Financial and accounting duties and responsibilities of directors

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GLOSSARY

This statement was issued in October 2008 by the Institute of Chartered Accountants in England and Wales, principally concerning the main duties and responsibilities of a financial or accounting nature owed by directors to their company and its shareholders and others, but also including an overview of more general duties and responsibilities. It sets out, where appropriate, what is considered to be good practice rather than what may be acceptable as the legal minimum required. It is hoped that the statement will be useful to members acting as directors and to members generally in conveying to directors the extent of these responsibilities. It is stressed, however, that the statement is not intended to cover other aspects, however important, of a director's position.

The statement is concerned with companies in the United Kingdom subject to the provisions of the Companies Act 2006. It has, with one exception (see below), been prepared on the basis of the complete implementation of that Act, in relation to a company formed under that Act, whereas at the time of issue some provisions of the Act have not yet commenced and readers should be aware that certain 1985 Act provisions and transitional adaptations remain in force until 1 October 2009 (see Appendix B for a list of commencement dates, extracted from the Final Implementation Timetable published by BERR in December 2007).

The exception is in relation to the model articles. Under section 20 a company formed under the 2006 Act will, unless it adopts articles that provide otherwise, have as its articles the model articles prescribed by secondary legislation under section 19. At the time of issue no model articles are yet prescribed. Accordingly references to typical articles herein are to the 1985 Act Table A (modified in 2007) that apply to companies formed under the 1985 Act (on or after 1 October 2007). Where Table A articles apply by default to a company – i.e. by statutory provision in lieu of specific provision by the company – it is the version of Table A in force at the time of the company's formation that is relevant.

References to legislation should be taken to mean legislation as amended up to 1 October 2008. The meaning of terms printed in italics can be found in the Glossary at the end of the statement.

This statement replaces its predecessor issued in 1996 as revised in 2000, which was itself an updated version of that originally issued in 1970.

English counsel have confirmed that this statement is consistent with the English law as at 1 October 2008 had the 2006 Act been fully implemented as at that date. Counsel accept no responsibility (other than to the Institute) in relation to advice ascribed to them in this statement.

Scope and purpose

1 Directors of companies, whether public or private, have various responsibilities towards their companies, breach of which may not only be detrimental to those companies and their shareholders, but also may lead to civil and criminal liability of the individual director concerned. The aim of this statement is to provide guidance to members who are directors as to their responsibilities, principally in relation to financial and accounting matters, but also including an overview of their general duties. The responsibilities of shadow directors (see paragraph 7 below) are not the subject matter of this guidance although they are referred to from time to time.

2 In discussing these responsibilities, companies which are subject to the *2006 Act* are considered, differentiating between public and private companies as appropriate. Special categories of entities such as those incorporated by Royal Charter, special *Act* or pursuant to other legislation, for example, building societies or friendly societies, are not dealt with but the responsibilities discussed may usefully be borne in mind in the context of incorporated entities not within the *Act*. However, the guidance in this statement does not apply to members of a Limited Liability Partnership, whether they be designated members or otherwise. Certain specialised areas, including special rules for charitable companies and banks are not covered.

3 It is to be stressed that the aim is to guide directors and not to provide them with a detailed analysis of the law on the topic under discussion. Interpretation of the law often depends upon the particular circumstances and if directors are in difficulty over interpretation of their duties they should seek independent legal or other professional advice, or contact the Institute's Technical Enquiries helpline or Ethics helpline services. Reference to Section 7.1 'Professional conduct and disclosure in relation to defaults or unlawful acts', Section 9.5 'Anti-money laundering guidance for the accountancy sector' and to the Code of Ethics 3.4 'Professional accountants in business (Part C)' may also be useful.

Part 1: General Duties and Responsibilities of Directors

Directors' status, powers and duties

Who is a director?

4 A director, by whatever title, is one who is in practice responsible for the management of a company's affairs. There is no comprehensive definition of a director in statute, the only guidance given being that the term 'director' includes any person occupying the position of director, by whatever name called (Companies Act 2006, section 250). For example, in some companies management may be entrusted to 'Governors' or 'Council Members'. They will be directors. Further, and separately, the word director in some statutory provisions includes a de facto director, that is a person who acts as a director without having been appointed.[1] A definition of 'director' for certain taxation purposes is given in the Income Tax (Earnings and Pensions) Act 2003, section 67.

5 A company must have a minimum of two directors if public, and a minimum of one if private (Companies Act 2006, section 154). At least one director must be a natural person (Companies Act 2006, section 155). The method of appointment of directors will generally be governed by the *Articles*. Normally the first directors are chosen by the subscribers to the company's *Memorandum* and thereafter by procedures as provided by the *Articles*, eg by the members in general meeting or by written resolution. At a general meeting of a public company, the appointment of each director must be voted on individually, unless a resolution that a single resolution will suffice has first been agreed by the meeting without opposition (Companies Act 2006, section 160(1)).

6 Certain particulars need to be filed with the Registrar of Companies. The Companies Act 2006 permits directors to file a service address with the Registrar of Companies for the public record. However, their home addresses must still be provided to the Registrar on a confidential basis (which are only accessible by certain government departments, and by credit reference agencies unless the director benefits from a Confidentiality Order). The conditions for service addresses are set out in The Companies Act 2006 (Annual Return and Service Addresses) Regulations[2].

Shadow directors

7 Certain legislative provisions concerning directors extend to 'shadow directors'. A shadow director is a class of director distinct from actual directors of the company, whether de jure/appointed directors or de facto directors (see paragraph 4 above). A 'shadow director' is defined as 'a

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[1] *Re Lo-Line Electric Motors Ltd* [1988] Ch 477; *Secretary of State for Trade & Industry v. Tjolle* [1998] 1 BCLC 333, 343.

[2] At the time of writing these are draft Regulations expected to be made under section 857 of the *Act* in 2008 and to come into force from 1 October 2009.

person in accordance with whose directions or instructions the directors of a company are accustomed to act' (Companies Act 2006, section 251; *CDDA86*, section 22; and *IA86*, section 251), although it is provided that 'a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity'. It should be stressed, however, that what is necessary is that the whole board of directors acts under the direction of the shadow director. Depending on the facts, it is possible for a bank or a 'company doctor' to be a shadow director. Where a shadow director is itself a company, it does not necessarily follow that directors of the corporate shadow director are themselves shadow directors. Instead each such person's own actions are looked at separately. Further analysis of the term shadow director is to be found in case law.[3]

Non-executive directors

8 'Executive' and 'non-executive' directors have the same duties in law. An 'executive director' is merely a director who has specific delegated responsibilities within the company, as an executive. Directors are not required to give continuous attention to company affairs unless their exective position so requires. However, all directors, including non-executive directors, should familiarise themselves with the company's affairs, including its financial position, and should attend meetings of the board, and of any committee of the board of which they are members, whenever they are reasonably able to do so[4]. The role of the non-executive director is discussed further in paragraphs 13 to 15 below.

Who cannot be a director?

9 Normally, the company's *Articles* will deal with the appointment of the directors (*Table A*, regulations 73 to 80), but there are certain statutory restrictions:

- a person may not be appointed a director of a company unless he has attained the age of 16 years subject to any exceptions granted by the Secretary of State (Companies Act 2006, sections 157 and 158);
- an undischarged bankrupt or a person subject to a bankruptcy restrictions order may not, without leave of the court, act as a director (*CDDA86*, section 11);
- a person subject to a disqualification order from the court, or who has given a disqualification undertaking, may not act as a director (*CDDA86*, sections 1 and 1A);
- a person cannot be a company's auditor and a director at the same time (Companies Act 2006, section 1214).

Status of directors

10 A director is an officer of the company but is not necessarily an employee. The status of an employee is governed by the contract under which he serves

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[3] *Secretary of State for Trade & Industry v. Deverell* [2001] Ch 340.
[4] *Daniels v. Anderson* [1995] 16 ACSR 607 (NSW Court of Appeal).

the company. An executive director is normally both a director and an employee.

11 A director is entrusted with powers by the *Articles*. In some ways he is treated as an agent of his company and in others as a trustee of its assets, but strictly speaking he is neither one nor the other.

12 A director owes to his company seven statutory general duties (Companies Act 2006, sections 170 to 177), which might conveniently be divided into those of loyalty and good faith, analogous to those owed by a trustee, and those of care and skill, differing fundamentally from those owed by a trustee (see paragraphs 19 *et seq* below).

13 A director may have executive status or operate in a non-executive capacity. The non-executive director has a positive contribution to make in ensuring that the board fulfils its main objectives. He can exercise an impartial influence and bring to bear experience gained from other fields; executive directors would therefore be well advised to consider the appointment of such directors to serve alongside them. The *Combined Code* emphasises the importance of non-executive directors (see paragraphs 231 *et seq*). The *Combined Code* is applicable to *listed companies* and operates on a 'comply or explain' basis.

14 The *Combined Code* provides that a board of directors should establish an audit committee of at least 3 non-executive directors, all of whom should be independent non-executive directors,. In the case of smaller *quoted companies*, the audit committee may have two members, and the committee may include (but not be chaired by) the company chairman. A smaller *quoted company* is, for this purpose, one that is below the FTSE 350 throughout the year immediately prior to the reporting year. At least one member of the audit committee should have recent and relevant financial experience.

15 Institute members are well qualified for appointment as non-executive directors because of the special skills and experience which they have to offer. It is important that, before accepting a board appointment, prospective non-executive directors should be aware that, other than as indicated in paragraph 8 above, their responsibilities in law are no different from those of directors holding executive status, and that they will be held to a standard of care and skill reflecting their professional expertise. They should also ensure that, in applying their skills, they do not act as professional advisers to the board – a director does not advise his fellow directors but has collective responsibility with them – and should satisfy themselves that the company has access to and gets all the outside professional advice that it needs.

Powers of directors

16 Directors are under a statutory duty to act within their powers (Companies Act 2006, section 171). They derive their powers from the *Articles* and they should study carefully the *articles* of their particular company. Directors also should have regard to the powers given to the company by its

constitution (athough a company need not have an objects clause – see Companies Act 2006, section 31). These powers must be exercised in a manner which is lawful under the Companies Acts. Acts which are beyond the company's powers or in contravention of the Companies Acts are likely to be ultra vires.

17 The company in general meeting may in certain circumstances exercise powers normally vested in directors, for example where there is deadlock on the board[5] or where there are no directors[6], but these circumstances will be rare.

18 Directors must exercise their powers collectively and the majority decision will usually prevail. The *Articles* will govern how the directors are to proceed (*Table A*, regulations 88 to 98) and will often authorise directors to delegate the exercise of their powers to a committee consisting of one or more directors, or to a managing, or other executive, director (*Table A*, regulation 72).

Duties of directors

19 The duties of directors are owed to the company as a whole. Their duties and responsibilities arise out of common law and have been partly codified into statute (Companies Act 2006, sections 170 to 177). In codifying directors' duties, the Government's intention was for the most part not to change them but to 'make the law clearer and more accessible', which reflects 'the modern view that it is good business sense for companies to embrace wider social responsibilities'[7]. Therefore, interpretation of the general duties should take place within the previous structure of common law, which is acknowledged in section 170(4)of the *2006 Act*.

20 A director of a company owes seven general statutory duties to the company (Companies Act 2006, sections 171 to 177). These seven duties are set out below:

- to act within powers;
- to promote the success of the company for the benefit of its members as a whole (see paragraphs 21 to 24);
- to exercise independent judgment;
- to exercise reasonable care, skill and diligence (see paragraph 25);
- to avoid conflicts of interest (see paragraphs 30 to 36);
- not to accept benefits from third parties; and
- to declare interest in proposed transaction or arrangement (see paragraphs 32 to 36).

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5 *Barron v. Potter* [1914] 1 Ch 895.
6 *Alexander Ward & Co v. Samyang-Navigation Co* [1975] 1 WLR 673.
7 BERR Press release dated 28 September 2007.

The Government has issued[8] the following high-level guidance as to how directors should act to ensure compliance with their duties:

- 'Act in the company's best interests, taking everything you think relevant into account.
- Obey the company's constitution and decisions taken under it.
- Be honest, and remember that the company's property belongs to it and not to you or to its shareholders.
- Be diligent, careful and well informed about the company's affairs. If you have any special skills or experience, use them.
- Make sure the company keeps records of your decisions.
- Remember that you remain responsible for the work you give to others.
- Avoid situations where your interests conflict with those of the company. When in doubt disclose potential conflicts quickly.
- Seek external advice where necessary, particularly if the company is in financial difficulty.'

21 In promoting the success of the company for the benefit of its members as a whole, directors must have regard to, amongst other matters, six ancillary factors (Companies Act 2006, section 172). These factors are:

- the likely consequences of any decision in the long term;
- the interests of the company's employees (see below);
- the need to foster the company's business relationships with suppliers, customers and others;
- the impact of the company's operations on the community and the environment;
- the desirability of the company maintaining a reputation for high standard business conduct; and
- the need to act fairly as between members of the company.

