



Special Release No.7

The Companies Act 2006

May 2008

Trading Disclosures

Introduction

The Companies Act ('2006 Act'), the culmination of eight years of consultation, was finally passed in November 2006. The 2006 Act repeals and restates almost all of our existing company law and is being implemented in stages, with the remaining key implementation dates being 1 October 2008 and 1 October 2009.

From 1 October 2008 the interim regime that we have had in place since January 2007 in relation to trading disclosures will be replaced by the new regime set out in the Companies (Trading Disclosures)

Regulations 2008 ('Regulations'). The Regulations bring together the existing set of provisions in one place, and make some changes to the existing rules. The main changes are:

- a significant relaxation of the sanctions provisions - failure to comply will not be an offence if the company had a 'reasonable excuse' for that failure;
- an expanded list of documents which are required to state the company's name; and
- a partial definition of a company's website.

Rationale behind the obligation to disclose

The rationale behind the obligation to disclose company details on stationery is that people who deal with a company should know that its liability is limited, and should have sufficient information to enable them to obtain publicly available information about it from Companies House and from the company itself.

Recent past

As noted in our first Special Release on the 2006 Act, the disclosure obligation was expanded significantly in January 2007 so that it now extends to e-mails and websites. The Government made these changes in order to meet the deadline for implementation of an EU Directive (as the 2006 Act had only just received Royal Assent). However, further changes are coming into force on 1 October 2008 as part of the wider overhaul of company law.

What will companies need to do?

Companies will be required to make a number of displays and disclosures under the Regulations, each of which must be capable of being read by the naked eye – in other words, it must be in a clear and legible font that is not too small.

Display of registered name

A company will need to display its registered name at its registered office and any 'place of inspection' (any other location where a company keeps available for inspection any company record which it is required to keep so available). The registered name will also have to be displayed at any other location at which the company carries on its business, unless that location is primarily used for accommodation. The display of the name will have to be clearly visible to any visitors to the location and must be continuously displayed.

In addition to the requirements above, a company will also be required to disclose its name on the following (whether in electronic or paper form):

- its business letters (which now expressly includes e-mails);
- its notices and other official publications;
- its bills of exchange, promissory notes, endorsements and order forms;

- cheques;
- orders for money, goods or services;
- its bills of parcels, invoices and other demands for payment, receipts and letters of credit;
- its applications for licences to carry on a trade or activity;
- all other forms of its business correspondence and documentation (this is a new catch-all category); and
- its websites.

Further requirements for business letters, order forms and websites

In addition to the registered name, a company will also need to disclose the following on its business letters, order forms and on its websites:

- its place of registration;
- its registered number;
- its registered office address;
- that it is a limited company (if exempt from the requirement to use the word 'limited' as part of its registered name or if it is a private community interest company);

- its paid up share capital, if it discloses its share capital.

In addition, there will be a specific disclosure relating to business letters only: a company will have to disclose the name of every director of the company where the name of any one or more director appears in the company's business letters, except where it only appears in the text or as a signatory. In the instance of a director being a body corporate, 'name' means the corporate name or the firm name.

Requests for information

A company will have to disclose, on receipt of a written request from someone it deals with in the course of business, the address of its registered office, any 'inspection' place, and the type of company records kept in that office or place. The company must send a written response within five working days of receipt of such request.

Sanctions

As noted above, one of the most important changes in the new regime is the significant relaxation of the sanctions provisions, such that a failure to comply will not be an offence if the company had a 'reasonable excuse' for that failure. As we shall see below, the January 2007 changes have created more problems for companies than the Government may have anticipated, and it does seem unfortunate that a company which has sought to comply with the legislation but, due to the uncertainties inherent in it, nevertheless technically has fallen foul of it should be exposed to the possibility of criminal sanctions. Note, however, that the Regulations do introduce a daily default fine in cases of continued contravention, and extend the provisions to cover shadow directors.

Potential problem areas

Companies have struggled over the past year with the following three questions in particular.

- What is a 'business letter'? There is still no definition, and although the position has been clarified to some extent in that it now expressly includes e-mails, the position is not always clear-cut. For example, what about a blank e-mail, attaching a letter as a pdf? Would it make any difference if the e-mail contained the following text: "Please see attached – let's discuss when you've had the chance to review"? The cautious view to take is that both would be a 'business letter' although it is possible to argue that an entirely blank e-mail does not constitute a business letter.
- What about group companies? Where an employee of one group company (A Ltd) e-mails third parties about matters concerning other group companies, which company's details should be included in the e-mail? The simple answer is that the e-mail should contain the details of the company whose headed paper the employee would use if he or she were sending a hard copy letter. Unfortunately this principle is not always easy to apply in practice.
- What constitutes a company's website? The government had initially considered including a definition in the January 2007 revisions to the regime making it clear that a website is not a company's website if its content is determined solely by persons other than the company or it does not relate to the company, its business or its operations. Unfortunately, however, this was dropped. The Regulations that come into force this October go some way to remedying this issue, as they note that a reference to a company's website "includes a reference to any part of a website relating to that company which that company has caused or authorised to appear." This is by no means a perfect definition, but it does at least help.

Action

Although the Regulations do not introduce huge change to the existing disclosure requirements, it is important that all companies prepare for the introduction of the Regulations now in order to ensure compliance in time for 1 October. All companies should therefore be carrying out an audit of all the relevant areas (i.e. business letters, signage, websites, stationery) in order to ensure that these include, or will include, the necessary information. Looking ahead, it is also important to note that regulations reforming the rules applicable to overseas companies carrying on business in the UK will be coming into force on 1 October 2009.

Contacts

This bulletin reflects the law and practice as at May 2008. It is general in nature, and does not purport in any way to be comprehensive or a substitute for specialist legal advice in individual circumstances.

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