

Company secretarial update

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The Walker report

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Directors' duties

Codification of directors' duties: Directors' duties have been put on a statutory footing for the first time by the Act and some new duties have been introduced.

Action point: Company secretaries should ensure that their boards and senior management receive appropriate training on their obligations.

Duty to avoid conflicts of interest: Directors are now under a duty to avoid situations where a director has, or can have, a direct or indirect interest which conflicts, or may conflict, with the interests of the company. This duty is very broad and, as such, it is of great importance that companies ensure they have the appropriate measures in place to authorise such conflicts, or potential conflicts. This will avoid the risk of action being taken against directors or transactions being invalidated for breach of duty.

Where a company is part of a group with common directorships across that group, unless the articles contain a provision stating otherwise, intra-group directorships may be considered to give rise to a conflict of interest and thus create problems in effecting intra-group transactions.

In a recent case, the Courts have found a director to be in breach of his duty to avoid a conflict of interest and found that he had acted dishonestly. He was ordered to repay over £2 million to the company. This case emphasises the need for directors to ensure that they are open and transparent in their dealings with the company and that any potential conflicts of interest must be notified to the board and approval gained prior to any action being taken.

Action points: Ensure that the articles of your companies are updated to allow directors to authorise actual or potential conflicts of interest and, where relevant, contain provisions relating to intra-group directorships. Specific approval by independent members of the board should then be sought, as appropriate, and a procedure should be put in place to record such declarations and authorisations.

Overseas companies with a presence in the UK

New registration regime: The existing place of business and branch registration regime is being replaced with a single registration to be known as a UK establishment. Existing places of business and branches will be treated as a UK establishment from 1 October 2009.

Existing places of business will need to provide additional information to Companies House in order to meet the requirements of the new regime in the form of a transitional return. This return must be filed at Companies House by 31 March 2010. Any overseas companies that have not previously filed accounts, together with a certified translation where applicable, must do so by the earlier of either 1 October 2010 or the date on which the filing would fall due under the present regime.

Action points: Ensure that the transition return is completed and filed at Companies House by 31 March 2010.

Ensure that you understand the new disclosure requirements relating to the filing of accounts and make sure that accounts are ready for filing by the appropriate deadline.

Share capital

Authorised share capital: Private companies will no longer be required to fix their maximum authorised share capital under the Act. Companies will therefore be able to allot shares without the need to seek shareholder approval to increase the authorised share capital, provided that there are no provisions in the company's articles to the contrary. This will make allotments of shares much simpler in future and will avoid the need to monitor authorised share capital levels.

Companies Act 2006 – have you taken action yet? – cont'd

Action point: Existing companies should pass an ordinary resolution to remove the current limits on authorised share capital.

Directors' authority to allot shares: Private companies with only one share class will no longer need to obtain express authority from its shareholders to allot shares, provided there are no provisions in a company's articles to the contrary. Again, this will make it simpler to allot shares in future.

Action point: Existing companies with only one class of shares should pass an ordinary resolution to take advantage of the provisions.

Statements of capital: Filings made with Companies House concerning alterations to share capital will need to include a 'Statement of Capital'; relevant filings include returns of allotment, notifications of capital reductions or share buybacks and annual returns.

Action point: Ensure that your company secretarial software has been upgraded to include the new Companies House forms in order to avoid rejection of forms and subsequent delays.

Reduction of capital: The new solvency statement procedure for reducing capital has been introduced for private companies, meaning that the existing court-approved procedure for reduction can be avoided in many cases.

Action point: Consider using the new solvency statement procedure to reduce share capital if any of following situations applies to your company:

- You are considering a corporate simplification programme.
- You have dividend blocks within the group.
- You have non-distributable reserves that you wish to render distributable.

Redenomination of share capital: A simplified procedure will be introduced for companies wishing to re-denominate their share capital into one or more currencies

(subject to any restrictions in the company's articles). This procedure extends to cancelling part of the issued share capital in order to round the values of the newly re-denominated shares.

Action point: Companies previously deterred by the complex procedure for re-denominating capital may now wish to re-consider this in light of the new rules.

Directors and officers

Service addresses: Directors and secretaries must now provide a service address to Companies House on appointment in addition to their residential address. All existing directors and secretaries may also provide a service address. In many cases the service address used will be the registered office address of the company. For existing directors and secretaries, if no action is taken the service address will default to the individual's residential address. The residential address will not be made available on the public record but will be held on a secure register by Companies House.

Companies are also now required to keep a separate register of directors' residential addresses.

It will also now be possible for directors and secretaries to make an application to Companies House to have documents removed from the public record which disclosed their residential address if they, or someone who lives with them, is at risk of violence or intimidation as a result of their appointment.

Action points: Ensure that the appropriate form is filed at Companies House for each of your directors to record a new service address.