22 This duty to promote the success of the company for the benefit of the members as a whole is often referred to as the 'enlightened shareholder value' duty and is related to the business review requirement in the directors' report discussed at paragraph 119. At the time of passage of the legislation, this caused concern that directors would need to document the considerations behind every decision so as to protect themselves from liability for breach of this duty in actions brought by the company itself (perhaps following a change of management) or by minority shareholders suing either in the name of the company (a derivative action – see Companies Act 2006, sections 260 to 269) or on the basis that they have been 'unfairly prejudiced' within the meaning of section 994. However, it is important to remember that this is a single duty owed solely to the company. Each factor should be taken into account in the context of its implications for the success of the company, and thus its members as a whole. Frequently some of the listed factors will be irrelevant to the particular decision.

[8] http://www.berr.gov.uk/files/file40139.pdf.

23 The courts are likely to be reluctant to interfere with business decisions unless there is clear evidence of bad faith. The derivative claims provisions of the *Act* clarify the criteria and procedure for minority shareholders to bring a claim in the name of the company, but include protections to ensure that unmeritorious suits are quickly dismissed. Further, the directors will only be liable for breaches of duty that cause the company to suffer loss, or as a result of which they make a profit.

24 Directors should not therefore feel obliged automatically to create documentation showing they have considered all of the listed factors in making every decision; they should instead encourage a culture amongst themselves, and among those charged with briefing them and preparing board papers, where the wider consequences of decisions, on the success of the company, are routinely considered. As was the case before the Companies Act 2006, minutes should be produced so as to record decisions taken.

25 In performing their duties, directors must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (sometimes called the objective test) and the general knowledge, skill and experience that the director has (sometimes called the subjective test) (Companies Act 2006, section 174). Under the objective test, in general more would be expected of a director with an executive function (particularly a specific function such as finance director), whereas under the subjective test more would also be expected of a director having specifically relevant knowledge, skills and experience (such as a member of the Institute in respect of financial matters). The *Combined Code*, Schedule B gives guidance as to the care, skill and diligence expected of a non-executive director. Even in the case of a small company certain minimum standards should be attained[9].

26 The statutory general duties do not include a duty to the company's creditors but the common law rules in this area continue to apply. The extent to which, for a company in a deteriorating financial condition, creditors' interests need to be taken into account, before they become overriding, cannot be stated with precision. The issue was succinctly summarised by the Company Law Review (Modern Company Law for a Competitive Economy – Final Report, Volume II, paragraph 3.17), when discussing whether a statutory rule could be formulated in this area, as follows: 'Arguably directors should also be bound to take a balanced view of the risks to creditors at an earlier stage in the onset of insolvency. Such a principle has been recognised in . . . one case in [the] Court of Appeal [*West Mercia Safety Wear Ltd v Dodds* [1988] BCLC 250 CA]. It would require directors, where they know or ought to recognise that there is a substantial probability of an insolvent liquidation, to take such steps as they believe, in their good faith judgement, appropriate

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[9] *Re Produce Marketing Consortium Ltd* [1989] 5 BCC 569.

to reduce the risk, without undue caution and thus continuing also to have in mind the interests of members. The greater the risk of insolvency in terms of probability and extent, the more directors should take account of creditors' needs and the less those of members. At the point where there is no reasonable prospect of avoiding insolvent liquidation the interests of creditors become overriding under . . . section 214 [of the *IA86*]'.[10] Where there is a real possibility of insolvent liquidation, the directors should seek appropriate professional advice (see paragraphs 296, 288 and 309 to 312 regarding wrongful and fraudulent trading).

27 Directors should bear in mind that breach of these duties, inter alia, may result in them being judged unfit to be concerned in the management of a company (*CDDA86*, section 9) and lead to disqualification (*CDDA86*, sections 6 and 8).

Specific statutory duties

28 Company law imposes a number of specific duties on directors, such as the preparation of *annual accounts*, and these are dealt with in later sections. However, one specific duty is examined in paragraphs 144 to 151, namely, the duty in relation to auditors.

Duties falling upon the company

29 The above are duties that under companies legislation fall directly upon the directors. Company law places other duties upon the company itself, as does other law, eg tax law in relation to the preparation of tax computations. The company can, however, act only through its directors, who in this regard are its agents.[11] Thus it will fall upon the directors to ensure that the company complies with such obligations, although it is of course customary that the directors delegate such tasks to others. The fact that a task may be delegated will not, however, relieve a director of all responsibility; if a task is delegated the director must ensure that the person concerned is suitable for the task and the director should take reasonable steps to monitor the work. However, a director may, depending on the circumstances, rely on his co-directors and the officers of the company although such reliance should not be wholly unquestioning.[12]

Directors' relationship with company

30 A director of a company must avoid any situation in which he has, or can have, a direct or indirect interest that conflicts or may conflict with the interests of the company. This applies in particular to the exploitation of any

[10] The *West Mercia* principle has been applied in *Colin Gwyer & Associates Ltd v. London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153.
[11] *Ferguson v. Wilson* [1866] LR 2 Ch 77.
[12] *Re City Equitable Fire Insurance Company* [1925] Ch 407; *Secretary of State for Trade & Industry v. Bairstow [No.2]* [2005] 1 BCLC 136.

property, information or opportunity. It does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company or if the matter has been authorised by the directors. Authorisation may be given by the directors of a private company if it does not conflict with the constitution of the company.[13] For a public company, the constitution may enable the directors to give such authority. Any such meeting must be quorate without counting the director in question (Companies Act 2006, section 175). Directors are advised to study the constitution of the company, which is normally the *Articles*, with care.

31 A director of a company must not accept any benefit from a third party by reason of his being a director. For these purposes, a third party is any person other than the company or *associated body corporate* or person acting on behalf of the company (Companies Act 2006, section 176). This does not prevent, for example, a firm contracting with a company to provide the company with a person's services as director and that firm paying that person.

32 If a director is in any way directly or indirectly interested in a proposed transaction or arrangement with the company he must declare the nature and extent of the interest to the other directors and this declaration must be made before the company enters into the contract or arrangement (Companies Act 2006, section 177). This declaration may (but need not) be made at a meeting of the directors or by notice in writing (Companies Act 2006, section 184) or by a general notice (Companies Act 2006, section 185). Where the declaration is required of a sole director of a company that should have more than one director, it must be in writing (Companies Act 2006, section 186). A director need not declare an interest if it cannot reasonably be expected to give rise to a conflict of interest or the other directors are, or ought to be, aware of the interest or it concerns terms of his service contract (Companies Act 2006, section 177).

33 A declaration by a notice is one sent to each other director in writing and may be in hard copy or in an electronic form agreed by the recipient and will be deemed to form part of the proceedings of the next meeting of the directors (Companies Act 2006, section 184).

34 General notice that the director has an interest in a specified body corporate or firm or is connected with a specified indvidual and that, after the date of the notice, the director is to be recognised as having an interest in any transaction or arrangement with such body corporate or firm or individual is a sufficient declaration. Such general notice may be given to the directors of the company at a meeting of the directors or brought up and read at the next such meeting. The notice must state the nature and extent of the director's interest in the body corporate, firm or person (Companies Act 2006, section 185).

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[13] This only applies to companies which are incorporated after 1 October 2008. For companies incorporated before 1 October 2008 a shareholder resolution is required to give the board the power to authorise (Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007 (SI 2007/3495) article 47(3).

35 Where a director becomes aware of an interest arising after the company has entered into a transaction or arrangement he must declare it in the same manner and with the same provisos as set out in paragraphs 32 and 33 above as soon as is reasonably practicable (Companies Act 2006, section 182).

36 If an unauthorised conflict or a failure to make a required declaration of interest does arise, the director will be personally liable for any loss suffered by the company and will have to account for any benefit which accrued to him. Under common law, if notice has not been given to the company, it may in certain circumstances avoid the contract (Companies Act 2006, section 178). Furthermore, failure to declare an interest in an existing transaction or arrangement is a criminal offence (Companies Act 2006, section 183).

Directors' contracts

37 Where there is any contract of service with the director, the contract or a written *memorandum* of its terms must be kept by the company and be open to inspection by its members who are also entitled to copies subject to payment (Companies Act 2006, sections 227 and 228). These rules also apply to contracts with the subsidiaries of the company. Members carrying out executive functions would be well advised to ensure that they have a written contract with the company. A contract should address, inter alia, duties, pay, sickness, holidays, pension, notice and dismissal procedures, confidentiality, proportion of time spent on company duties and competition. Best practice in the area of remuneration and contracts is addressed in the *Combined Code*.

38 Where the guaranteed term of a director's employment with the company or a subsidiary is or may be longer than two years, approval has to be given by a resolution of the members of the company and of the company's holding company of which he is also a director (Companies Act 2006, section 188). If a company agrees to a long-term provision in contravention of the requirement for such approval, the provision is void to the extent of the contravention and the company is entitled to terminate the contract at any time by giving reasonable notice (Companies Act 2006, sections 188 and 189).

39 The resolutions in paragraphs 38 41 and 42 below must not be passed unless, for a written resolution, a *memorandum* setting out the proposed contract is sent to every member at the same time as they are sent the resolution and, in the case of a meeting, it is available at the registered office of the company at least 15 days before the meeting and at that meeting. Where a memorandum is not sent to or submitted to a member by accident, the requirement is disregarded for the purpose of determining whether the requirement has been met but the *Articles* may override this (Companies Act 2006, section 224).

Substantial property transactions

40 An arrangement under which a director of a company or its holding company or a person connected with such a director acquires or disposes of a substantial non-cash asset from or to the company is voidable at the instance of the company unless it is first approved by a resolution of the members of the company or is conditional upon such a resolution being received. For this purpose substantial non-cash assets are those which either

(a) exceed 10% of the company's asset value and are more than £5,000 or
(b) exceed £100,000.

If the transaction or arrangement is subsequently approved within a reasonable time by the members of the company or the holding company as appropriate it can no longer be avoided. Whether or not the transaction has been avoided the director or the connected person is liable to the company for any gain he may have made and to indemnify the company for any loss or damage resulting from the arrangement or transaction. The *Act* should be consulted for further details (Companies Act 2006, sections 190 to 196).

Arrangements of a financial nature

41 Subject to the exceptions noted in paragraph 43, a company may not make a loan to a director of the company or of its holding company or give a guarantee or provide security in connection with a loan made by any person to such a director without the approval by a resolution of the members of the company. If the director is a director of the company's holding company then the transaction must also be approved by a resolution of the members of the holding company. The resolution must be accompanied by a *memorandum*, the requirements for which are set out in paragraph 39 and, in addition, the *memorandum* must disclose the nature of the transaction, the amount of the loan and its purpose and the extent of the company's liability under any transaction connected with the loan (Companies Act 2006, section 197). If the company is a public company, or is a *company associated with a public company*, the foregoing also applies to a person connected with a director of the company or of its holding company, if any.

42 Subject to the exceptions noted in paragraph 43, if the company is a public company or a *company associated with a public company,* it may not make a quasi-loan to, or enter into a credit transaction with, a director of the company or of its holding company or a person connected with such a director or give a guarantee or provide security in connection with a quasi-loan or credit transaction made by a person to such a director or connected person unless the transaction has been approved by a resolution of the members of the company. A *memorandum* is required to accompany the resolution, the requirements for which are equivalent to those specified in paragraph 41 above. A quasi-loan is one in which the company indirectly advances a sum to a person by paying that person's liability such as by paying that person's credit card or personal bills (Companies Act 2006, sections 198 to 203). A credit transaction is one under which a creditor disposes of land or supplies goods or services on the understanding that payment is to be deferred (Companies Act 2006, sections 198 to 203).

43 Various transactions are excepted from the above requirements for shareholder approval as follows:

(a) Expenditure on company business if the value of the transaction and other relevant transactions or arrangements does not exceed £50,000 (Companies Act 2006, section 204).
(b) The cost of defending proceedings (Companies Act 2006, section 205).
(c) Expenditure in connection with a director defending himself in an investigation or proposed investigation by a regulatory authority or in order to avoid such expenditure (Companies Act 2006, section 206).
(d) Loans, quasi-loans, or the provision of a guarantee or security for a loan or quasi-loan not exceeding £10,000, and a credit transaction (or the provision of a guarantee or security in respect a credit transaction) not exceeding £15,000 (Companies Act 2006, section 207). The value of the transaction includes the value of any other relevant transactions or arrangements as defined by the *2006 Act*, sections 210 and 211.
(e) A credit transaction, or a guarantee or provision of security in connection with a credit transaction, if it is in the ordinary course of business of the company and the value and terms are no more favourable than would have been offered to a person of similar financial standing not connected to the company (Companies Act 2006, section 207).
(f) Intra-group transactions (Companies Act 2006, section 208).
(g) Loans, quasi-loans or the provision of a guarantee or security for a loan or quasi-loan by a money-lending company in the ordinary course of its business that is not more favourable than would have been offered to a person of the same financial standing not connected with the company (Companies Act 2006, section 209).

44 The consequences of contravention of the above requirements in relation to members' approval for loans etc are that the transactions or arrangements are voidable at the instance of the company. In the case of a contravention of the requirement for a members' resolution this can be rectified by a subsequent resolution within a reasonable period, after which the transaction or arrangement is no longer voidable (Companies Act 2006, sections 213 and 214).

Directors' remuneration and compensation for loss of office

45 Company law does not confer on a director any right to remuneration – such a right must come from the company's *Articles* and/or the director's service contract. *Listed companies* are expected to establish remuneration committees to act in setting directors' remuneration. The *Combined Code* addresses best practice provisions relating to remuneration committees and their procedures and also remuneration policy, service contracts and compensation.

