



# COMPANY LAW MEMO 2009

Newsletter Issue 4

July 2009

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Welcome to the *Company Law Memo 2009* newsletter, highlighting important recent developments in company and insolvency law. You can also access comprehensive updates to specific paragraphs via our online updating service. We always welcome suggestions from readers, so please contact us if you have any comments.

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## NEWS ROUND-UP

### Limited partnership reform

See *CLM* ¶17

Although the Government has decided not to go ahead with its main proposals to reform limited partnership law following the responses to its consultation (see *CLM 2009 Newsletter Issue 3*), it is taking the opportunity to address some issues pending a decision on the more contentious proposals. It has published a draft Legislative Reform Order which will amend the Limited Partnership Act 1907 (draft Legislative Reform (Limited Partnerships) Order 2009). The Order will clarify the registration requirements for limited partnerships, setting out in more detail what needs to be included in the application for registration and what criteria a limited partnership's name has to fulfil. It will also provide for a certificate of registration to be provided by Companies House to a new limited partnership on successful registration, which will constitute conclusive proof of when the limited partnership came into existence.

The draft Order is expected to come into force on 1 October 2009.

### Amendments to Community Interest Company Regulations

See *CLM* ¶62+

The Government has published its response to the consultation on its proposed changes to the CIC regulations (SI 2005/1788; see *CLM 2009 Newsletter Issue 2* for details of the consultation). While it will proceed as planned with most of the amendments suggested, some notable proposals are not being taken any further at this stage:

- » the proposal to amend the community interest test by allowing the regulator to take the wider community and public policy into account has been rejected as there was a danger that it would change the regulator's role too much and impose a quasi-judicial function on him;
- » the proposal to enable a CIC that is being wound up to transfer its assets to a non-asset-locked public authority or regulatory body has been shelved for now due to concern over how it might work in practice. The Government plans to consult specifically with interested parties to see if the concerns raised can be overcome; and
- » the questions raised about how to deal with the inconsistency between the requirement for the regulator's consent for a transfer at an undervalue to an asset-locked body, and the lack of such a requirement where the transfer is for the benefit of the community. Most respondents favoured extending the requirement for consent, but this would move away from a light-touch regulatory approach and may hinder growth. Such transfers are rare and of relatively low value, so the Government will put this issue to one side for now and consider it further.

The Government had proposed to leave the provisions dealing with alternate directors in the regulations, on the basis that they do not impose any requirement on CICs. However, it has decided to change its approach in the light of the consultation responses and remove them, leaving CICs to deal with alternate directors in their articles if they wish (as with companies generally).

An updated draft of the Community Interest Company (Amendment) Regulations 2009 is available at:

[http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi\\_9780111481004\\_en.pdf](http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111481004_en.pdf).

They are expected to come into force on 1 October 2009.

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# News



## NEWS ROUND-UP cont...

### Updated Financial Reporting Standards

See CLM ¶4211+

The ASB has published the following amended FRSs **to refer to** the new Companies Act and supporting regulations (SI 2008/410):

- » FRS 2: Accounting for subsidiary undertakings;
- » FRS 6: Acquisitions and mergers; and
- » FRS 28: Corresponding amounts.

The amended FRSs apply for accounting periods of companies beginning on or after 6 April 2008. They do not make any changes to existing reporting requirements.

The amendments can be freely downloaded from the FRC website: <http://www.frc.org.uk/asb>.

### EC consultation on the adoption of international standards on auditing in the EU

See CLM ¶4290+, ¶4314

The European Commission is consulting with the public on the **possible adoption** of international standards on auditing, for the **audits of** all limited companies in the EU. EU law allows the adoption of such auditing standards if they:

- » have been developed with proper due process, public oversight and transparency;
- » are generally accepted internationally;
- » contribute a high level of credibility and quality to companies' annual accounts; and
- » are conducive to the European public good.

Comments on questions within the consultation paper in relation to the above, and on the scope and timing of adoption are invited by 15 September 2009.

The consultation paper can be freely downloaded from the Commission's website: [http://ec.europa.eu/internal\\_market/consultations/2009/isa\\_en.htm](http://ec.europa.eu/internal_market/consultations/2009/isa_en.htm).