Create a new register of directors' and secretaries' residential addresses and update the existing register of directors and secretaries with the new service address.

Consider if an application should be made to Companies House to remove documents disclosing residential addresses from the public record.

Companies Act 2006 – have you taken action yet? – cont'd

Maiden names: There is a new requirement for directors and secretaries to disclose their maiden name where they have been used for a business purpose in the previous 20 years.

Action points: Contact each of your directors and company secretaries, as appropriate, to obtain their maiden names. Update the register of directors and secretaries with the name and ensure that it is disclosed on the next annual return.

Company secretary: Private companies are no longer required to appoint a company secretary unless their articles specifically state otherwise. They may, of course, continue to have a company secretary; in such cases the secretary will retain their statutory powers.

Action points: Companies should consider whether they wish to retain a company secretary. If a secretary is not retained, the articles of association should be reviewed to ensure that there are no specific actions required to be taken by the secretary.

Corporate directors: Companies are now required to have at least one director who is a natural person.

Action point: Companies who did not have a natural individual appointed as a director on 8 November 2006 should ensure that another individual is appointed as a director by 1 October 2010.

Resolutions and meetings

AGMs: There is no longer a requirement for private company's to hold an AGM, unless there are contrary provisions in their articles. The timing for holding a public company's AGM has changed so that it must now be held within six months of the accounting year end.

Action points: Private companies should review their articles to establish whether there are any specific provisions relating to the requirement to hold an AGM and remove any such provisions.

Public companies should ensure that all future AGMs are convened in accordance with the new time limits.

Shareholder rights directive: Under new regulations introduced on 3 August 2009, traded companies are required to give 21 days notice of all general meetings, not just annual general meetings as required under the Act. However, provided companies offer shareholders the facility to vote their shares electronically, and an appropriate resolution, passed as a special resolution, is approved at the company's AGM on an annual basis, other general meetings of the company may be convened on 14 days notice.

Action points: Traded companies should ensure that they have an appropriate system enabling shareholders to appoint proxies electronically, and a special resolution approving the shorter notice period should be added to the list of resolutions to be passed at each AGM.

Resolutions: All private companies are now permitted to pass written resolutions in place of holding a general meeting. Public companies are no longer allowed to pass written resolutions. Whereas under previous law, all written resolutions had to be agreed to unanimously, it is now only necessary to obtain agreement from those shareholders representing the requisite proportion of voting rights (i.e. over 50% for an ordinary resolution, or 75% for a special resolution).

The Act lays down a very specific procedure for the circulation and passing of written resolutions, including the requirement to include certain statements and notice that the resolution will lapse if not approved with 28 days of circulation.

Action point: Ensure that the correct procedures are being adhered to when passing written resolutions in order to avoid invalidating resolutions.

Companies Act 2006 – have you taken action yet? – cont'd

A company's constitution

Articles: Going forward, the articles of association will be the primary constitutional document of all companies. The memorandum was previously an important document setting out the company's objects, however this document will now exist for the sole purpose of recording the details of the initial subscribers and their agreement to form a company. For existing companies, all other provisions of the memorandum will be deemed to be a part of the articles from 1 October. New companies will be incorporated with unrestricted objects as a default.

Action point: Company secretaries should take this opportunity to update their articles of association and take advantage of new simplified procedures by removing their authorised share capital and not requiring directors to seek shareholder approval.

Accounts

Accounts: Private companies are no longer required to lay their accounts before the company in general meeting. However, the accounts must be circulated to all the members of the company by the date on which the accounts are filed with Companies House, or by the accounts filing deadline, whichever is earlier. The obligation to approve the accounts in general meeting remains for public companies and in addition quoted companies must publish the accounts on their website.

The deadlines for filing accounts with Companies House have been shortened for accounting periods beginning on or after 6 April 2008. For private companies it has been reduced from 10 months after the year end to nine months, and for public companies from seven months to six months. Penalties for late filing of accounts have also been increased and are structured to penalise repeat offenders to a greater degree. Companies House are also being more aggressive at present in initiating proceedings against companies and directors who are not keeping up-to-date with their filing obligations.

Action points: Private companies should be sure that they adhere to the obligation to circulate accounts by the prescribed deadline and all companies should ensure their accounts are prepared and approved in good time so as to meet the shortened filing deadlines.

New Alternative Investment Market (AIM) rules

The London Stock Exchange has published a new version of the AIM rules, together with a new 'AIM Note for Investing Companies'. The new rules and the note became effective on 1 June 2009.

The new rules clarify the regime for both the admission of investing companies to the AIM market and also their continuing obligations once admitted.

An investing company is defined in the new rules as "any AIM company which has, as its primary business or objective, the investing of its funds in securities, business or assets of any description". This definition would include cash shells and special purpose acquisition companies but does not include a holding company for a trading company.