46 A company may remove a director by ordinary resolution at a meeting before the expiration of his period in office provided *Special Notice* of such resolution has been given (Companies Act 2006, section 168)[14], or by special

[14] On receipt of notice of a proposed resolution to remove a director the company must forthwith send a copy of such notice to the director who is entitled to be heard on the

resolution (Companies Act 2006, sections 282(5) and 283), in which case *special notice* is not required The board may be able to remove a director if it is given this right by the *Articles* of the company. This does not deprive the director of compensation or damages that may be due to him in respect of the termination.

47 A company may not make a payment to a director for loss of office unless the payment has been approved by a resolution of the members of the company, nor may it make a payment for loss of office to a director of its holding company unless payment has been approved by the members of that company by a resolution (Companies Act 2006, sections 217). This rule does not apply to certain termination payments or liquidated damages set out in an existing legal obligation in an employment contract (see paragraph 50 below). This rule also applies to payments for loss of office in connection with a transfer of the whole or any part of the undertaking or property of the company and to payments in connection with a share transfer resulting from a takeover bid (Companies Act 2006, sections 218 and 219).

48 A *memorandum* must be circulated with the resolution to the members under the same formalities as described in paragraph 39 above. Definitions of 'payments for loss of office' and further conditions relating to the sale of shares and the amounts to be taken for loss of office are set out in sections 215 to 217 of the *Act*.

49 Accounting regulations made under Sections 412 and (for *quoted companies*) 421 of the *Act* specify the disclosure to be made in a company's accounts in respect of a director's remuneration and compensation for loss of office (see paragraphs 111 and 127 below). In addition, UK *listed companies* are required by the *Listing Rules* to make additional disclosures (see paragraph 128 below).

50 Approval by the members is not required for payments made in good faith:

(a) by way of discharge of an existing legal obligation or by way of damages for breach of such an obligation;
(b) by way of settlement or compromise of any claim arising in connection with the termination of a person's office or employment;
(c) by way of a pension in respect of past services;
(d) if the amount or value of the payment by the company or any of its subsidiaries together with the amount or value of any other relevant payments does not exceed £200 (Companies Act 2006, section 220 and 221).

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resolution at the meeting. The director may make representations in writing, which must be sent by the company to all members with the notice of the meeting but, if too late for this or by default of the company, the representations must be read out at the meeting. These representations need not be sent out or heard if the court considers that the rights are being abused (Companies Act 2006, sections 168 and 169).

51 If a payment is made without the members' approval it is held in trust for the company making the payment and any director who approves the payment is jointly and severally liable to indemnify that company. If the payment is made in connection with a share transfer it is held on trust for the persons selling the shares and any costs of distributing it to those persons must be covered by the person holding the monies in trust (Companies Act 2006, section 222).

Statutory provisions in relation to directors' liability

52 Any provision that purports to exempt a director of a company, to any extent, from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void. Similarly, any provision by which a company directly or indirectly provides an indemnity, to any extent for a director of the company, or an 'associated company' against any such liability is void. (Both provisions are however subject to exceptions as described below.) An 'associated company' is broadly defined for this purpose as a company in the same group (Companies Act 2006, section 256). Note that this is different from the definition of an associate (or associated undertaking) for accounting purposes. Both prohibitions are however subject to the following exceptions (Companies Act 2006, section 232).

53 A company is permitted to purchase and maintain for a director of the company, or an 'associated company' (see paragraph 52 above), insurance against any such liability (Companies Act 2006, section 233). The existence of such 'Directors and Officers' (D&O) insurance does not exonerate members from their obligations.

54 The other exceptions are qualifying third party indemnity provisions and qualifying pension scheme indemnity provisions (Companies Act 2006, sections 234 and 235). These provisions permit, subject to certain conditions, companies to indemnify directors in respect of proceedings brought by third parties. The indemnity may cover liability incurred by the directors to any person other than the company or an 'associated company' (see paragraph 52 above). This may include legal costs and the costs of an adverse judgment. However, the indemnity must not cover criminal fines, penalties imposed by regulatory bodies (e.g. the *FSA*), the defence costs of criminal proceedings where the director is found guilty, and (for third party indemnity provisions) the defence costs of civil proceedings successfully brought against the director by the company or an 'associated company' and the costs of unsuccessful applications by the director for relief under section 1157 of the *Act* (honest and reasonable conduct). Companies entering into any indemnity provisions should consider obtaining appropriate legal advice. Such qualifying indemnity provisions have to be made available for inspection by members of the company and disclosed in the directors' report of the company whose directors benefit from the provisions and also, where relevant, in the directors' report of the 'associated company' giving the indemnity (Companies Act 2006, sections 236 and 237).

55 A company may ratify conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company. The decision of the company to ratify such conduct must be made by resolution of the members of the company. The director in question and any member 'connected with him' may not vote on the resolution. This provision does not affect any other enactment or rule of law imposing additional requirements for valid ratification or any rule of law as to acts that are incapable of being ratified by the company (Companies Act 2006, section 239).

56 There is a specific 'safe harbour' in the case of the directors' report, the directors' remuneration report and any summary financial statement so far as it is derived from either of those reports. A director is not subject to any liability to a person other than the company resulting from reliance, by that person or another, on information in such a report. It also prevents any third party seeking any other relief (Companies Act 2006, section 463(5)). A director of a company is liable to compensate the company for any loss suffered by it as a result of any untrue or misleading statement in such a report or the omission from such a report of anything required to be included in it. However, the director is liable only if he knew the statement to be untrue or misleading, or was reckless as to whether it was untrue or misleading, or he knew the omission to be dishonest concealment of a material fact (Companies Act 2006, section 463).

57 There are specific provisions concerning liability of the company for false and misleading statements in certain publications made pursuant to the *Transparency Obligations Directive* for companies with securities traded on a *regulated market*. The publications concerned are annual financial reports, half-yearly reports and interim management statements. The provisions also cover material included in a preliminary announcement that will appear in the annual financial report in substantially the same form (*FSMA2000*, section 90A).

58 An issuer of securities to which these provisions apply is liable to pay compensation to a person who has acquired such securities issued by it (but not a person who has sold or held them) and has suffered a loss in respect of them as a result of any untrue or misleading statement in a publication to which the provisions apply or the omission from any such publication of a matter required to be included in it. A person is not considered to have suffered a loss unless he can demonstrate that it was reasonable for him to place reliance on, and had relied on, the information in the relevant publication. Furthermore, the company is so liable only if a director knew the statement to be untrue or misleading, or was reckless as to whether it was untrue or misleading, or was reckless as to whether it was untrue or misleading, or knew the omission to be dishonest concealment of a material fact, and only if the claimant acted in reliance on such statement in circumstances where it was reasonable for the claimant so to rely. A person other than the issuer (e.g. a director) is not subject to any liability, other than to the issuer, in respect of such loss (*FSMA2000*, section 90A).

59 These provisions restrict liability, to pay compensation to a third party, to the company. However, if a director is party to an untrue or misleading statement, he might still be liable (under common law) to compensate the company for any loss suffered as a result of a claim from a third party.

60 HM Treasury is consulting[15] on whether to extend this statutory regime on issuer liability:to issuers with securities admitted to trading on *non-regulated markets* and to cover all disclosures to a Regulatory Information Service. The proposals would also permit sellers (but not holders) of securities to recover losses incurred through reliance on fraudulent misstatements, and impose liability on issuers for dishonest delay.

Share dealing

61 There is nothing in company law to prevent a director, his spouse or minor child entering into any transaction relating to his company's shares, so long as it does not constitute insider dealing (see paragraph 63 below), market abuse (see paragraph 64 below) or infringe the *Articles* (for example, care should be taken to ensure compliance with any restrictions on transfer such as pre-emption rights). However, for a company with shares traded on a *regulated market*, under Chapter 3.1.2R of the *DTRs*, any person with managerial responsibility and their connected persons must notify the company in writing within four business days of all transactions on their own account in the shares of the company or any other derivatives or financial instruments related to the company's shares. *DTR* Chapter 3.1.3R specifies what has to be reported. As soon as possible after receipt of the information and, in any case not later than the end of the next business day following its receipt, the company must inform a Regulated Information Service of any information given to it (*DTR* 3.1.4R).

62 All directors of companies traded on any market (*regulated markets* and *non-regulated markets*) must establish and comply with internal protocols to control share dealings. For example, *listed company* directors must comply with the *Model Code* set out in the Annex to LR9. Such rules provide that no directors (or employees with access to inside information) may deal in shares without first obtaining clearance from a designated director, and clearance to deal must not be given during a period where there exists any matter which constitutes inside information in relation to the company, nor when the company is in a 'close period'[16], broadly speaking, covering its year end and results announcements (including half yearly and quarterly announcements).

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[15] For the Government's proposals to extend liability to other types of issuers and other types of publications see the HM Treasury consultation paper available at http://www.hm-treasury.gov.uk/media/2/5/issuerliability_170708.pdf.

[16] For example, 'close period' for companies included on the Official List is defined in paragraph 1(a) of the *Model Code* on directors' dealings in securities set out in LR9 Annex 1 R.

Insider dealing

63 For a company traded on any market (*regulated markets* and *non-regulated markets*), a director must not deal in any of its securities if he is in possession of unpublished price sensitive information in relation to those securities. Part V of the Criminal Justice Act 1993 makes insider dealing a serious criminal offence; contravening the legislation can lead to an unlimited fine or imprisonment. Insider dealing may involve dealing in securities on the basis of inside information, encouraging another on the basis of such information or disclosing inside information otherwise than in the proper performance of a person's duties. A person has information as an insider if it is, and he knows that it is, inside information or he has it, and knows that he has it, from an inside source. Inside information must relate to a specific issue of securities or to a particular issuer or issuers of securities, which is specific or precise and would be likely, if made public, to have a significant effect on the price of the security. Information that relates to securities or issuers of a general nature or has been made public is not inside information.

Market abuse

64 Market abuse is behaviour in relation to qualifying investments admitted (or in respect of which a request has been made for admission) to trading on any market, whether a *regulated market* or *non-regulated market*. Market abuse includes dealing or attempting to deal on the basis of inside information (subject to certain defences), disclosing inside information otherwise than in the proper course of one's employment, profession or duties, and the creation of a false or misleading impression relating to qualifying investments (including artificial prices) through transactions or orders to trade. The market abuse offences are civil rather than criminal offences. They are contained in *FSMA2000,* section 118 and are enforced by the *FSA*, which can publicly censure offenders, and require them to pay unlimited penalties and/or compensation. They sit alongside the criminal insider dealing offences mentioned at paragraph 63 above, so action can be taken against a person under *FSMA2000,* section 118 in addition to prosecution for the criminal offence of insider dealing.

Part 2: Financial Reporting and Accounting Responsibilities

65 In relation to financial and accounting matters, directors have extensive, specific duties. This part 2 of this statement gives an overview of this wide area. Put shortly, directors are required to maintain accounting records and to prepare accounts. There is a choice of accounting standards (ie, UK standards or *EU-adopted IFRS*) to apply and if UK standards are used there are special rules in the *Act* dependant on size. A company must also prepare a directors' report containing a business review (not required of a certain size of company) and *quoted companies* must prepare a detailed directors' remuneration report. Subject (principally) to a size-based exemption, these accounts and reports are subject to audit. The audited accounts and reports must be sent to members and filed on public record; there are however provisions facilitating the sending to members of a summary document and

the filing, for certain sizes of company, of cut-down or abbreviated versions of the accounts. Where these accounts and reports are found to be defective, the *Act* facilitates revision. In addition to these duties under company law, other requirements can arise in relation to accounts and reports by virtue of market or regulatory rules, such as in relation to corporate governance codes or half-yearly reports. All of these matters are discussed in some further detail in paragraphs 66 to 241.

Accounting records

Contents

66 A company is required to keep adequate accounting records, being those that are sufficient to show and explain the company's transactions (Companies Act 2006, section 386).[17] More specifically they must:

(i) disclose with reasonable accuracy, at any time, the financial position of the company at that time;
(ii) enable the directors to ensure that any accounts required to be prepared comply with the requirements of the Companies Act and, where applicable, of Article 4 of the *IAS Regulation*;
(iii) contain entries from day-to-day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place; and
(iv) contain a record of company assets and liabilities.

In the case of a company dealing in goods, the accounting records must also:

(v) contain statements of stock held by the company at the end of each financial year;
(vi) contain statements of stocktakings from which any statement prepared under (v) above is made; and
(vii) except when the sale is an ordinary retail sale, contain statements of all goods sold and purchased showing the goods and the buyers and sellers in sufficient detail to enable the goods and the buyers and sellers to be identified.

67 A *parent company* which has a *subsidiary undertaking* in relation to which the above does not apply (e.g. an overseas subsidiary), must take reasonable steps to ensure that the undertaking keeps such records as are needed to enable the directors of the *parent company* to ensure that any accounts required to be prepared under Part 15 of the Companies Act 2006 (including consolidated accounts) comply with the requirements of that Act and, where applicable, of Article 4 of the *IAS Regulation*.

[17] The technical release 'Accounting records' (FRAG 5/92) gives further guidance on the requirement to keep accounting records. However, this guidance was written in the context of the requirements of the Companies Act 1985 and, although the Institute regards it as continuing to be valid guidance (given that there is no substantive change between the *1985* and *2006 Acts*), is expected to be superseded by guidance to be published by the *FRC* which takes into account the *2006 Act*.