### European Directive on accounting disclosures for SMEs and consolidated accounts

See CLM ¶4356+

A new European Directive has been published which **will permit**:

- » small and medium-sized companies to be exempted from the requirement to disclose an explanation of formation expenses in the notes to their accounts; and
- » parent companies to be exempted from the obligation to draw up consolidated accounts and reports for immaterial subsidiaries.

The UK must implement provisions to comply with this directive before January 2011.

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# News



## NEWS ROUND-UP cont...

### New OFT guidance on mergers

See ¶5507+

Following a consultation process in 2008 (see *CLM 2008 Newsletter Issue 3*), the OFT has published finalised guidance to companies on its merger review procedures (“Mergers – jurisdictional and procedural guidance” June 2009). The guidance **covers** various topics, including:

- » **relevant merger situation:** a transaction will only fall within OFT’s remit if it constitutes a “relevant merger situation”. The guidance provides an interpretation of the term, and in particular, sets out the circumstances when two enterprises will be considered to have merged and cease to be distinct;
- » **fast-track procedure:** this has been introduced so that mergers can be referred to the Competition Commission more quickly (provided that the test for reference has been met). With this procedure, the OFT estimates that it can refer a merger to the Commission in as little as 10 working days after receiving notification from the parties to the merger;
- » **undertakings and orders:** the OFT can request initial undertakings at any time while it considers whether to refer a merger. It can then impose initial orders if the parties are unwilling to provide acceptable undertakings within a short timeframe. Even after the OFT has decided to refer the merger, it may still accept undertakings in lieu from the parties (although the OFT has clarified that it will only do so where the undertakings in lieu contain proposals for remedies which are clear cut and ready for implementation); and
- » **informal advice:** the guidance clarifies the circumstances where it will provide informal advice on competition issues to the parties involved. These circumstances are in line with existing practice, i.e. the OFT will only consider applications for advice where the parties intend in good faith to proceed with the transaction, and its duty to refer a merger to the Competition Commission is a genuine issue.

This new guidance **supersedes** the OFT’s previously published information on its merger review process.

A copy of the guidance can be found on the OFT’s website:  
[http://www.of.gov.uk/shared\\_of/mergers\\_ea02/of527.pdf](http://www.of.gov.uk/shared_of/mergers_ea02/of527.pdf).

### Consultation on various Takeover Code amendments

See *CLM* ¶6788, ¶6805+, ¶6818, ¶6850, ¶6872+

The Takeover Panel has issued a consultation paper on various proposed amendments to the Code. Many of the amendments are **minor** in nature and simply codify existing practice, or are designed to remove any ambiguity in the application of the Code Rules.

The more **substantial** amendments relate to the following areas:

- » **mandatory offers:** currently, if a bidder makes a mandatory offer for a company (“B”) where B owns at least 50% of another company (“C”), the Panel may require the bidder to make a separate offer for C (r 9.1 City Code note 8). The Panel proposes to reduce this ownership threshold from 50% to 30% (i.e. the Panel may require the bidder to make a separate offer to C’s shareholders if B owns at least 30% of C);

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- » **management incentivisation:** in general, any favourable conditions to the deal must be available to all of the target's shareholders, so if the bidder has any incentivisation arrangements with the target's management, the target's independent adviser must publicly state its opinion on whether the arrangements are fair and reasonable to its shareholders (r 16 City Code note 4). The Panel proposes to amend this rule to require the independent adviser to state its opinion even when limited discussions on the arrangements have taken place;
- » **documents on display:** the Code requires certain documents to be available for inspection from the time the offer document or the target board's circular is published (r 26 City Code). These include, for example, the auditors' report where a profit forecast has been used. The Panel proposes to require the parties to the offer to make these documents available on their websites as well;
- » **proceeding with the offer:** a bidder is usually expected to proceed with an offer that it has announced unless, for example, a competitor has posted a higher offer (r 2.7 City Code). In practice, the bidder should consult the Panel first before deciding not to proceed. The Panel proposes to codify this practice and require mandatory consultation; and
- » **offers subject to competition clearance:** an offer will lapse if it has been referred to a merger control authority, which then decides that the offer cannot proceed (r 12 City Code). However, the current rules do not state the restrictions that will apply to the bidder after the offer lapses. The Panel proposes to amend the rules to prohibit the bidder from making a new offer for the target for 6 months (from the date of the authority's decision).

