

PROPOSED CHANGES TO COMPANY LAW

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A Bill has been published to introduce a number of changes to the Companies Act 2006, including a requirement for companies to maintain a register of persons having significant control over them, an extension of directors' duties to shadow directors, the prohibition of corporate directors, an ability to disqualify directors in relation to misconduct overseas and the abolition of bearer shares.

The Small Business, Enterprise and Employment Bill follows the Government's consultations on enhancing the transparency of UK company ownership and increasing trust in UK business and reducing red tape for companies.

A summary of the key company law provisions is set out below. The Bill also covers insolvency and employment-related matters.

REGISTER OF PERSONS HAVING SIGNIFICANT CONTROL

Every company will be required to maintain and keep open for public inspection a PSC register: a register of persons having significant control. This information will also need to be filed at Companies House once a year. The principal objective is to prevent corrupt individuals hiding behind secret companies, which has been prompted by debates at the G20.

Companies will have duties to take reasonable steps to investigate and obtain information on PSCs and to keep that information up to date, including an obligation to serve notices on anyone who may know anything about who might be a PSC. There are also duties on PSCs to supply information to the company. There is a right for companies to impose restrictions on shares without a court order where a PSC has failed to comply with its disclosure obligations.

A person having significant control of a company will be any individual who has an interest in more than 25% of the shares or voting rights, or who otherwise exercises control over the management. This includes where the 25% interest is held individually or jointly, for example as one of a number of members of a firm that is not a legal person. There are provisions for establishing if an individual has control via a trust or fund.

The requirements will apply to all UK companies (including companies limited by guarantee) and limited liability partnerships. However, companies which have securities listed on a regulated market and comply with DTR 5 or equivalent disclosure requirements will be exempt.

Separate moves to introduce a similar requirement at EU level, for companies subject to anti-money laundering legislation, are ongoing.

It will be possible to make an application to Companies House to stop beneficial ownership information being publicly disclosed in exceptional circumstances. This is likely to be in line with the existing regime for addresses not to be disclosed where there is a serious risk of violence or intimidation.

DIRECTORS' DUTIES TO APPLY TO SHADOW DIRECTORS

Shadow directors will be subject to the general duties that apply to directors "where and to the extent they are capable of so complying". This means that shadow directors may be sued by the company if they breach those duties. Regulations will be made to make provision for adaptations or for some duties not to apply to shadow directors. The extent of the duties on shadow directors will be clearer once those regulations are published. Investors who appoint board observers or others in accordance with whose instructions the board is accustomed to act should consider what measures can be put in place to avoid such persons being shadow directors, or to ensure that they will be covered by appropriate liability insurance.

The definition of shadow director is being amended so that someone will not be a shadow director if the board acts in accordance with instructions or directions given by that person in the exercise of a function conferred by or under an enactment, for example an administrator.

CORPORATE DIRECTORS

The use of one company as a director of another company will be prohibited, with limited exceptions. Exceptions will be contained in regulations to be published separately and we expect they will include an exception for group structures and pension trustees. Existing corporate directors will automatically cease to be directors a year and a day after the new legislation comes into force. Unless they are replaced with individual directors before then, companies will need to consider the impact on quorum requirements and provisions in the Articles of Association as to a minimum number of directors.

DISQUALIFICATION OF DIRECTORS

The current regime for disqualification of directors is being amended. There is a broader list of factors to be considered when determining if someone is unfit to be a director, including culpability and materiality of past conduct, track record, misconduct overseas and breach of sectoral regulation as well as general directors' duties. One of the factors to be taken into account is "the extent to which [a director or shadow director] was responsible for the causes of a company or overseas company becoming insolvent". This could act as a disincentive to risky business decisions, as directors will be concerned about potential disqualification if it all goes wrong.

COMPENSATION OF CREDITORS

There is a new power to apply for a compensation order against a disqualified director where creditors have suffered identifiable losses from their misconduct. In addition, liquidators and administrators will be able to assign claims against miscreant directors to increase the chances of action being taken against them.

BEARER SHARES

"Share warrants to bearer", where the owner of shares is listed in a company's register of members as the bearer of a warrant, are being abolished. These are seldom used, except by a number of small companies. Existing warrants will need to be converted into shares or cancelled. Companies will have the power to remove the authority to issue warrants from their Articles of Association without needing shareholder approval.

STATEMENTS OF CAPITAL

Public companies will be required to include a statement of the aggregate amount paid up on their shares on account of their nominal value. This should be easier to comply with than the current requirement to include the amount paid and unpaid on each share.

CUTTING RED TAPE FOR SMALLER COMPANIES

The Bill also introduces a number of administrative changes which may benefit smaller companies and make the administration of larger groups easier. These include an ability to keep information on a central register at Companies House and opting out of the requirement to maintain separate statutory registers and an ability to deliver a confirmatory statement in each twelve month period that there have been no changes to information on the record rather than having to complete an annual return (a "check and confirm" process). There is also a commitment to introducing a process for registering a new company electronically. In addition, the procedure for striking off a company that is not carrying on business and a company that has applied to be struck from the register will be shortened to approximately two months.