68 Failure to keep accounting records in accordance with the above requirements may render every officer of the company liable to a fine, imprisonment or both (Companies Act 2006, section 387).

69 In addition to the statutory requirement to keep adequate accounting records, the directors have an overriding responsibility to ensure that they have adequate information to enable them to discharge their responsibility to manage the company's business.

70 The duty to promote the success of the company will involve ensuring that adequate control is kept over its records and transactions, for example:

(a) cash;
(b) debtors and creditors;
(c) stock and work in progress;
(d) capital expenditure; and
(e) major contracts.

The nature and extent of the accounting and management information needed to exercise this control will depend upon the nature and extent of the company's business.

71 To restrict the possibility of actions for wrongful trading, directors will need constantly to be aware of the company's financial position and progress, and the accounting records should be sufficient to enable them to be provided with the information required for drawing conclusions on these matters. The directors should also be satisfied that proper systems to provide them with regular and prompt information are in place (see also paragraph 310 *et seq* below).

72 Directors must also be aware of a company's prospects. It may therefore be prudent to prepare a budget in the short term and a business plan in the longer term against which the subsequent performance of the business can be measured. Periodic management accounts assist in enabling the actual operating results and cash position to be compared with the plan. Once again, the need for, extent and frequency of the preparation of such accounts and the level of management to which they are presented, will depend upon the size, scope and nature of the business. However, the directors' report on the financial statements must contain an indication of the likely future developments in the business of the company (and its *subsidiary undertakings* when *group accounts* are prepared) (*Large/Medium Companies Accounts Regulations 2008*, Schedule 7, Paragraph 7(b)), and a business plan is likely to be helpful in this context.[18] It is also likely to be relevant for the preparation of the business review which requires a description of the principal risks and uncertainties facing the company as well as (in the case of a *quoted company*) details of the main trends and factors likely to affect the future development,

[18] An *SCR Company* is not required to make this disclosure – see paragraph 123 below.

performance and position of the company's business (Companies Act 2006, section 417).

Retention of records

73 Accounting records are required to be kept at the company's registered office or at such other place as the directors think fit and such records must be open at all times to inspection by the company's officers (Companies Act 2006, section 388). Special provisions apply where the records are kept outside the United Kingdom.

74 Subject to any directions in respect of the disposal of records in a winding up, the records must be preserved in the case of a private company, for 3 years from the date on which they were made, and in the case of a public company, for 6 years from the date on which they were made (Companies Act 2006, section 388).

75 However, directors may feel that it is wise to keep documents for longer in view of the periods which the law allows for legal actions to be brought. The main minimum limitation periods are:

(a) in the case of simple (i.e. non-specialty) contracts, 6 years from the date on which the cause of action arose (Limitation Act 1980, section 5);
(b) in the case of specialty contracts (i.e. contracts under seal), 12 years from the date on which the cause of action arose (Limitation Act 1980, section 8);
(c) in cases of personal injury, 3 years from (i) the date the cause of action accrued; or (ii) the date of knowledge (if later) of the person injured (Limitation Act 1980, section 11);
(d) in cases of negligence (excluding personal injuries), the time limit for an action for latent damage will be the later of:
  (i) six years from the date on which the cause of action accrued; and
  (ii) where the facts are not known at the date the cause of action accrued, three years from the earliest date on which the plaintiff, or any person in whom the cause of action was vested before him, had the knowledge required to bring an action and a right to bring such action (Limitation Act 1980, section 14A);
(e) an overriding time limit for actions for negligence (excluding personal injuries) of 15 years is imposed from the date on which there occurred any act or omission:
  (i) which is alleged to constitute negligence;
  (ii) to which the damage in respect of which damages are claimed is alleged to be attributable (Limitation Act 1980, section 14B);
(f) in actions to recover trust property, 6 years from the date on which the right of action accrued, save where the claim relates to a fraudulent breach of trust or where the action is to recover trust property from the trustee (Limitation Act 1980, section 21). In this context, directors are treated as trustees[19]; and

[19] *JJ Harrison (Properties) Ltd v. Harrison* [2002] 1 BCLC 162; *Gwembe Valley Development Co Ltd v. Koshy (No 3)* [2004] 1 BCLC 131.

(g) Companies within the scope of the Money Laundering Regulations are required to retain records of the identification of their customers or clients for the duration of the business relationship and for five years after the termination of the business relationship or after an occasional transaction has been completed. Specific transaction records must be retained for five years from the date the transaction was completed, or general transaction records until the business relationship ends.

76 Also to be considered are the various tax and related requirements:

(a) For corporation tax purposes, a company must keep and preserve its records for a period of six years from the end of the period for which a tax return may be required. Records for these purposes includes records of all receipts and expenses and sales and purchases together with any supporting documents which includes accounts, books, deeds, contracts, vouchers and receipts. If a company fails to keep and preserve its records, it is liable to a penalty of up to £3,000. HM Revenue & Customs have the power to require a company to produce documents relating to its tax liability. (Finance Act 1998, Schedule 18, paragraphs 21, 23 and 27.)
(b) For VAT purposes, every taxable person must keep records, including accounts and all related documents, for 6 years (Value Added Tax Act 1994, section 58 and Schedule 11, paragraph 6(3) and paragraph 31 of the Value Added Tax Regulations 1995 (SI 1995/2518)).
(c) For PAYE purposes, employers are under a duty to keep all PAYE records which do not have to be sent to HM Revenue & Customs under the PAYE regulations for not less than 3 years after the end of the year to which they relate (Regulation 97(8) of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682)).
(d) For National Minimum Wage purposes, employers must keep records to establish that an employee is receiving at least the National Minimum Wage. These records must be kept for a minimum period of three years from the end of the pay reference period (Regulation 38 of the National Minimum Wage Regulations 1999 (SI 1999/584)).
(e) For Student Loan purposes, employers must keep a record of all wages sheets, deductions working sheets and other documents and records relating to the calculation and deduction of Student Loan repayments for a period of at least three years after the end of the tax year to which they relate (Regulation 43(5) of the Education (Student Loans) (Repayment) Regulations 2000 (SI 2000/944)).

77 While original records will naturally be the best evidence of the information they contain, copies will be admissible in court, so long as the copies can be regarded as trustworthy. A judge has power to admit copies in evidence and to specify the method of authentication (Civil Evidence Act 1995, section 8). Therefore, if original company documents are to be copied in hard or electronic format, directors should ascertain that the procedures adopted not only ensure that all records are copied but also that they are legible, stored safely and capable of being properly authenticated. If

accounting records are in a non-legible form any software, etc. necessary to retrieve the information in a usable form should also be retained.

Annual Accounts and Reports

78 Directors have a duty to prepare accounts, a directors' report and (for *quoted companies*) a directors' remuneration report, and a number of subsidiary and associated responsibilities in relation to those.

Preparing accounts

79 A company's '*annual accounts*' comprise the *individual accounts* (see paragraphs 96 and 110 below) and any *group accounts* (see paragraphs 102 and 110 below) (Companies Act 2006, section 471). If *group accounts* are prepared, special provisions apply to the profit and loss account of the *parent company* (see paragraph 104 below). Accounts may be prepared in accordance with either UK GAAP ('*Companies Act accounts*') or *EU-adopted IFRS* ('*IAS accounts*') (see paragraph 92). The '*annual accounts and reports*' comprise the *annual accounts* together with the directors' report, the auditor's report and, for *quoted companies*, the directors' remuneration report (Companies Act 2006, section 471). The preparation of the accounts is the responsibility of the directors (Companies Act 2006, sections 394 and 399) and is governed by statute. As noted previously, the directors may delegate such tasks to others. The fact that a task is delegated will not relieve a director of responsibility; if a task is delegated the director must ensure that the person concerned is suitable for the task and the director should take reasonable steps to monitor the work (see paragraph 29 above).

80 The *annual accounts* must be approved by the board and the company balance sheet must be signed on their behalf by a director (Companies Act 2006, section 414). The wording of the section requires a director to sign, that is, a director in office at the time of signing, rather than those in office during the year to which the accounts relate. It is a criminal offence to approve *annual accounts* that do not comply with the *Act* and, where applicable, Article 4 of the *IAS Regulation* (Companies Act 2006, section 414).

Accounting reference periods

81 The period covered by the *annual accounts* (the financial year) must coincide with the company's *accounting reference period* or be within 7 days of that period (Companies Act 2006, section 390). The *accounting reference period* is a period ending with the next occurence (usually) of the company's *accounting reference date*.

82 A company's first *accounting reference date* will normally be the last day of the month in which the anniversary of incorporation falls (Companies Act 2006, section 391).

83 A company may alter its *accounting reference period* if certain conditions are met (Companies Act 2006, section 392):

(a) Notice must be sent to the registrar of Companies. A notice to alter a previous *accounting reference period* may not be given if the period allowed for laying and delivering accounts and reports in relation to that period has already expired.

    If the result of the change is that the *accounting reference period* is extended, it may not be extended beyond 18 months unless the company is in administration; and

(b) A company may only extend its *accounting reference period* a second or subsequent time if it complies with the following rules:
    (i) there must be a gap of at least 5 years between the end of the earlier extended *accounting reference period* and the subsequent notice; or
    (ii) the change is to bring the company's *accounting reference period* into line with that of a parent or *subsidiary undertaking*, though reference should be made to the precise terms of section 392(3)(a) of the *Act*; or
    (iii) the company is in administration; or
    (iv) the consent of the Secretary of State has been given.

True and fair requirement

84 The directors of a company must not approve accounts, whether they are *Companies Act accounts* or *IAS accounts*, unless they are satisfied that they give a true and fair view of the assets, liabilities, financial position and profit or loss of the company, in the case of *individual accounts*, and of the undertakings included in the consolidation, in the case of the company's *group accounts* (Companies Act 2006, section 393). For companies subject to the *DTR* chapter 4, the directors must also make a statement that the accounts do in fact give a true and fair view.

85 As regards *Companies Act accounts*, the Accounting Standards Board (*ASB*) obtained a legal opinion from Mary Arden QC (now Lady Justice Arden) (following on from earlier joint opinions with Leonard Hoffmann QC (now Lord Hoffmann)) on the relationship between accounting standards and the 'true and fair requirement' in the Companies Act 1985 (now contained in Companies Act 2006, section 396 and 404 in respect of *Companies Act accounts*) in 1993. This opinion is reproduced in the *ASB*'s Foreword to accounting standards and should be considered in full. Some of the key points made are:

- the question of whether accounts satisfy the true and fair requirement is a question of law for the Court;
- the task of interpreting the true and fair requirement cannot be performed by the court without evidence as to the practices and views of accountants;
- the Court will infer that statutory policy favours both the issue of accounting standards (by a body prescribed by regulation (the *ASB*, see paragraph 111)) and compliance with them. These factors increase the likelihood that the Courts will hold that in general compliance with accounting standards is necessary to meet the true and fair requirement; and

- the Court is likely to treat UITF abstracts as of considerable standing even though they are not envisaged by the Companies Acts. This will lead to a readiness on the part of the Court to accept that compliance with abstracts of the UITF is also necessary to meet the true and fair requirement.

86 In 2008 the *FRC* obtained from Martin Moore QC[20] a further opinion which, among other things, found that the central conclusions of the earlier opinions have been endorsed by the courts, which will approach the true and fair requirement in the manner described in those opinions.

87 Since 2005, UK companies have been able to prepare their accounts in accordance with *EU-adopted IFRS* (see paragraph 95 below) in addition to UK GAAP. IAS 1 *Presentation of Financial Statements* requires that financial statements shall present fairly the financial position. The 2008 Moore opinion (mentioned above) confirms that this IAS 1 requirement is not a different requirement to that of showing a true and fair view, but is a different articulation of the same concept. In June 2005 the *FRRP* published a legal opinion on the effect of the *IAS Regulation* on the requirement for accounts to give a True and Fair View in the context of the Companies Act 1985. In addition, pursuant to section 393 of the *Act* (see paragraph 84) both *Companies Act accounts* and *IAS accounts* are now directly required by law to give a true and fair view.

Statement of directors' responsibilities

88 If the financial statements or accompanying information (for example, the directors' report) do not include an adequate description of the responsibilities, in relation to the accounts, of those charged with governance (ie, for a company, the directors), auditors' professional standards require that the auditors' report should include a description of those responsibilities (ISA 700).

89 An example wording is given in the APB Bulletin 2006/06 *Auditor's reports on Financial Statements in the United Kingdom* (Appendix 5) describing the directors' responsibilities for a non-publicly traded company incorporated in the United Kingdom preparing its financial statements under UK GAAP.

90 For *listed companies*, the *Combined Code* (see paragraph 231 below) at code provision C.1.1 provides that the directors should explain in the annual report their responsibility for preparing the accounts.

91 For companies subject to the *DTR* chapter 4, the directors are also required to give a responsibility statement. This statement not only acknowledges their responsibilities but must state that the accounts do in fact give a true and fair view.

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[20] Martin Moore QC's opinion is available from the *FRC* website at http://www.frc.org.uk.