The consultation is **open until** 25 September 2009. A copy of the consultation paper is available at:

<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/pcp200902.pdf>.

### Insolvency Service reports on first 6 months of new guidelines for pre-packs

See CLM ¶18904+

The Insolvency Service has published the results of its **review of compliance with SIP 16** "Pre-packaged sales in administration" (see *CLM 2009 Newsletter Issue 1*) by insolvency practitioners engaged in pre-pack sales during the first 6 months of 2009 ("Report on the First Six Months' Operation of Statement of Insolvency Practice 16"). During that period the Insolvency Service received SIP 16 information from insolvency practitioners relating to 572 pre-pack sales concerning companies in administration. Of these, 370 cases (65%) were compliant with the requirements of SIP 16.

In the 202 cases (35%) that were not compliant the Insolvency Service states that there was significant room for improvement. In particular, there were **concerns regarding:**

- » the timing of the SIP 16 information being provided;
- » the lack of explanation, in a large minority of cases, of the background to the circumstances surrounding the administrator's appointment, their prior involvement with the company and why the company needed to enter into administration; and
- » the lack of detailed disclosures and explanations as to the nature of any marketing activity that had been undertaken, any offers received for the purchase of the business or assets of the company, whether any assets were subject to any security (and the amount owed to secured creditors) and in relation to valuations obtained of the company's business or underlying assets (including goodwill).



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The Insolvency Service wrote to the **insolvency practitioners** who had not complied with SIP 16, in most cases requesting further information. In only 3% of the cases, the insolvency practitioner(s) was reported to his appropriate authorising body for consideration for regulatory or disciplinary action.

The Insolvency Service points out that a **failure to comply does not imply** that there was any misconduct on the part of the insolvency practitioner in relation to the pre-pack sale itself, nor a lack of good faith or a failure to act in the interests of creditors. SIP 16 is in its early stages and the Insolvency Service has recognised that there may have been some initial misunderstanding of what is required, or expected. Indeed a recent independent survey undertaken by R3 (the Association of Business Recovery Professionals) indicated that 99% of its member insolvency practitioners believed that they were complying with SIP 16. The report clarifies what information is expected to be provided and the Insolvency Service expects compliance with SIP 16 to improve. It remains confident that SIP 16, when complied with, does give better information to creditors at an early stage and a greater degree of transparency in pre-pack sales.

The Insolvency Service acknowledged that many of the concerns raised by the review are not strict requirements of **SIP 16** and confirmed that it is looking to make **amendments** to require:

- » the information be sent to creditors, and the Insolvency Service, within a set timescale;
- » full disclosures as to any:
  - security to which the company's assets are subject;
  - valuations obtained; and
  - director's financial interests.

SIP 16 is only one method by which the Insolvency Service seeks to uncover any **misconduct by directors** of companies in administration. It also receives information about suspected director conduct issues from insolvency practitioners' reports (required to be made if it appears that the director(s) is unfit to be concerned in company management, see CLM ¶8856) and complaints from members of the public made via the Insolvency Service hotline, or directly to the CIB (see CLM ¶7195+). The Insolvency Service has considered such information as part of this review and (although the review is in its early stages at present) the report confirms that so far there is no suggestion of a disproportionately high level of director misconduct in pre-pack sales as compared to other company administrations.

The Insolvency Service will continue to monitor the information it receives and will report again on the operation of SIP 16 in early 2010.

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## RECENT CASES

### Directors of corporate directors

See *CLM* ¶2210, ¶2213

*Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v Holland and another* [2009] EWCA Civ 625

A director of a company (A Ltd), which is itself a director of another company (B Ltd), will not be a **de facto director** or **shadow director** of B Ltd merely because he is a director of A Ltd. It is not enough for the individual director to actively participate in A Ltd's board decisions in relation to the actions of B Ltd.

However, the individual director of A Ltd could become a de facto director of B Ltd if he steps outside the confines of his role as a member of the board of A Ltd and acts directly in relation to the affairs of B Ltd.

