Companies Act 2006 Update

Other conflict of interest provisions coming into force on 1 October 2007

New provisions come into force on 1 October 2007 governing:

- Substantial property transactions between directors and persons connected with directors
- Payments to directors for loss of office

These provisions govern whether or not shareholder approval is required for the company to enter into such transactions.

In addition to complying with any requirement for shareholder approval, both the board and the conflicted director continue to need to comply with their duties as directors - e.g. the board must be satisfied that entering into the transaction or making the payment is likely to promote the success of the company and the conflicted director must make a declaration of his interest, if required (from 1 October 2008, it will no longer be necessary for the conflicted director to make a declaration of his interest in relation to a payment for loss of office). For more information on directors' duties, please see our earlier briefing notes.

Substantial property transactions

Shareholder approval continues to be required for substantial property transactions between a company and the company's directors, directors of its holding company, or persons connected with such directors (unless an exemption applies). A substantial property transaction is defined as one involving one or more non-cash assets, the total value of which exceeds £100K or 10% of the company's net assets (subject to a de minimis).

Changes under the new provisions are as follows:

- The de minimis is increased from £2K to £5K.

- In order to remove loopholes in the existing provisions:

  The new provisions are stated to apply to indirect as well as direct acquisitions.

  A new rule provides for the aggregation of non-cash assets forming part of a series of arrangements for the purpose of determining whether the financial thresholds have been exceeded.

- Payments under directors' service contracts and payments for loss of office are specifically excluded from the substantial property transaction requirements.

- A company can enter into a substantial property transaction that is conditional on shareholder approval.

  This is intended to offer more flexibility so that companies do not lose out on an acquisition where the seller is not prepared to wait until shareholder approval has been obtained.

  The company is not, however, liable under the contract if shareholder approval is not forthcoming.

- Shareholder approval is no longer required where the company that enters into the substantial property transaction is a company that is in administration.

  Insolvency practitioners will welcome this new exemption.

- There are minor changes to some of the other exemptions.

- The definition of connected persons is expanded.

Payments for loss of office

Shareholder approval continues to be required for any payment to a director for loss of office (unless an exemption applies).

Changes under the new provisions are as follows:

- In order to remove loopholes in the existing provisions:

  A payment for loss of office is more widely defined to cover any payment to a director as consideration for or in connection with his retirement from or to compensate him from losing any office (whether as director or otherwise) or employment with either the company or with a subsidiary of the company.

  The new rules cover payments to former directors as well as non-cash payments

  Payments to connected persons or third parties at the direction of/for the benefit of a director or a person connected with him are treated as a payment to the director.

- The current exemption for payments made in discharge of legal obligations is carried forward but the wording has been changed to make it clear that this exemption only applies to payments made in discharge of a legal obligation that was not entered into in connection with or in consequence of, the event giving rise to the payment for loss of office etc.

- A new exemption provides that shareholder approval is not required if the payment that is made by the company or its subsidiary does not exceed £200.

Connected persons

The definition of connected persons is being extended from 1 October 2007 to include (in addition to those already covered under the Companies Act 1985):

- Civil partners
- Persons (whether of the same or a different sex) with whom the director "lives as partner in an enduring family relationship" (not defined) unless the person is the director's grandparent, grandchild, sister, brother, aunt or uncle, nephew or niece
- The director's parents
- Children or step-children of the director who are over 18 years old (those under 18 are already covered)
- Children or step-children of the director's unmarried partner (who are not children or step-children of the director) if they live with the director and are under 18 years old.

Contact us

For further information or if you have not received our previous updates on the Companies Act 2006, please contact:

Sue Lowry
DD 0845 310 7215
E sue.lowry@berryman.co.uk

Roger Harcourt
DD 0845 310 5529
E roger.harcourt@berryman.co.uk

Berryman Park House Friar Lane Nottingham NG1 6DN
DX 10004 Nottm 1 **T** 0115 945 3700 **F** 0115 948 0234
W www.berryman.co.uk