Applicable accounting framework

92 Under the *2006 Act* companies, other than charitable companies, may prepare their *individual accounts* and/or *group accounts* in accordance with either UK GAAP (*Companies Act accounts*) or *EU-adopted IFRS* (*IAS accounts*). Charitable companies registered in England and Wales are required to prepare *Companies Act accounts* (Companies Act 2006, sections 395, 396, 403 and 404) and must, therefore, use UK GAAP. A company is not required to produce its *individual accounts* and its *group accounts* under the same accounting framework.

93 After a company has prepared IAS *individual accounts* it must use the same framework in subsequent years unless there is 'a relevant change of circumstances' (Companies Act 2006, section 395). A relevant change of circumstances occurs if:

- the company becomes a *subsidiary undertaking* of another undertaking that does not prepare IAS *individual accounts*; or
- the company ceases to be a *subsidiary undertaking*; or
- the company ceases to be a company with securities admitted to trading on a *regulated market*; or
- a *parent undertaking* of the company ceases to be a company with securities admitted to trading on a *regulated market*.

The same 'relevant change of circumstances' rule applies to IAS *group accounts* (Companies Act 2006, section 403).

94 Directors of a UK *parent company* must secure that the company and any *subsidiary undertaking*s preparing accounts in accordance with the *Act* (e.g. UK subsidiary companies) use the same financial reporting framework subject to certain exemptions (Companies Act 2006, section 407). The exemptions are:

- where the *parent company* does not prepare *group accounts*;
- undertakings that are charitable companies. The requirement to use the Companies Act framework for charitable companies does not preclude the use of international accounting standards for non-charitable *subsidiary undertakings*;
- parent companies that produce IAS *group accounts* may produce IAS *individual accounts* even if the *subsidiary undertakings* prepare *Companies Act accounts*; and
- cases where the directors of the *parent company* believe there are 'good reasons for not doing so'. Guidance notes[21] available from the *BERR* website note that 'This provision is intended to provide a degree of flexibility where there are genuine (including cost/benefit) grounds for using different accounting frameworks within a group of companies.'. The guidance notes also give some examples of 'good reasons'.

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[21] Guidance for UK companies on accounting and reporting requirements under the *2006 Act* and the application of the *IAS Regulation,* available at http://www.berr.gov.uk/files/file46791.pdf.

95 Companies with securities admitted to trading on a *regulated market* are required to apply *EU-adopted IFRS* in their *group accounts* (Article 4 of the *IAS Regulation*). UK Parent companies on *AIM* are required to apply *EU-adopted IFRS* in their accounts for periods beginning on or after 1 January 2007 (*AIM* Rule 19). See paragraph 110.

Companies Act individual accounts

96 The 'Companies Act *individual accounts*' required by law are a profit and loss account and a balance sheet. The accounts are required to give a true and fair view of the assets, liabilities, financial position and profit or loss of the company (Companies Act 2006, section 396). This may mean supplying information in addition to that specified or, in special circumstances, even departing from the statutory requirements. However, the need to make such departures will be rare, and while it is for the directors to decide, the question should be discussed with the company's auditors. In the event of any departure, particulars of it, the reasons for it and its effect must be given in a note to the accounts (Companies Act 2006, section 396). The *ASB* has issued FRS 18 *Accounting policies* which specifies the disclosure to be made (FRS 18 paragraphs 62 to 65).

97 Companies preparing Companies Act *individual accounts* must prepare them in accordance with either:

- the *Large/Medium Companies Accounts Regulations 2008*; or
- the *Small Companies Accounts Regulations 2008*, as applicable.

98 An *SCR Company*'s *annual accounts and reports* are prepared under a less onerous disclosure regime, set out in the second mentioned regulation above, and certain *SCR Companies* are exempt from the statutory requirement for audit (see paragraph 130 *et seq* below).

99 The form of the *individual accounts* prepared under the *Large/Medium Companies Accounts Regulations 2008* will vary according to the type of company.

- Most companies will be required to prepare their accounts in accordance with Schedule 1 (Companies Act *individual accounts*: companies which are not banking or insurance companies).
- Banking companies and insurance companies should use Schedules 2 and 3 respectively.

Paragraphs 100 to 101 below deal with the requirements which are of general application and paragraph 108 below refers to banking and insurance companies.

100 Directors of companies, other than companies subject to the small companies regime (see paragraph 180 *et seq*) and medium-sized companies (the *Large/Medium Companies Accounts Regulations 2008*, Regulation 4(2)) (see paragraph 193 *et seq* below), are required to disclose whether or not the accounts comply with applicable accounting standards and to give details of

any non-compliance (*Large/Medium Companies Accounts Regulations 2008* Schedule 1, paragraph 45, Schedule 2 paragraph 54 and Schedule 3, paragraph 62). Except in exceptional cases, a departure from accounting standards will result in the issue of a qualified or adverse opinion on the view given by the financial statements.

Schedule 1 accounts

101 The *Large/Medium Companies Accounts Regulations 2008*, Schedule 1 ('Schedule 1') lays down rules as to the form and content of the balance sheet and profit and loss account as well as in respect of additional information which has been provided by way of notes to the accounts. Reference should be made to these requirements. They include:

(a) In preparing the *annual accounts*, statute requires that certain accounting principles must be used (Schedule 1, paragraphs 11 to 15). If, however, the directors believe that there are special reasons for departing from any of these principles, they may do so, as long as particulars of the departure, the reasons for it and its effects are set out in the notes to the accounts (Schedule 1, paragraph 10). It is advisable that any proposed departure should be discussed with the company's auditors.
(b) A choice of two balance sheet formats and four profit and loss account formats. Once the choice of formats has been made for the balance sheet and profit and loss account, the same formats must be used for subsequent financial years, unless, in the directors' opinion, there are special reasons for a change, in which case particulars of the change and the reasons for it must be disclosed in a note to the accounts (Schedule 1, paragraph 2).

Group accounts

102 Where a company has *subsidiary undertakings* there is an obligation to prepare *group accounts* in the form of consolidated accounts (Companies Act 2006, section 399). This requirement does not apply to a *parent company* that is subject to the small companies regime (see Appendix A below).

103 A *parent company* which does not have any of its securities admitted to trading on a *regulated market*, which is itself a subsidiary and which complies with certain other specified conditions is not required to produce *group accounts* (Companies Act 2006, sections 400 and 401). A *parent company* is also exempt from the requirement to prepare *group accounts* if all of its *subsidiary undertakings* could be excluded from consolidation in Companies Act *group accounts* under the various exemptions contained in section 405 of the Companies Act 2006 (Companies Act 2006, section 402).

104 Where a *parent company* produces *group accounts*, the *parent company* must draw up an individual profit and loss account and the board of directors must approve it, but it need not be published, subject to the auditor's report, sent to members or filed provided that the notes to the company's individual balance sheet show the company's profit or loss for the financial year and that it is disclosed in the company's accounts that this exemption applies (Companies Act 2006, section 408).

105 As noted in paragraph 92 above companies, other than charitible companies, may prepare their *group accounts* under the *Act* in accordance with either UK GAAP (Companies Act *group accounts*) or *EU-adopted IFRS* (IAS *group accounts*).

Companies Act group accounts

106 Companies Act *Group accounts* should be prepared under the *Large/Medium Companies Accounts Regulations 2008*, Schedule 6 which includes general rules together with modifications for banking groups and for insurance groups. Companies Act *Group accounts* must also comply with Schedule 1 as far as practicable (Schedule 6, paragraph 1). These requirements are subject to the overriding requirement that the *group accounts* give a true and fair view (see paragraph 84 *et seq*) of the state of affairs as at the end of the financial year, and the profit or loss for the financial year, of the undertakings included in the consolidation as a whole, so far as concerns the members of the *parent company* (Companies Act 2006, section 404).

107 A *subsidiary undertaking* may be excluded from the Companies Act *group accounts* in certain circumstances, for example, where the information necessary for the preparation of *group accounts* cannot be obtained without disproportionate expense or undue delay (Companies Act 2006, section 405). However, accounting standards may interpret such exemptions in a narrow manner. For example under UK GAAP *FRS 2 Subsidiary undertakings* notes that disproportionate expense or undue delay do not justify excluding from consolidation *subsidiary undertakings* that are individually or collectively material in the context of the group.

Banking and insurance companies and groups

108 Different rules apply to Banking and insurance companies and groups. Reference should be made to sections 396 and 404 of the *2006 Act* and the *Large/Medium Companies Accounts Regulations 2008* (Schedules 2 and 3). The definition of a banking or insurance company and group is contained in section 1164 and 1165 of the Companies Act 2006.

Applicable accounting standards for 'Companies Act accounts'

109 The Accounting Standards Board (*ASB*) is a body authorised to issue accounting standards for the purposes of section 464 of the *Act*. Its standards are known as Financial Reporting Standards (FRSs) and Statements of Standard Accounting Practice (SSAPs). The *ASB* has a committee known as the Urgent Issues Task Force (UITF) to assist it in areas where an accounting standard or Companies Act provision exists, but where unsatisfactory or conflicting interpretations have developed or seem likely to develop. The UITF seeks to obtain a consensus on the issue in question. While a consensus will not have the status of an accounting standard, the *FRRP* may take it into account in considering whether financial statements require revision (see paragraph 223 *et seq* below).

IAS accounts

110 Companies producing IAS *individual accounts* or IAS *group accounts* are required to prepare those accounts in accordance with *EU-adopted IFRS* and to state in a note to the accounts that they have been so prepared (Companies Act 2006, section 397 and 406).

111 Not all of the requirements of the *Large/Medium Companies Accounts Regulations 2008*, or the *Small Companies Accounts Regulations 2008* apply to *IAS accounts*. Companies producing *IAS accounts* still need to consider the following accounts requirements of these Regulations:

- The *Large/Medium Companies Accounts Regulations 2008*
  - Information about related undertakings (Regulation 7 and Schedule 4)
  - Information about directors' remuneration (Regulation 8 and Schedule 5)
- The *Small Companies Accounts Regulations 2008*
  - Information about related undertakings (Regulation 4 and Schedule 2)
  - Information about directors' remuneration (Regulation 5 and Schedule 3)

and other disclosures required pursuant to the Companies Act 2006:

- off-balance sheet arrangements (certain companies under s.410A);
- employee costs and numbers (s.411);
- directors' advances, credit and guarantees (s.413);
- disclosure of auditor remuneration (s.494, SI 2008/489[22] and see also TECH 6/06 (Revised)); and
- principal terms of a liability limitation agreement with the auditor (s.538 and SI 2008/489[23]).

Small companies – less onerous disclosure requirements for accounts prepared for members

112 As noted above, there is a less onerous disclosure regime for *SCR Companies* in relation to the directors' report (see paragraphs 122 to 124 below) and *annual accounts* prepared for members.

113 There is simplified format for the *annual accounts* for a financial year, which is only available for *Companies Act accounts*, which includes a simplified balance sheet with a number of sub-headings being aggregated, and a reduced level of disclosure in the notes to the accounts. The details are found in Regulation 3 and Schedule 1 of the *Small Companies Accounts Regulations 2008*.

[22] The Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008 (SI 2008/489).

[23] The Companies (Disclosure of Auditor Remuneration and Liability Limitation Agreements) Regulations 2008 (SI 2008/489).

114 An *SCR Company* is not subject to the *2006 Act*'s requirement to disclose information about off-balance sheet arrangements (Companies Act 2006, section 410A(1)). This is the case irrespective of the accounting framework used in preparing the *SCR Company*'s *annual accounts*. However, *SCR Companies* should provide any information about off-balance sheet arrangements required by applicable accounting standards.

Medium-sized companies – disclosure exemptions for accounts prepared for members

115 As noted earlier, medium-sized companies are entitled to some exemptions in relation to the statutory disclosures required in the directors' report (see paragraphs 125 and 126 below) and *annual accounts* prepared for members.

116 The exemption in respect of the form and content of a company's *individual accounts* for a financial year is only available for *Companies Act accounts*. The exemption allows the notes to the accounts to omit the statement of compliance with accounting standards and the details required by the regulations of related party transactions (*Large/Medium Companies Accounts Regulations 2008*, Regulation 4(2)). However, medium-sized companies should provide such information if it is required by applicable accounting standards.

117 A medium-sized company is exempt from the *Act*'s requirement to disclose the financial impact of any material off-balance sheet arrangements that it is party to during the financial year (Companies Act 2006, section 410A(4)). This exemption applies irrespective of the accounting framework used in preparing the companies *annual accounts*. However, medium-sized companies must provide the details of the nature and business purpose of any material off-balance sheet arrangements (Companies Act 2006, sections 410A(1) and (2)(a)) and any information required by applicable accounting standards.

Directors' report

118 The directors' report attached to the *annual accounts* must include specified information under sections 415 to 419 of the *2006 Act,* and under Schedule 7 of the the *Large/Medium Companies Accounts Regulations 2008* ('Schedule 7') or Schedule 5 of the *Small Companies Accounts Regulations 2008* for *SCR companies*. Some of the specified information is considered in paragraphs 119 *et seq* below. Companies subject to the small companies regime and medium-sized companies are entitled to certain exemptions in relation to the requirements of section 417 of the *Act* (see paragraphs 122 to 126 below).