### The scope of a company's business and directors' fiduciary duties

See *CLM* ¶2392

*Re Allied Business and Financial Consultants Ltd, O'Donnell v Shanahan & Others* [2009] EWCA Civ 751

The Court of Appeal has overturned the decision of *Re Allied Business and Financial Consultants Ltd, O'Donnell v Shanahan & Others* [2009] EWHC 1973 (Ch) in relation to directors' duties to **avoid conflicts of interest** and to account for profits (now the statutory duty **not to accept benefits from third parties**) (see *CLM 2008 Newsletter Issue 5*). The Court held that the question of whether an opportunity pursued by directors for their own benefit is within the scope of the company's business (actual or contemplated) is irrelevant when deciding whether directors have breached these duties by taking advantage of the opportunity themselves.

Mr S, Mr L and Ms O were all shareholders and directors of AB&FC Ltd. The company was operated on the basis of a quasi-partnership and they each received an equal share of its profits. AB&FC Ltd's business was that of providing financial advice and assistance (including arranging commercial loans, residential mortgages and insurance). Mr S and Mr L had acquired an interest in a property for investment purposes in their own right rather than through AB&FC Ltd. Ms O contended that this amounted to breaches of Mr S and Mr L's fiduciary duties. At first instance the High Court found that the acquisition of properties for investment was not in fact within the scope of AB&FC Ltd's business and that, although its objects were wide enough to allow the directors to diversify into such activity, there was no suggestion that it was ever contemplated by the directors that it might do so. Accordingly, there was no real sensible possibility of breach of duty.

The Court of Appeal disagreed. It held that the fact that Mr S and Mr L had personally taken advantage of an opportunity and information they had acquired in their capacity as directors of AB&FC Ltd gave rise to a duty to inform AB&FC Ltd of (and offer to it) that opportunity. They should have obtained AB&FC Ltd's consent before proceeding with the acquisition personally, even though there was no realistic prospect of AB&FC Ltd taking advantage of it itself, which they did not do. In addition, when Mr S and Mr L became personally involved in the transaction, they had preferred their own interests over those of AB&FC Ltd (in sacrificing the commission payable to the company for negotiating the sale). Accordingly, Mr S and Mr L were in breach of their fiduciary duties.

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## RECENT CASES cont...

### Administration and foreign proceedings

See CLM ¶8818, ¶8904

*Harms Offshore AHT "Taurus" GmbH & Co. KG v Bloom & Others* [2009] EWCA Civ 632

The **moratorium on legal proceedings** taken against a company in administration is confined to legal processes brought within the jurisdiction. Likewise, the term "legal proceedings" does not include foreign proceedings brought by a creditor who is not subject to the jurisdiction.

However, despite the strong presumption that the court will not interfere with the proceedings of a foreign court, administrators can apply to court for **injunctive relief** preventing a creditor pursuing or continuing with foreign proceedings in relation to the company's assets. Whether or not the court will grant such an injunction will depend on the facts of each case.

ONS Ltd carried on the business of offshore oil and gas exploration in the North Sea. It fell into financial difficulties and entered administration. Two of its creditors brought proceedings in a New York court in respect of amounts owed to them by ONS Ltd under charter agreements. Under its admiralty and maritime jurisdiction the New York district court granted the attachment orders sought by the creditors over ONS Ltd's tangible and intangible assets. The administrators subsequently obtained an injunction from the court (in the UK) requiring the creditors to procure the release of the attachment orders and the release of attachments which had occurred under those orders. The creditors appealed. The Court of Appeal confirmed that it is normally inappropriate for the court to interfere with foreign proceedings. However, the exceptional circumstances in this case meant that the grant of the injunction was justified because of the creditors' improper and oppressive conduct in:

- » misleading the New York district court by failing to inform it of the fact that ONS Ltd was in administration;
- » failing to inform the administrators of the attachment orders they had obtained until after they had succeeded in attaching funds (which were paid by the administrators into a supplier's bank account in New York in respect of post-administration liabilities) sufficient to meet their claims; and
- » effectively setting a trap for the administrators.

### Removal of administrators after pre-pack sale

See CLM ¶9038+

*Clydesdale Financial Services Ltd and others v Smalles and others* [2009] EWHC 1745 (Ch)

Administrators were removed by the court following a pre-pack sale where the terms of sale and the circumstances which led up to it gave rise to a **legitimate concern warranting an independent investigation** by another administrator.