The main purpose of the new rules is to ensure that AIM is not used for overly complex funds which are more appropriate for the main market.

What are the changes?

- The new rules introduce changes relating to investment managers. An investment manager is expected to be independent from the board of an investing company.

- Investing companies are now required to have a precise and detailed 'investing policy' which must be announced regularly and should be outlined in its annual accounts. This has altered the old regime which required a company to have an 'investing strategy'.
- An investing company will have 18 months to substantially implement its investing policy once admitted to AIM. 'Substantially implemented' is deemed to be over 50% of all funds available invested in accordance with the investing policy.
- Any material changes made to the investment policy will require prior consent of the shareholders.
- The new rules also make various clarifications to existing areas of the regime relating to investing companies.

Action points

- Existing investment companies should ensure that their investment manager is independent in accordance with the new rules by 30 September 2009.
- Investment companies should also announce any information required by the new AIM rules that they have not previously announced by 30 September 2009.
- Existing investment companies should review their investing policy and make any necessary changes by 1 December 2009.

The full text of the AIM Rules for Companies can be viewed by [clicking here](#).

New code of practice for remuneration policies

What has changed?

The Financial Services Authority (FSA) has published a new code of practice for remuneration policies (the Code) in the financial services sector which will come into effect on 1 January 2010. It will apply primarily to large banks, buildings societies and broker dealers in the UK.

The two main objectives of the Code are to ensure that the remuneration practices are consistent with good risk management and sustainability policies and that individual compensation practices provide the right incentives.

In particular, the Code discourages firms from entering into contracts with individuals that involve guaranteed bonuses for more than a year and expects that, for senior employees, two-thirds of their bonuses will be spread over three years.

What are the implications?

The FSA requires all relevant financial institutions to submit a remuneration policy statement by the end of October 2009 to enable it to monitor compliance with the Code. Firms that are found to be non-compliant with the Code may be subjected to enforcement action or forced to hold additional capital.

Firms will also be required to review and make any necessary amendments to their current employment contracts in order to ensure compliance with the Code.

Action points

Company secretaries of relevant financial institutions should do the following:

- Ensure that the remuneration committee is fully briefed on the Code.
- Ensure that a remuneration policy statement is drawn up and signed off by the remuneration committee for submission to the FSA by the end of October 2009.
- Review employment contracts to ascertain whether they need to be amended in line with the Code.
- Prepare for meetings with the FSA which are scheduled to take place between November 2009 and February 2010 to implement the outcomes of their review of the submitted remuneration policy statement.



The Walker report

The Walker report was published on 16 July 2009 in response to concerns that failures in corporate governance had contributed significantly to excessive risk taking in the lead up to the financial crisis.

The report targets banking and other financial institutions (BOFIs); however, specific recommendations may also apply to other institutions, namely UK listed companies.

It is anticipated that the report's recommendations will be incorporated into the Combined Code, which is currently under review by the Financial Reporting Council (FRC).

What are the key themes of the review?

- The Combined Code remains 'fit for purpose' in regulating corporate governance.
- Shortcomings of boards relate to behavioural rather than organisational patterns and a more rigorous mechanism to challenge risk and strategic decisions should be embedded in board behaviour.
- A more stringent approach should be adopted at board level to scrutinise risk.
- Fund managers and major shareholders should be more engaged with investee companies and boards should be receptive to this.
- A higher level of oversight is required by the board in respect of remuneration policies.

What recommendations have come out of the review?

- Board size, composition and qualification – Non-executive directors should dedicate more time to their role and be provided with sufficient support and training to enable them to participate in the business effectively and monitor risk. They should also have access to dedicated support from the Secretariat.
- Functioning of the board and evaluation of performance – The chairman is expected to commit a substantial amount of time to the role and have the requisite experience to provide effective leadership to the board. It has also been recommended that the Chairman seek annual re-election.
- The role of institutional investors – BOFI boards should have a greater awareness of any material changes in the Company's shareholding and any substantial change over a short time period may require FSA involvement.
- Governance of risk – To manage risk more effectively, separate Risk Committees should be established. The remit of the committee will include the submission of an Annual Risk Report alongside the Annual Report.
- Remuneration – All aspects of remuneration policy should fall within the Remuneration Committee's remit and more generally, a higher degree of disclosure is required in relation to executive remuneration.

Action points

- Review the current board structure to ensure sufficient representation from both executive and non-executive directors.
- Ensure all non-executive directors are fully briefed on their role and regular training is provided.
- Ensure boards have sufficient dedicated company secretarial support.
- Establish a separate Risk Committee if not already in existence.
- Monitor the amount of time dedicated by the Chairman and non-executive directors.

The report's consultation period closes on the 1 October 2009 and it is expected that the final report will be published in November 2009.

The full report can be found here by [clicking here](#).



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