119 The directors' report must contain a business review of the company and, if *group accounts* are presented (see paragraph 102), its subsidiaries. This should contain a fair review of the business and a description of the principal risks and uncertainties that it faces (the detailed requirements are set out in Companies Act 2006, section 417 of which should be consulted). The purpose

of the business review is to inform members of the company and help them to assess how the directors have performed their duties to promote the success of the company (see paragraphs 21 to 24 above). *Quoted companies* are required to give additional disclosures including:

(a) the main trends and factors likely to affect the future development, performance and position of the company's business (forward-looking information);
(b) information about environmental matters, employees and social and community issues; and
(c) information about persons with whom the company has contractual or other arrangements which are essential to the company's business (subject to a specific exemption if, in the directors' opinion, disclosure would be seriously prejudicial to the person and contrary to the public interest).

If the review does not contain information of each kind mentioned in (b) and (c) above it must state which of those kinds of information it does not contain. The review is not required to contain information about impending matters in the course of negotiation if to do so would, in the directors' opinion, be seriously prejudicial to the interests of the company.

120 A company with securities carrying voting rights that are admitted to trading on a *regulated market* as at the end of the financial year must disclose in the directors' report specified information about their capital structure that would be pertinent in the event of a takeover bid (*Large/Medium Companies Accounts Regulations 2008,* Schedule 7, Part 6).

121 Unless the company is exempt from the requirement for an audit and has taken advantage of that exemption, the directors' report must contain a statement in relation to the provision of information to auditors as described at paragraph 146 below.

Small companies

122 The contents of a small company's directors' report should comply with section 416 of the *Act* and Regulation 7 and Schedule 5 of the *Small Companies Accounts Regulations 2008*.

123 There is an exemption in respect of the directors' report for a financial year available to *SCR Companies* and also to those small companies that would have qualified for the small companies regime but for being or having been a member of an ineligible group. The exemption allows the omission of, principally, the business review (Companies Act 2006, section 415A).

124 The directors' report exemption mentioned in paragraph 123 above is available to all eligible companies irrespective of the accounting framework chosen for the *annual accounts*.

Medium-sized companies

125 An exemption for the directors' report for a financial year is available to companies that qualify as medium-sized and also to those medium-sized

companies that would have qualified but for being or having been a member of an ineligible group (Companies Act 2006, section 467(4)). The exemption allows for the omission from the business review of the analysis of the company's performance for the financial year by reference to non-financial key performance indicators of the business review as otherwise required by section 417(6)(b) of the *Act* (Companies Act 2006, section 417(7)).

126 The directors' report exemption is available to all eligible companies irrespective of the accounting framework chosen for the *annual accounts*. The contents of a medium-sized company's directors' report should comply with section 416 of the *Act* and Regulation 10 of, and Schedule 7 to, the *Large/ Medium Companies Accounts Regulations*.

Directors' Remuneration Report

Statutory requirements
127 The directors of *quoted companies* are required to prepare a directors' remuneration report (Companies Act 2006, section 420), which must provide certain narrative disclosures about remuneration policy and numerical disclosures concerning the remuneration of individual directors (*Large/ Medium Companies Accounts Regulations 2008,* Schedule 8).

Regulatory requirements
128 In addition to the statutory requirements mentioned above, the *Listing Rules* have their own requirement for a report to shareholders on directors' remuneration (LR 9.8.8). However, for the great part most of the *Listing Rules* requirements are substantially covered by the requirements in the above regulations, although there are some differences that can make compliance with both sets of requirements complicated.

Requirement for audit and relationship with auditor
129 A company's *annual accounts* must be audited unless an exemption is available (Companies Act 2006, section 475).

Small companies – audit exemption
130 A company that meets the following conditions in respect of a financial year is exempt from the requirement to have an audit of its accounts for that year. The conditions are:

(a) that the company qualifies as a small company in relation to that year, as determined under section 382(1) to (6) (see Appendix A below);
(b) that its turnover in that year does not exceed £6.5 million; and
(c) that its balance sheet total (as defined in section 382(5)) for that year is not more than £3.26 million.

(Companies Act 2006, section 477.)

131 Besides the qualifying conditions referred to above, the company must not have received a notice of a requirement to obtain an audit from members

holding in total 10% or more of the nominal value of its issued share capital or 10% of a particular class of share. If the company does not have a share capital, the notice must be given by 10% or more of the members. The notice must be given after the start of the financial year to which it relates but no later than one month before the end of that year (Companies Act 2006, section 476).

132 Furthermore, a company is not entitled to the exemption unless its balance sheet contains a statement above the name and signature required by section 414 of the *Act* to the effect that:

(a) that the company is entitled to the exemption under section 477 (small companies) of the *2006 Act*;
(b) that the members have not required the company to obtain an audit of its accounts for the year in question; and
(c) the directors acknowledge their responsibilities for complying with the requirements of the *Act* with respect to accounting records and the preparation of accounts.

(Companies Act 2006, sections 475(2), (3) and (4)).

133 A company is not entitled to the exemption if, it was at any time within the financial year in question, one of the following:

- a public company (although a public company that is dormant may be entitled to the audit exemption for dormant companies);
- a banking or an authorised insurance company, or an e-money issuer, a MiFID investment firm or a UCITS management company (as defined by *FSMA2000*);
- a company that carries on an insurance market activity;
- a special register body as defined in section 117(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 or an employers' association as defined in section 122 of that Act or Article 4 of the Industrial relations (Northern Ireland) Order 1992 (SI 1992/807) (N.I. 5) (Companies Act 2006, section 478).

134 A company that is a *parent company* or a *subsidiary undertaking* for any part of a financial year is not entitled to the audit exemption unless either:

(a) it was both a *subsidiary undertaking* and dormant throughout the whole the period or periods during the financial year when it was a *subsidiary undertaking*; or
(b) it is a member of a group meeting the conditions set out below throughout that period.

135 Those conditions are that:

(a) the group qualifies as a small group (as determined by section 383 of the *2006 Act*) in relation to the financial year in question (see paragraph A7 below);

(b) the group was not at any time in that year an ineligible group (within the meaning of section 384(2) and (3) of the *2006 Act*) (see paragraph A11 below);
(c) the group's aggregate turnover is not more than £6.5 million net (or £7.8 million gross); and
(d) the group's aggregate balance sheet total for that year is not more than £3.26 million net (or £3.9 million gross).

136 A company may meet any relevant requirement on the basis of either the net or the gross figure. 'Net' and 'gross' have the same meaning as in section 383 of the *2006 Act* (see Appendix A) (Companies Act 2006, section 479). A 'group' means in relation to a *parent company* or a *subsidiary undertaking* the entity together with all of its associated parent, subsidiary and fellow *subsidiary undertakings* (Companies Act 2006, section 479(4)).

Small charitable companies

137 A charitable company that is not required by the *2006 Act* (or by its constitution or other authority) to have an audit may nevertheless require an audit by reference to The Charities (Accounts and Reports) Regulations 2008 (SI 2008/629) and The Charities Act 2006 (Charitable Companies Audit and Group Accounts Provisions) Order 2008 (SI 2008/527) or the Charities Accounts (Scotland) Regulations 2006 (as the case may be).

Dormant companies – audit exemption

138 A company is exempt from the requirements of Part 16 of the Companies Act 2006 relating to the audit of accounts and from the obligation to appoint auditors if:

(a) the company has been dormant since its formation; or
(b) the company has been dormant since the end of the previous financial year and meets all of the following criteria:
    - it is entitled to prepare accounts in accordance with the small companies regime (see Appendix A) or would be but for having been a public company or a member of an ineligible group (see paragraph A11 below);
    - it is not required to prepare *group accounts* for that year;
    - it is not (and was not at any time in the year in question) a banking or authorised insurance company, an e-money, a MiFID investment firm or a UCITS management company (as defined by *FSMA2000*) or carries on insurance market activity;
    - no objection to exemption is made by members holding in total more than 10 per cent of the issued share capital or 10 per cent of a particular class of share by depositing a written notice at the company's registered office not later than one month before the year end.

139 If a dormant company takes advantage of the audit exemption, section 480(3) of the Companies Act 2006 requires the directors to make two statements on the balance sheet:

(1) that it is exempt from audit as a dormant company under section 480 of the Companies Act 2006 (Companies Act 2006, section 475(2)); and
(2) that the members have not required the company to obtain an audit of its accounts in accordance with section 476 of the Companies Act 2006; and that the directors acknowledge their responsibility for complying with the requirements of the *2006 Act* with respect to accounting records and the preparation of accounts (Companies Act 2006, section 475(3)).

140 A company that qualifies for audit exemption as a dormant company is also exempt from the obligation in section 485 of the *2006 Act* to appoint auditors. As the directors do not know necessarily in advance whether they will, or will be able to, claim the exemption from audit, the wording in section 485(1) offers a practical solution by allowing the directors of a private company to resolve not to appoint an auditor where they believe that audited accounts are unlikely to be required. Sections 480, 481 and 485 of the *Act* should be consulted for further details.

141 If a dormant company ceases to qualify for the audit exemption during the year, the directors must appoint auditors at any time before the next period for appointing auditors (Companies Act 2006, section 485(3)(b)). The period for appointing auditors is no later than 28 days after the period allowed for sending out copies of the company's *annual accounts* for the previous financial year, or, if earlier, the date on which the *annual accounts* for previous financial year are sent out (Companies Act 2006, section 485(2)).

142 An additional disclosure requirement applies where the directors of a dormant company are taking advantage of the audit exemption and the company has acted as an agent for any person during the financial year. The directors must state that fact in the notes to the accounts and in the abbreviated accounts if such accounts are produced (*Large/Medium Companies Accounts Regulations 2008*, Schedule 1, paragraph 71 and *Small Companies Accounts Regulations 2008*, Schedule 1, paragraph 63; Schedule 4, paragraph 10).

143 A company is dormant during any period in which it has no significant accounting transaction (one that is required to be entered in the company's accounting records by section 386 of the Companies Act 2006) (Companies Act 2006, section 1169(1) and (2)). However, the following transactions are disregarded and do not jeopardize a company's dormant status:

- any transaction arising from a subscriber to the company's *memorandum* taking shares at the formation of the company;
- any payments of fees to the Registrar of Companies relating to a change of name, its re-registration, the filing of its *annual accounts* or annual return or a penalty for failing to deliver its accounts to the Registrar of Companies (Companies Act 2006, section 1169(3)).

Duties in relation to auditors

144 It is the duty of a public company in general meeting to appoint its auditors for each financial year (Companies Act 2006, section 489). Auditors

of a private company are generally deemed to be reappointed each year (Companies Act 2006, section 487). In the case of a public company, the directors may appoint the company's first auditors at any time before a company's first relevant general meeting (Companies Act 2006, section 489). In the case of a private company, the directors may appoint the company's first auditor before the first period for appointing auditors, as defined in section 485 of the *Act*. Directors of both public and private companies may appoint an auditor to fill a casual vacancy. All of the foregoing is subject to the availability of an exemption from audit (see paragraph 130 *et seq* above).

145 The statutory rights of auditors cannot be restricted in any way.[24] Auditors have a statutory right of access, at all times, to the company's books, accounts and vouchers and to require from officers and employees of the company such information as the auditors think necessary for the performance of their duties (Companies Act 2006, section 499). Directors must therefore ensure that the auditors have adequate information for the performance of their duties. However, directors are not required to disclose to auditors any information in respect of which a claim to legal professional privilege could be maintained in legal proceedings (Companies Act 2006, section 499) although this might lead to a qualified audit report if the auditor fails to obtain such information and explanations as he thinks necessary for the performance of his duties. Further, the auditors of a holding company may require information and explanations from UK *subsidiary undertaking*s and their auditors. A person who knowingly or recklessly makes a statement to the auditors in the course of their audit which is misleading, false or deceptive in a material particular is guilty of a criminal offence, as is any person who delays in complying with a request for information. (Companies Act 2006, sections 499 to 501). In relation to overseas *subsidiary undertakings,* the auditor can require the company to seek from that undertaking or its officers, employees or auditors, such information as the auditor considers necessary (Companies Act 2006, section 500).

146 Directors are also, in effect, required to volunteer information to auditors. This arises through a requirement (Companies Act 2006, section 418) that the directors' report includes a disclosure to the effect that: so far as each director is aware there is no information, needed by the auditor ('relevant audit information'), of which the auditor is unaware; and that each director has taken all the steps he ought to have taken, as required by his duty to exercise reasonable care, skill and diligence (see paragraph 25 above), to make himself aware of such information and to establish that the auditor is aware of it. If this disclosure contains a statement that is false, a director is guilty of a criminal offence if he knows of or was reckless as to the falsehood and failed to take all reasonable steps to prevent the directors' report from being approved. The legislation specifies that the steps the director ought to have taken include (but are not limited to) making enquiries of his fellow directors and of the auditor. This requirement, in effect to ensure that information is obtained and passed on, is closely related to the requirement upon the

[24] *Newton v. Birmingham Small Arms Co* [1906] 2 Ch 378.

directors to prepare accounts that give a true and fair view and comply with the Companies Act 2006 (see paragraph 84 *et seq* above).

147 The information required for the accounts, and the processes and oversight of its production, would usually form the basis of relevant audit information. The additional challenges for directors are likely to be in relation to the measure of individual responsibility of a director and to the communication of the information to the auditor. On the first point, different standards will be required of different directors in the ususal way under the duty to exercise reasonable care, skill and diligence: under the objective test more would be expected of a director with an executive function; and under the subjective test more would also be expected of a director having specifically relevant knowledge, skills and experience (such as a member of the Institute). However, and as the Explanatory Notes to the predecessor legislation[25] make clear, this is not a requirement that each director should ensure that he and every other director have each disclosed all relevant audit information. Rather, the requirement might be characterised as one relating to the information that the individual has or ought reasonably to have and requiring the directors to communicate with each other so far as necessary to capture all relevant audit information and communicate it to the auditor.