A creditor of AS LLP applied for the removal of the joint administrators, and the appointment of a replacement administrator, after a pre-pack sale of AS LLP's work in progress had been implemented. The administrators had advised AS LLP about its future when it fell into financial difficulties and had actively participated in negotiating the terms of the pre-pack sale. The creditor complained that the administrators had failed to comply with SIP 16, had facilitated the sale at an undervalue (by failing to obtain a proper valuation of the work in progress) and had failed to consult AS LLP's creditors before the sale was agreed.

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The court exercised its power to remove the administrators. It rejected all allegations of impropriety against the administrators, but found that the terms and circumstances of the sale were a legitimate matter for consideration and investigation by an officeholder acting in the interests of AS LLP's creditors. As the joint administrators were so closely involved in the negotiations leading up to the pre-pack sale the court found that they would not be able to carry out such an independent review. The court stressed, however, that the removal of the administrators did not suggest any imputation against their integrity and that such independent investigation may discover that there was nothing untoward in relation to the sale.

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# Case law



## FOCUS ON... INSOLVENCY CONSULTATIONS

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The Insolvency Service has issued two consultation papers this summer. The first was announced in this year's Budget, as reported in *CLM 2009 Newsletter Issue 3*, and looks at ways of making the rescue procedures of administration and CVA more effective ("Encouraging Company Rescue – a consultation"). The Service hopes that its proposals would encourage more companies to use CVAs, and increase the chances of banks and trade suppliers to lend or extend credit to businesses that can be rescued. Comments are invited by 7 September.

The second consultation canvasses opinion on the EC Insolvency Regulation ("Evaluation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings – Evaluation Questionnaire"). It is an information-gathering exercise, so rather than putting forward proposals for improvement, it asks practitioners and others dealing with the Regulation for their opinion on how well it works, how often it is used, etc. Comments are invited by 29 September.

Copies of both consultation papers can be obtained from the Insolvency Service website: <http://www.insolvency.gov.uk/index.htm>.

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### Encouraging company rescue

#### Extension of pre-CVA moratorium

At the moment, only small companies can benefit from a moratorium while they are seeking approval of a CVA proposal (see CLM ¶9466+). The moratorium protects the company from claims during this time, so that the proposal accurately reflects the company's assets while it is being considered, allowing the creditors to make a decision based on a stable position. Otherwise, there is a danger that creditors, on learning of the company's financial difficulties, take aggressive debt recovery measures against the company, depleting its general pot of assets. The Insolvency Service proposes to extend the availability of the pre-CVA moratorium to medium-sized and large companies too (subject to the same exclusions for certain types of company, see CLM ¶9467). Currently, such companies enter into administration if they want a moratorium pending approval of a CVA proposal. Administrations are more expensive than CVAs, so although this may protect the assets from claims, it depletes them to a greater degree than a pre-CVA moratorium would. Many medium-sized and large companies are deterred from using a CVA as a result, and take the administration route instead.

The consultation paper includes a second proposal to enable a company to apply to court for a longer moratorium (of an initial period of 42 days, with the option to extend it once to 3 months in total). A moratorium would only be granted if the court was satisfied that the moratorium would be in the creditors' interests as a whole. The idea behind this proposal is to enable larger companies with more complicated affairs extra time to put their proposal together so they do not have to announce their intention to enter into CVA before they are fully ready to do so.

# Focus on...



## FOCUS ON... INSOLVENCY CONSULTATIONS cont...

### Encouraging lending

It can be very difficult for companies in CVA or administration to obtain new finance, or to extend existing arrangements, yet it is vital to their prospects of being rescued successfully. If existing lenders are unwilling to provide rescue finance, the company is only likely to be able to grant security to a new lender with the consent of the existing charge holders and if the company has unsecured assets (or equity in secured assets). Negative pledges (common clauses in security agreements preventing the company from granting further security over its assets without the charge holder's consent) can make it particularly difficult for companies to obtain new finance. Even if rescue finance can be obtained, the cost of it is often far higher than usual.

#### During administration

In administrations, rescue finance is already payable as an expense of the procedure and has priority over existing floating charge holders and unsecured creditors (see CLM ¶18928). The Insolvency Service proposes to further improve the position of lenders who provide finance during administration by:

- » granting rescue finance "super-priority", so that it ranks above all other administration expenses; and
- » enabling the rights of negative pledge holders to be overridden where they are standing in the way of the company obtaining rescue finance.

