with regard to risk management.

### Issues for comment

Views are invited on which parts of the Combined Code have worked well, whether it has reduced the effectiveness of the board, whether there are any aspects of governance not addressed and whether the 'comply or explain' mechanism operates effectively.

The FRC particularly welcomes views on the composition and effectiveness of the board as a whole; the respective roles of the chairman; the executive leadership and non-executive directors; the board's role in risk management; the role of the remuneration committee; the quality of support and information available to the board and the effectiveness of Section 2 of the Combined Code, which encourages dialogue between institutional investors and companies. Respondents are welcome, however, to comment on any other aspect of the Combined Code.

The FRC expect to publish its findings before the end of 2009. Any changes proposed to the Combined Code, or the way in which it operates, will be subject to further consultation.



## Data protection agenda for 2009

Data protection is currently high on the Government's agenda and organisations should be moving it up their agenda for 2009 as well. The key changes and events in 2009 are as follows:

- Earlier this year, the Government introduced the Personal Information Promise to which organisations can sign up as a way to publicise their adherence to good practice standards on data protection.
- The Information Commissioner's Office (ICO) has been given new powers to impose financial penalties for serious breaches of the Data Protection Act. It is expected that the new powers will mirror the sanctions available to the Financial Services Authority (FSA). Recent fines by the FSA for failures in data security controls (e.g. those imposed on Nationwide and Norwich Union) have been in the region of £1m. Regulations setting out the ICO's maximum fines are expected later this year.
- The ICO is due to publish a new code of practice on privacy notices in 2009, together with new guidance on best practice in data sharing.
- The current Information Commissioner is to retire this month. Christopher Graham, the Director General of the Advertising Standards Authority has been chosen as his replacement.
- A proposed new European Union directive is expected to amend current privacy laws associated with electronic communications. Under the draft directive, serious security breaches in a communications service would need to be notified to the subscribers of that service. If this is adopted, it will be the first piece of legislation in the UK requiring customers to be notified of data security breaches. The final regulation is due later this year.
- In November 2008, the Government proposed to alter the flat rate notification fee of £35 to create a tiered fee structure based on the size of the organisation. It is expected that this change will take place in October 2009.
- The British Standards Institute is due to publish a new standard on the specification for a personal information management system for data protection.

### Action points;

- Companies should review, at least annually, their internal controls over the use of personal data. This should include ownership and accountability, training and awareness and findings should be reported to shareholders.
- Transparency in the use of personal data should be increased, including the prominence and scope of privacy policies and information provided to individuals.
- Organisations should have procedures in place to react to and handle a data breach.
- If not exempt, you should ensure you have notified the ICO, renew your notification each year and ensure your register entry is kept up to date. Failure to do so is a criminal offence.

## Senior accounting officer

The recent Budget announced the introduction of legislation requiring the Senior accounting officer (SAO) of large companies and groups to report to HMRC regarding the adequacy of their accounting systems for the production of accurate tax returns. This will take effect for accounting periods starting on, or after, the Finance Bill receives Royal Assent, expected around 21 July 2009.

PricewaterhouseCoopers LLP (PwC) have recorded a webcast looking at the key issues, including an overview of PwC's suggested approach for scoping the requirement, documentation-relevant processes, designing and then operating an effective assessment, and reporting to the SAO.

[Click here](#) to view the webcast.

[pwclegal.co.uk](http://pwclegal.co.uk)

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers Legal LLP, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

© 2009 PricewaterhouseCoopers Legal LLP. All rights reserved. PricewaterhouseCoopers Legal LLP is a member of the PricewaterhouseCoopers network of firms, each of which is a separate and independent legal entity. Csec047