148 In terms of communication, this will involve more than, for example, just the final audit meeting. There should, for example, be consideration of the auditor's plan for the audit and whether there are risks hitherto unknown to the auditor that he has not planned for. It is, however, difficult to generalise on this topic. The arrangements for the identification and communication of relevant audit information will vary according to the size and complexity of any particular company's circumstances. One more point may be added: it will not be sufficient merely to ask the auditor whether he has all the information that he requires; nor would an auditor answer such a question.

149 Directors may be asked by the company's auditors to make written representations to confirm information on which the auditors have placed reliance in forming an opinion. Such confirmations are sought as part of the auditors' duty to obtain audit evidence, and in accordance with auditing standards, when the matter is material to the accounts and other sufficient appropriate audit evidence cannot reasonably be expected to exist. Pursuant to auditing standards, directors will also be asked to include in written representations an acknowledgement of their responsibility for internal controls and a statement that the directors believe that the effect of uncorrected accounts mis-statements, identified by the auditor, are immaterial.

150 It is a requirement of auditing standards that an auditor reports to the directors after an audit, drawing attention to any weakness in internal controls identified during the audit, although this is not a comprehensive list of all weaknesses that may exist. While there are no specific legal requirements relating to such reports, directors should consider them with care, since such a

[25] The requirement was first introduced by the *2004 Act*.

report may contain information which should put the directors on enquiry as to inadequacies in systems or personnel. The auditors may request a reply to the points raised in the management report and, in certain cases, may request that the directors' discussion of the report be recorded in the board minutes. Such reports will be particularly relevant to companies on the *Official List*; for such companies the *Listing Rules* (LR 9.8.6(6)(a)) require the company to state in its annual report that it complies with the *Combined Code* (see paragraph 231 below), which provides that the board, in particular its audit committee, should conduct an annual review of effectiveness of internal controls and report that fact to shareholders (*Combined Code,* provisions C.2.1 and C.3.2).

151 There are also occasions when directors need auditors' reports on matters other than the *annual accounts*, for example when a private company is making a payment out of capital in respect of the purchase of its own shares (Companies Act 2006, section 714) and when a private company is re-registering as a public company (Companies Act 2006, section 92).

Auditor Liability Limitation

152 Companies may enter into Liability Limitation Agreements with their auditor (Companies Act 2006, sections 534 to 538). The Institute has obtained a legal opinion[26] that confirms that directors can recommend auditor liability limitation agreements to the shareholders without breaching their fiduciary duties. The *FRC* has issued guidance[27] that sets out factors for directors to consider when assessing the advantages of entering into a Liability Limitation Agreement and explains which provisions are permitted, and the process for obtaining shareholder approval.

Quoted companies: right of members to raise audit concerns at accounts meetings

153 Members of *quoted companies* (or at least a substantive body of them/ their shareholdings) have the right in relation to questions about the annual audit that they intend to raise at the *accounts meeting* to require the company to publish them on their website (Companies Act 2006, sections 527 to 531).

Resignation and removal of auditor

154 If an outgoing auditor makes a statement of circumstances surrounding their ceasing to hold office, which he must always do in the case of a *quoted company*, the company must circulate such statement to *entitled persons* or apply to court for permission not to do so (Companies Act 2006, section 520). Also, in circumstances where an auditor ceases to hold office before the end of his or its term, the company is required to notify the Professional Oversight

[26] The legal opinion given by Mark Hapgood QC is available at: http://icaew.com/index.cfm/route/149874/.

[27] The *FRC* guidance is available at: http://www.frc.org.uk/images/uploaded/documents/FRC%20ALLA%20Guidance%20June%202008.pdf.

Board or, in some cases, the auditor's Recognised Supervisory Body, that the auditor has ceased to hold office (Companies Act 2006, section 523). Such notification must contain either a copy of the auditor's statement of circumstances, or a statement by the company of the reasons for the auditor ceasing to hold office.

Laying, sending out and delivering (filing) accounts

Private companies

155 There is no statutory requirement for private companies to lay their *annual accounts and reports* before a general meeting of members – however, some companies may have such requirement in their *Articles*. Nevertheless, private companies must send copies of their *annual accounts and reports* to members, debenture holders, and *entitled persons* (Companies Act 2006, section 423) within a specified time period (Companies Act 2006, section 424). The manner in which they are sent out may be in hard copy or, subject to certain conditions, in electronic form or by means of a website (Companies Act 2006, sections 1143 to 1148).

156 A private company is required to send out its *annual accounts and reports* no later than 9 months after the end of the company's *accounting reference period*, which is when it must have filed its accounts and reports with the Registrar of Companies. If the company delivers its accounts and reports to the Registrar of Companies at an earlier date, it must have sent out its *annual accounts and reports* to its members by that earlier date (Companies Act 2006, section 424).

157 The copy of the accounts and reports delivered to the Registrar of Companies before the end of the 9 month filing period must, as explained more fully at paragraphs 180 *et seq*, be in the form required by sections 444 or 444A of the *Act* (small companies), section 445 of the *Act* (medium-sized companies) or section 446 of the *Act* (unquoted (large) companies) (Companies Act 2006, section 441).

Public companies

158 The directors of public companies are responsible for laying such a company's *annual accounts*, the directors' report, directors' remuneration report (*quoted companies* only) and any auditors' report before the company in general meeting (an '*accounts meeting*') (Companies Act 2006, section 437). For a *quoted company*, the auditors' report must also cover the auditable part of the directors' remuneration report.

159 The *annual accounts and reports* must be sent to *entitled persons* (Companies Act 2006, section 423) at least 21 days before the date of the *accounts meeting* (Companies Act 2006, section 424). For *traded companies*, *entitled persons* include those persons that have been nominated by registered shareholders to enjoy information rights, such as indirect investors whose investments are held through intermediaries (Companies Act 2006, section

146). The manner in which they are sent out may be in hard copy or, subject to certain conditions, in electronic form or by means of a website (Companies Act 2006, sections 1143 to 1148).

160 The *annual accounts and reports* are normally laid before members at the company's annual general meeting, which is therefore the *accounts meeting*. The *accounts meeting* must be held before the end of the period allowed for delivering the *annual accounts and reports* to the Registrar of Companies (Companies Act 2006, section 437(2)). The *annual accounts and reports* must be delivered to the Registrar of Companies for filing (Companies Act 2006, section 441) within 6 months from the end of a public company's *accounting reference period* (Companies Act 2006, section 442). A *quoted company* that is admitted to trading on a *regulated market* must make public its *annual accounts and reports* within 4 months from the end of each financial year (*DTR* 4.1.3).

Quoted companies and websites

161 A *quoted company* must ensure that its *annual accounts and reports* are available on its website as soon as reasonably practicable and then continuously until the next financial year's *annual accounts and reports* are available on the website (Companies Act 2006, section 430). To comply with the *DTRs,* a *quoted company* must ensure that it keeps its *annual accounts and reports* publicly available for five years (*DTR* 4.1.4).

Exchange-regulated companies

162 Directors of exchange-regulated companies, such as those admitted to trading on the *AIM* or *PLUS-quoted* markets, should be aware of the requirements of their relevant exchange. For example, an *AIM* company must publish *annual accounts,* which must be sent to shareholders without delay and in any event within 6 months after the end of the financial year to which they relate. An electronic copy must be sent by e-mail to the *LSE* (Rules 19 and 20, *AIM* Rules for Companies 2007). An *AIM* company must also make its *annual accounts* available on its website (Rule 26, *AIM* Rules for Companies 2007).

Offences and penalties

163 If a (public or private) company's *annual accounts and reports* are not sent to members and others entitled to receive them within the relevant time period the company and every officer of the company who is in default is liable to a fine (Companies Act 2006, section 425). Failure by any company to file its *annual accounts and reports* with the Registrar of Companies and, for a public company, failure to lay the *annual accounts and reports* before the company in general meeting, before the end of the allowed periods, renders every person who was a director immediately before the end of the relevant time periods liable to a fine and, for continued contravention, to a daily default fine (Companies Act 2006, sections 438(4), 451(4)).

164 Failure by a *quoted company* to comply with the requirement that its *annual accounts and reports* are available on its website (see paragraph 161

above), other than in extenuating circumstances that it would not be reasonable for the company to prevent or avoid, renders every officer of the company liable to a fine (Companies Act 2006, section 430(6) and (7)).

165 If a company has not complied with the filing requirements of section 441 of the *Act* before the end of the relevant period for filing its *annual accounts and reports* with the Registrar of Companies, any member, or any of the company's creditors, or the Registrar may serve notice on the company requiring its compliance with the filing requirements. If the directors of the company fail to make the default good within 14 days after this notice have been served, then the person who served the notice may apply to the court to make an order instructing the directors to comply within a period specified by the court. The court order may also require the directors to bear the cost of the application (Companies Act 2006, section 452).

166 A disqualification order may be made against any person persistently in default in filing *annual accounts and reports* and other statutory returns, or convicted in consequence of a failure to comply with legislation requiring the filing of *annual accounts and reports* and other returns (*CDDA86*, sections 3 and 5).

167 Failure to file the *annual accounts and reports* before the end of the relevant filing period renders the company liable to an automatic civil 'late filing penalty'[28]. This is in addition to any liability of the directors under section 451 of the *Act* (Companies Act 2006, section 453). The penalty is based on a sliding scale depending on the length of time between the date permitted by section 441 of the *Act* for filing and the actual date of delivery to the Registrar. The penalty doubles for any company that also filed late the previous year, and is higher for public companies.

Filing period for a company's first annual accounts and reports

168 Where the *annual accounts* are for the company's first *accounting reference period* after incorporation and that period exceeds 12 months, the time allowed for delivering the *annual accounts and reports* to the Registrar of companies is the later of either 9 months (for a private company) or 6 months (for a public company) from the first anniversary of incorporation of the company or 3 months after the end of the *accounting reference period* (Companies Act 2006, section 442).

Summary financial statements

169 All companies that have their accounts audited, if complying with certain conditions summarised below, may send copies of a summary

[28] The Companies (Late Filing Penalties) and Limited Liability Partnerships (Filing Periods and Late Filing Penalties) Regulations 2008.

financial statement in place of the full *annual accounts and reports* (as required by section 423 of the *2006 Act*) to *entitled persons*. Unless the conditions are met, a company cannot send out a summary financial statement. The enabling provisions of the *2006 Act* are found in sections 426 to 429 of the *Act*. The detail supplementing these provisions is found in the *Summary Financial Statement Regulations 2008*. There are different form and content requirements depending upon whether the company is quoted or unquoted, is a banking or insurance company, and prepares *IAS* or *Companies Act individual* or *group accounts*.

170 A company may exercise its option to send out a summary financial statement if it has duly consulted the *entitled persons* and provided the company's constitution or debenture trust deed or governing instrument do not require the full accounts and reports to be sent to *entitled persons* (*Summary Financial Statement Regulations 2008*, Regs 4 and 5). The *Summary Financial Statement Regulations 2008* should be referred to regarding the method of due consultation and the details of the form and content of the summary financial statement.

171 In addition to the form and content specified for particular types of company in the relevant schedule to the *Summary Financial Statement Regulations 2008*, all companies must include in the summary financial statement the dividend information from the full accounts and reports and the aggregate directors' emoluments information required by paragraph 1 of Schedule 3 to the *Small Companies Accounts Regulations 2008* or paragraph 1 of Schedule 5 to the *Large/Medium Companies Accounts Regulations 2008* as the case may be (*Summary Financial Statement Regulations 2008,* Reg 9(6)).

172 Furthermore, the summary financial statement of a *quoted company* must contain the whole of, or a summary of, its policy on directors' remuneration and the performance graph from its directors' remuneration report (*Summary Financial Statement Regulations 2008*, Reg 10(2)). For companies included in the *Official List*, the *Listing Rules* (LR 9.8.13) require disclosure of the earnings per share information from the full accounts and reports.

173 Where the directors' report contains takeover-related capital structure disclosures (see paragraph 120 above) the company must give certain explanatory material about those disclosures in the summary financial statement. Alternatively, it may send that material to the person receiving the summary financial statement separately at the same time as it sends the statement (*Summary Financial Statement Regulations 2008*, Reg 10(1)). This may interact with the requirements of *DTR* 7.2.6 (see paragraph 234 below).

174 The summary financial statement must state that it is only a summary of information derived from the company's *annual accounts* and in the case of a *quoted company*, the directors' remuneration report. It must also state whether

it contains additional information derived from the directors' report and, if so, that it does not contain the full text of the report. (Companies Act 2006, sections 427(3) and 428(3).) Furthermore, it must state in a prominent position that the summary financial statement does not contain sufficient information to allow as full an understanding either: in the case of company, of the results and state of affairs of the company; or in the case of a group, of the results of the group and state of affairs of the company or of the group, and, in both cases, of their policies and arrangements concerning directors' remuneration (*Summary Financial Statement Regulations 2008*, Regs 9(3) and (4)).