To make it easier for administrators to obtain rescue finance, the consultation paper proposes that they should be able to grant new security against unsecured property or property that is already secured, either as a subordinate charge or as an equal first charge (with the consent of the existing charge holder or the court, if the charge holder refuses consent). New security should only be obtained where the administrator is satisfied that:

- » it is necessary in order to obtain rescue finance;
- » the interests of existing charge holders are protected; and
- » obtaining the rescue finance is in the best interests of the creditors as a whole.

The Insolvency Service is also seeking views on whether floating charges and asset-based lending arrangements, such as factoring and invoice discounting, should be able to apply to new assets acquired during the administration. For example, if such a charge or arrangement survives the company entering into administration, book debts arising during the procedure fall within the security. However, if it were limited to assets acquired or book debts arising before the company entered administration, the administrator would be able to negotiate a new charge or arrangement, extend the existing one or use the assets for the benefit of the administration, as appropriate in the circumstances. If the charge holder or other party to the factoring or other agreement felt they were being treated unfairly, they could apply to court.

#### During CVA

Rescue finance also falls within the expenses of a CVA (see CLM ¶9549) and can rank above other expenses etc, depending on the terms of the CVA. In addition, directors can offer the company's or their own personal property as security. The Insolvency Service proposes to give companies in CVA the same powers to grant security for rescue finance as administrators (above). Where existing charge holders are left with a portion of their debt being unsecured, they will be able to vote on the CVA proposal to the extent of their unsecured debt.

The question regarding floating charges and asset-based lending arrangements also applies to CVAs.

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Focus on...

## FOCUS ON... INSOLVENCY CONSULTATIONS cont...

### EC Insolvency Regulation

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The Insolvency Service has also launched a consultation paper on the subject of the EC Insolvency Regulation (see CLM ¶7366+). The purpose of this consultation is to gather views on the Regulation from practitioners and others with experience in practice of it in advance of the European Commission's study on the subject next year. The EC's final report is not due until June 2012. The consultation seeks opinions on the Regulation generally, as well as on specific aspects of it, such as the effect of there being no concrete definition of COMI, the relationship between secondary and main proceedings and the publicity requirements of insolvency proceedings under the Regulations.

The consultation takes the form of a survey, asking respondents to comment on how often and in what circumstances the Regulation is used and how effective it is in different circumstances.

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# Focus on...

New Edition



## Tax Memo 2009-2010 - helping to solve your tax problems

Tax Memo 2009-2010 will be fully revised and updated to reflect law and practice as at the date of Royal Assent to the Finance Act 2009, and includes commentary on the:

- New benchmark system for employee subsistence expenses
- Restriction of tax relief available on pension contributions made by higher earners and the special annual allowance
- Abolition of the Commissioners' system for tax cases and introduction of the new tribunals
- Implementation of the new harmonised system for tax penalties
- Changes to cross-border services for VAT (from January 2010)
- New VAT partial exemption changes (effective April 2009).

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## COMPANIES ACT 2006: IMPLEMENTATION

The text of the Companies Act 2006, explanatory notes and tables of destinations and origins are freely available to download at: <http://www.opsi.gov.uk/acts/acts2006a.htm>.

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To see when specific sections of the Act will or have come into force, check the *implementation timetable* on the FL Memo Ltd newsletter homepage (follow the link to "Companies Act 2006 implementation timetable"). The implementation timetable is up to date to the final version of the Eighth Commencement Order.

### October implementation

A draft of the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 has been published. It mainly sets out amendments that need to be made to other legislation as a result of the new Companies Act. Most of the transitional provisions and savings relating to the implementation of the new Act can be found in the relevant Commencement Order, but there is a handful in this new Order. The Order will also make some minor amendments to the new Companies Act itself.

The Order will come into force on 1 October 2009.

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### Limited liability partnerships

See CLM ¶77+

A final version of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 has been published (SI 2009/1804). As expected, it applies most of the new Companies Act, with appropriate modifications, to LLPs:

- » names;
- » trading disclosures;
- » protection of members from unfair prejudice;
- » members' names and addresses (note that members in LLPs are akin to directors in companies). The requirement to keep a register of members is new for LLPs;
- » fraudulent trading;
- » formalities of doing business, such as execution of deeds and documents;
- » Companies House, including annual returns;
- » charges and debentures;
- » company reorganisations;
- » dissolution and restoration; and
- » miscellaneous provisions.

