Companies Bill - First Update

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Introduction

We published our introductory paper on the Companies Bill 2006 in August. As we noted in that paper, the Bill is likely to become law in November this year. However, other than in the case of one or two specific sections which will come into force at once, for example those dealing with the Transparency Obligations Directive, (which relates to quoted companies) it is not likely to become fully effective until some time in the Autumn of 2007.

The Bill continues to grow and has now reached over 1,600 sections and 16 schedules, making it the largest piece of UK legislation ever to go through the Parliamentary process. We can only hope the end justifies the huge efforts to bring the Bill into law. Since our earlier paper, there have been a number of important general developments which we thought we would bring to your attention.

We will continue to produce papers of a general nature over the next few months, where we think this is useful. When the Bill becomes law we will prepare more detailed briefing notes. We would welcome feedback during this process. We have already had some positive and helpful comments from our clients and friends and we hope this process will continue.

It is also our intention, for those of you who receive this note and are based in the UK, to run a series of seminars to provide more detailed information about key aspects of the legislation and how they might impact on companies operating in the UK.

A few practical thoughts

Although implementation of the legislation may seem a long time away, there is much work for many existing companies to think about. Below are several examples but there are numerous others. We will be publishing more detailed papers on these and other matters.

- Directors will need to begin to understand firstly the scope of their new duty to "promote the success of the company for the benefit of its members as a whole", and the various matters they need to consider when looking at "enlightened shareholders' value" (see our previous paper) and, secondly, changes to those areas of law relating to conflicts of interest and disclosure.

- Some companies will want to think about reviewing many of their constitutional documents and in particular their articles of association, once the results of the DTI consultation referred to above are known. Companies which have entered into joint venture agreements, shareholder agreements and similar arrangements may feel that these also need review.

- Companies may wish to consider the proposed new rules on meetings. These might include electronic communications with their shareholders and the way in which meetings are held and resolutions passed.

Consolidation of current companies legislation

Earlier drafts of the Bill suggested that the previous core companies legislation – that is the Companies Acts 1985 and 1989 – would remain as separate Companies Acts after the Bill became law. However, during the summer the DTI has decided that most, but not all, of the remaining provisions of those two pieces of legislation should be restated in the Bill and have now issued a first set of what are called "draft restatement clauses". The new draft clauses deal, among other things, with debentures and company charges, fraudulent trading and protection of members against unfair prejudice. Parts of existing legislation which will escape the consolidation currently include DTI investigations and the regulation of auditors.

The DTI does not, we believe, wish to change any of the existing legislation and has stated that any unintended changes to the current law will be corrected through amendments brought forward later on during the Parliamentary process.

What this in fact means is that as mentioned above we will end up with one vast piece of Companies legislation but at least the legislation will be more or less in one place! This, ultimately, is probably going to be of benefit to both practitioners and their clients.

Effect on existing companies

The DTI has just finished consulting on the application of certain provisions of the Bill to existing companies. Although the results are awaited, the DTI has suggested that its general approach to implementing the Bill for existing companies is guided by three main objectives:-

(a) It wishes the Bill's provisions to apply to existing companies as well as new ones and although much of the Bill will be able to be applied to existing companies without modification, discussions are required where there is a case for making transitional arrangements for existing companies.

(b) It recognises the importance of decisions taken by members and directors and agreements already entered into by existing companies (for example, constitutional arrangements) which it calls "existing bargains", and by which is meant shareholder agreements, joint ventures and similar. The second objective of the DTI is therefore to ensure so far as possible that existing bargains are not overridden.

(c) Its final objective is to make it as easy as possible for existing companies to comply with the new requirements of the Bill and take advantage of its new freedoms.

The DTI's consultation paper covers various areas including:-

- A company's constitution;
- Share capital;
- Annual general meetings; and
- Company secretaries.

To take one example; at present there are restrictions in a company's articles of association (constitution) to alter its share capital. As a result, alterations can only be made if its articles of association permit that alteration. A company may therefore only start the process of reducing its share capital under current legislation, if it is authorised to do so by its articles. This means for existing companies, silence in the articles effectively amounts to a restriction on what the company can do. However, new legislation is drafted is drafted in a way which means that for companies formed under the Bill, silence in the articles will effectively permit the alteration in question. Returning to our example, in the case of changes to share capital the DTI has asked whether an existing company should (i) only be able to make alterations to its share capital without the requirement for prior authorisation in its articles if it first gets its members' approval to change its articles to allow this or (ii) whether the company should immediately be empowered to make such alteration to its share capital free from any restrictions once the Bill becomes law.

Another example in the consultation paper is whether existing private company secretaries should retain their existing powers to execute and authenticate documents. In future, new private companies will not be required to appoint a company secretary. Perhaps this is a change which will have less of an impact than is currently thought as the Bill proposes a new form of signatory - the authorised signatory.

It is becoming apparent that the scope of the Bill and its fundamental changes to numerous areas of corporate law which have been enshrined in Companies legislation, in some cases for decades, will need careful thought during the long transitional period which the DTI is suggesting.

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