The final draft is substantially the same as the previous one, with some exceptions:

- » the company communications provisions will not be applied to LLPs (ss 1143-1148 CA 2006). This is consistent with LLPs' ability to make their own provisions regarding internal management;
- » LLPs are required to have at least two members. Instead of applying the company provision (s 156 CA 2006) giving the secretary of state the power to require an LLP with fewer than two members to make another appointment, the provision allowing a sole member to apply to have the LLP struck off the register will be applied (s 1003 CA 2006);
- » instead of requiring all LLPs to list all of their members in business letters, only those with fewer than 20 members will have to do so;
- » where a member applies to restore the LLP to the register using the new "administrative restoration" procedure (see CLM ¶7546), he will have to notify all other former members;
- » references to shadow members have been removed from the regulations, as they have no meaning in relation to LLPs;
- » the provisions dealing with overseas companies are not being extended to overseas LLPs for the time being, although the Government will keep this question under review; and

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- » the Cross-Border Mergers Regulations 2007 (see CLM ¶¶6536) will apply to LLPs and will provide for a merger involving an LLP and a company.

There are already some amendment regulations addressing a mistake in the main regulations discussed above (SI 2009/1833). The main regulations mistakenly repeal the application to LLPs of the provisions in CA 1985 relating to floating charges in Scotland; the amendment regulations correct this.

Both sets of regulations will come into force on 1 October 2009.

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### Overseas companies

See CLM ¶¶140+

The final version of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 has been published (SI 2009/1917). Unlike the draft version (see *CLM 2009 Newsletter Issue 3*), the final version includes provisions dealing with the execution of documents by overseas companies. It applies the following provisions of the new Companies Act to overseas companies, with relevant modifications:

- » company contracts (s 43, see CLM ¶¶3492+), enabling an overseas company to enter into contracts;
- » execution of documents (s 44, see CLM ¶¶3494), setting out how an overseas company can execute documents generally;
- » execution of deeds (s 46, see CLM ¶¶3490), setting out how an overseas company can execute deeds; and
- » contracts etc entered into before the overseas company is formed (s 51, see CLM ¶¶356+).

The regulations also deal with the execution of documents under Scottish law.

The other provisions concern the registration of charges and debentures created by overseas companies over their property in the UK. Much of the substance of these provisions is the same as in the draft version, except that the final version:

- » deals with charges created under Scottish law; and
- » does not include a criminal offence for failure to register a charge (although the other consequences of failure to register remain).

The final draft of the Overseas Companies Regulations 2009 has also been published (SI 2009/1801). It is the same as the previous draft, *CLM 2009 Newsletter Issue 3*, dealing with all issues to do with overseas companies, apart from contracts and charges (above) and names (which are dealt with in separate regulations, also see *CLM 2009 Newsletter Issue 3*).

The regulations will come into force on 1 October 2009.

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### Shares and share capital

See CLM ¶¶740, ¶¶952, ¶¶1351, ¶¶1383, ¶¶1387, ¶¶1435, ¶¶1487

As reported in *CLM 2009 Newsletter Issue 2*, the draft Companies (Share Capital and Acquisition by Company of its Own Shares) Regulations 2009 were published for comment back in March. The consultation closed in April, with the overall response being supportive of the draft. Based on that, BIS has finalised the regulations, with no substantive changes introduced (SI 2009/2022).

The regulations will come into force on 1 October 2009.

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### Uncertificated shares

See CLM ¶1828

The Companies Act 2006 (Consequential Amendments) (Uncertificated Securities) Order 2009 has been published (SI 2009/1889). The purpose of the new Order is to update references in the existing regulations on uncertificated shares (SI 2001/3755) to take into account the implementation of the new Companies Act 2006 provisions on shares in October this year.

The new Order will come into force on 1 October 2009.

### Implementation of the Shareholders' Rights Directive

See CLM ¶3533, ¶3556, ¶3626, ¶3724, ¶3731, ¶3743, ¶3840, ¶3843, ¶3846, ¶3849

The new Companies Act will be amended as expected by The Companies (Shareholders' Rights) Regulations 2009 (SI 2009/1632). The amendments will bring CA 2006 into line with the Shareholders' Rights Directive (EC Directive 2007/36). Although primarily aimed at listed companies, some of the amendments will apply to both listed and non-listed companies, see *CLM 2008 Newsletter Issue 6*.

The new provisions apply to shareholder meetings of which notice is given on or after 3 August 2009.

ICSA has published a guidance note on the new regulations ("ICSA Guidance on the Implementation of the Shareholder Rights Directive"). It can be downloaded from its website at: <https://icsasoftware.wufoo.com/forms/icsa-guidance-on-the-shareholder-rights-directive/>.

### Companies House forms and filing requirements

See CLM ¶14040+, ¶9900

Companies House has published information on filing requirements under the new Companies Act. This information comprises:

- » draft copies of the new forms;
- » a draft price list for filing fees and the charges for obtaining information from Companies House;
- » a copy of each set of Model Articles (for private companies limited by shares, public companies and private companies limited by guarantee);
- » draft updated Companies House guidance; and
- » a copy of the draft Registrar's Rules 2009, which set out how documents can be filed using different methods and what criteria they must fulfil.

The new forms etc will apply when the new Companies Act is fully in force on 1 October 2009. This information can be found at:

<http://www.companieshouse.gov.uk/companiesAct/companiesAct.shtml>.

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### Documents delivered to Companies House and applications for striking off

See *CLM* ¶14049, ¶14080, ¶17491+

The final version of the Registrar of Companies and Applications for Striking Off Regulations 2009 has been published (SI 2009/1803). It is the same as the previous draft, see *CLM 2009 Newsletter Issue 3*, dealing with:

- » applications for voluntary striking off;
- » applications for rectification of the register;
- » documents which may be delivered to the registrar in Welsh without an English translation (and in other languages with an English translation); and
- » permitted characters and symbols in names and addresses.

The regulations will come into force on 1 October 2009.

### Accounts and audit

See *CLM* ¶14246, ¶14252, ¶14278

The final version of the Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009 has been published (SI 2009/1581). No further changes have been made since the previous draft, see *CLM 2009 Newsletter Issue 3*, dealing with corporate governance statements (the "business review" part of directors' reporting obligations) of publicly traded companies.

The regulations will come into force on 1 October 2009.

### The Takeover Panel's powers in the Isle of Man

See *CLM* ¶16755

The Companies Act 2006 (Extension of Takeover Panel Provisions) (Isle of Man) Order 2009 has been published (SI 2009/1378). This follows an earlier Order (SI 2009/1208) which amends Schedule 2 to the new Companies Act and which gives the Takeover Panel new disclosure powers (see *CLM 2009 Newsletter Issue 3*). The purpose of this new Order is to extend the application of the amended Schedule to the Isle of Man.

The new Order came into force on 1 July 2009.

### Disclaimer of bona vacantia property after dissolution

See *CLM* ¶17492

BIS has issued a consultation on what transitional arrangements should be made to deal with the changes in the deadlines by which the Crown must disclaim bona vacantia property of a dissolved company. Under CA 1985, the time limits for making this decision are (s 656 CA 1985):

- » 12 months from notification, where the Crown is notified of a company's dissolution; or
- » 3 months from an application being made by a person who is interested in the property.

Under the new Companies Act, these deadlines are extended to 3 years and 12 months, respectively (s 1013 CA 2006). Under the 8th Commencement Order, the new deadlines apply where a company is dissolved on or after 1 October 2009 (para 8 Sch 2 SI 2008/2860). However, since it can take a long time for the Crown to be notified of a company's dissolution, this would result in the Crown having to operate under two systems for some time. Therefore, BIS

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proposes to apply the new deadlines where a company was dissolved before 1 October 2009, but the Crown had no notice that any property had vested in it, had not received an application from an interested party, nor had it disclaimed the property on 1 October 2009.

A copy of the consultation paper can be found at: <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/draft/page40411.html>. Comments are invited by 21 August.

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### Taxes and National Insurance

The Companies Act 2006 (Consequential Amendments) (Taxes and National Insurance) Order 2009 has been published (SI 2009/1890). The purpose of the new Order is to update references in the existing tax and national insurance legislation (and related secondary legislation) to take into account the final implementation stage of the new Companies Act in October this year.

The new Order will come into force on 1 October 2009.

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