175 For an unquoted company, the company's auditor has to provide an opinion that the summary financial statement is consistent with the company's *annual accounts* and, where information derived from the directors' report is included in the statement, with that report, and complies with the requirements of section 427 of the *2006 Act* and of the *Summary Financial Statement Regulations 2008*.

176 In the case of a *quoted company*, the company's auditor's opinion must also cover the consistency with the directors' remuneration report and the summary financial statement complies with the requirements of section 428 of the *2006 Act* (rather than section 427) and of the *Summary Financial Statement Regulations 2008*.

177 The summary financial statement must state whether the auditor's report on the *annual accounts* and, in the case of a *quoted company*, on the auditable part of the directors' remuneration report, was unqualified or qualified. If it was qualified, the full report must be included together with any further information needed to understand the qualification. Similar requirements apply in respect of the auditor's statement in their reports concerning the consistency of the director's report with the accounts and any statement made about inadequate accounting records or returns, or their non-agreement with the accounts, or any failure to obtain necessary information and explanations (Companies Act 2006, sections 427(4)(d) to (g) and 428(4)(d) to (g)).

178 An *entitled person* retains the right to request a copy of the full accounts and report. To this extent, the summary financial statement must include a clear and conspicuous statement as to how the *entitled person* may obtain the full accounts and reports, free of charge, and also how to apply to receive them in all future years (Companies Act 2006, sections 427(4)(c) and 428(4)(c) and *Summary Financial Statement Regulations 2008*, Reg 9(5)).

179 A summary financial statement may be sent to *eligible persons* in hard copy or, subject to certain conditions, in electronic form or by means of a website (Companies Act 2006, sections 1143 to 1148). Where summary financial statements are accessible from a website to the general public, the summary financial statement should include the 'non-statutory accounts'

wording required by section 435(1) of the *2006 Act*, as described in paragraph 214 below.

Form of accounts and reports for filing

Small companies regime

Individual accounts

180 The directors of an *SCR Company* that prepare Companies Act *individual accounts* for its members have three options as to the form and content of what must be delivered to the Registrar of Companies for each financial year:

- a copy of the *annual accounts and reports* as sent to members (see paragraph 97); or
- at a minimum, a copy of the balance sheet and its notes from the *annual accounts* sent to members together with, where applicable, a copy of the auditor's report sent to members (Companies Act 2006, sections 444(1)(a) and 472). A copy of the company's profit and loss account and/or its directors' report may be filed with the balance sheet (Companies Act 2006, sections 444(1)(b)); or
- abbreviated accounts (Companies Act 2006, section 444(3), Regulation 6 of, and Schedule 4 to, the *Small Companies Accounts Regulations 2008*) and, if the company is not exempt from audit, the special auditor's report (Companies Act 2006, section 444(4)).

181 The directors of a small private company that prepares IAS *individual accounts* only have two choices for what must be delivered to the Registrar of Companies:

- a copy of the IAS *annual accounts*, the directors' report and, where applicable, the auditor's report as sent to the members; or at a minimum
- a copy of the balance sheet and its notes from those accounts together, where applicable, a copy of the auditor's report sent to members. A copy of the company's profit and loss account and/or its directors' report may be filed with the balance sheet (Companies Act 2006, section 444(1)(b)).

182 Where the directors deliver to the Registrar of Companies *IAS accounts*, or *Companies Act accounts* that are not abbreviated accounts, and do not deliver a copy of the company's profit or loss account or a copy of the directors report, the copy of the balance sheet must contain a prominent statement that the company's *annual accounts and reports* have been delivered in accordance with the provisions of the *2006 Act* applicable to *SCR Companies* (Companies Act 2006, section 444(5)).

183 If the directors choose only to deliver a copy of the balance sheet and its notes, the balance sheet must state the name of the director who signed it on behalf of the board of directors under section 414 of the *Act* and it must be

signed[29] on behalf of the board by a director of the company (Companies Act 2006, section 444(6)).

184 Where a copy of the company's directors' report is delivered to the Registrar of Companies, it must state the name of the director or company secretary who signed it under section 419 of the *Act* and it must be signed[30] on behalf of the board by either a director or the company secretary (Companies Act 2006, section 444(6A)).

185 If the company is not exempt from audit (or has not taken advantage of the exemption), a copy of the auditor's report on the *annual accounts* and directors' report sent to its members must be delivered to the Registrar of Companies (Companies Act 2006, section 444(2)). The copy of the auditor's report must state the name of the auditor and (where the auditor is a firm) the name of the *senior statutory auditor* who signed the report. The copy must also be signed[31] by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign on its behalf. In circumstances where the auditor's name can be omitted under section 506 of the *2006 Act* it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 449(4A)(b)) (Companies Act 2006, section 444(7)).

Abbreviated Companies Act individual accounts

186 Where an *SCR Company* delivers to the Registrar of Companies a copy of its abbreviated *Companies Act accounts* under section 444(3) of the *2006 Act*, the copy balance sheet must contain a statement in a prominent position that it has been prepared in accordance with the provisions applicable to *SCR Companies* (*Small Companies Accounts Regulations 2008*, Schedule 4, paragraph 1(2)). As mentioned above, an *SCR Company* that is not exempt from audit (or has not taken advantage of any such exemption) that delivers abbreviated *Companies Act accounts* to the Registrar of Companies must also deliver a copy of the special report of the company's auditor on those abbreviated accounts (Companies Act 2006, sections 444(4) and 449).

187 The auditor's special report must state whether in their opinion the company is entitled to deliver abbreviated accounts and those accounts to be

[29] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

[30] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

[31] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

delivered are properly prepared in accordance with Regulation 6 of, and Schedule 4 to, the *Small Companies Accounts Regulations 2008* (Companies Act 2006, section 449(2)). If the auditors' report on the company's *annual accounts* for members is qualified, the special report must set out that report in full together with any further material necessary to understand the qualification. Similarly, any statement under section 498(2)(a) or (b) about inadequate accounts, records or returns or accounts not agreeing with the records and returns, or under section 498(3) about a failure to obtain necessary information or explanations included in the audit report must be reproduced in full in the special report (Companies Act 2006, section 449(3)).

188 The copy of the auditor's special report delivered to the Registrar of Companies must be signed[32] by the auditor (or where the auditor is a firm) by a person authorised to sign on its behalf (Companies Act 2006, section 449(4A)(a)). In circumstances where the auditor's name can be omitted under section 506 of the *2006 Act* it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 449(4A)(b)).

189 Where the directors of an *SCR Company* prepare abbreviated Companies Act *individual accounts* for delivery to the Registrar of Companies, this does not affect the obligation to prepare a full set of accounts for its shareholders. As previously noted, those accounts are subject to less onerous disclosure requirements and, in some instances, may be exempt from a statutory audit.

<u>Small companies exemption in relation to the directors' report</u>

190 The directors of a company that is entitled to the small companies exemption in relation to the directors' report under section 415A of the *Act* (see paragraph 123 above) must deliver to the Registrar of Companies a copy of the company's *annual accounts* (that is, the company's individual profit and loss account and balance sheet with supporting notes to both primary statements) (Companies Act 2006, sections 471 and 472). Unless the company is exempt from audit and advantage has been taken of that exemption, the directors must also deliver a copy of the auditor's report on those accounts (and any directors' report) (Companies Act 2006, section 444A(1)(a) and (2)). They may also deliver a copy of the directors' report (Companies Act 2006, section 444A(1)(b)).

191 The copies of the balance sheet and directors' report delivered to the Registrar of Companies must state the name of the person who signed it on behalf of the board (Companies Act 2006, section 444A(3)).

[32] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

192 The copy of the auditor's report must state the name of the auditor and (where the auditor is a firm) the name of the person who signed it as *senior statutory auditor* and must be signed[33] by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign it on its behalf (Companies Act 2006, section 444A(4)). In circumstances where the auditor's name can be omitted under section 506 of the *Act*, the report must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 444A(5)).

Medium-sized companies

Individual accounts

193 The directors of a private medium-sized company that prepares Companies Act *individual accounts* for its members have two options as to the form and content of what must be delivered to the Registrar of Companies for each financial year:

- A copy of the *annual accounts and reports* as sent to members (see paragraph 97); or
- Abbreviated accounts (Companies Act 2006, section 445(3), Regulation 4(3) of the *Large/Medium Companies Accounts Regulations 2008*) and, if the company is not exempt from audit, the special auditor's report (Companies Act 2006, section 445(4)).

194 The directors of a medium-sized private company that prepare IAS *individual accounts* have no choice and must deliver a copy of the IAS *annual accounts*, the directors' report and, where applicable, the auditor's report as sent to the members (Companies Act 2006, section 445).

Abbreviated Companies Act individual accounts

195 A medium-sized company's abbreviated Companies Act *individual accounts* omit supplementary disclosures in relation to the company's turnover and allow for a modification of the profit and loss account to occlude a gross profit number or the ability to calculate one from the information provided (*Large/Medium Companies Accounts Regulations 2008*, Regulation 4(3)).

196 Unlike a small company, there is no requirement for a medium-sized company to include on the balance sheet a statement that the abbreviated Companies Act *individual accounts* have been prepared in accordance with the provisions applicable to medium-sized companies.

197 However, as mentioned earlier, a medium-sized company that is not exempt from audit (or has not taken advantage of any such exemption) that

[33] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

delivers abbreviated Companies Act *individual accounts* to the Registrar of Companies must also deliver a copy of the special report of the company's auditor on those abbreviated accounts (Companies Act 2006, sections 445(4) and 449).

198 The auditor's special report must state whether in their opinion the company is entitled to deliver abbreviated accounts and those accounts to be delivered are properly prepared in accordance with Regulation 4 of the *Large/Medium Companies Accounts Regulations 2008* (Companies Act 2006, section 449(2)). If the auditors' report on the company's *annual accounts* is qualified, the special report must set out that report in full together with any further material necessary to understand the qualification. Similarly, any statement under section 498(2)(a) or (b) about inadequate accounts, records or returns or accounts not agreeing with the records and returns, or under section 498(3) about a failure to obtain necessary information or explanations included in the audit report must be reproduced in full in the special report (Companies Act 2006, section 449(3)).

199 The copy of the auditor's special report delivered to the Registrar of Companies must be signed[34] by the auditor (or where the auditor is a firm) by a person authorised to sign on its behalf (Companies Act 2006, section 449(4A)(a)). In circumstances where the auditor's name can be omitted under section 506 of the *Act,* the report must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 449(4A)(b)).

200 Where the directors of a medium-sized company prepare abbreviated Companies Act *individual accounts* for delivery to the Registrar of Companies, this does not affect their obligation to prepare a full set of accounts for its shareholders.

Group accounts

201 A medium-sized company that is the parent of a group must deliver to the Registrar of Companies a copy of its *group accounts* (as part of its *annual accounts*), the directors' report and the auditor's report (Companies Act 2006, sections 446 and 471). Although the *2006 Act* has criteria for determining whether a *parent company* qualifies as medium-sized such status confers no exemption from the preparation of *group accounts*. A medium-sized company's Companies Act *group accounts* benefit from the same exemptions and modifications as described in paragraph 195 *et* seq[35]. There are no disclosure exemptions or modifications for a medium-sized company's IAS *group accounts*. In the case of a medium-sized company preparing either

[34] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

[35] Paragraph 1(1) of Schedule 6 to the *Large/Medium Companies Accounts Regulations 2008*.

Companies Act *group accounts or* IAS *group accounts*, the company's individual profit and loss account may be omitted and the notes need not include information on the company's employee numbers and costs provided that the *annual accounts* disclose that advantage has been of the exemption (Companies Act 2006, section 408). The only exemptions from preparing and thus delivering *group accounts* are where (subject to conditions) the company is a member of either a larger EEA group or a larger non-EEA group or where all of the company's *subsidiary undertakings* do not need to be included in the consolidation (Companies Act 2006, section 399(2)).

Unquoted companies (other than SCR or medium-sized companies)

202 Private companies that exceed the medium-sized company qualifications (referred to generically as large companies) and private companies that do not qualify for the small companies regime or exemption, or as medium-sized, or are ineligible to do so are caught by the filing obligations of unquoted companies (Companies Act 2006, section 446). The directors of such companies must deliver copies of the company's *annual accounts* and the directors' report (both as prepared for members) and the auditor's report on those accounts (and the directors' report) (Companies Act 2006, section 446 (1) and (2)). The legislation also provides that the copies of the balance sheet and directors' report must state the name of the person who signed it on behalf of the board under sections 414 and 419 of the *Act* respectively. They must also be signed on behalf of the board by a director of the company or, in the case of the directors' report, by the company secretary (Companies Act 2006, section 446(3) and (3A)).

203 Where the company is a parent of a group its *annual accounts* must contain its *group accounts* (Companies Act 2006, sections 446 and 471). In this case, the company's individual profit and loss account may be omitted and the notes need not include information on the company's employee numbers and costs provided that the *annual accounts* disclose that advantage has been of the exemption (Companies Act 2006, section 408). This applies irrespective of whether the *group accounts* are *Companies Act accounts* or *IAS accounts*. The only exemptions from preparing and thus delivering *group accounts* are where (subject to conditions) the company is a member of either a larger EEA group or a larger non-EEA group or where all of the company's *subsidiary undertakings* do not need to be included in the consolidation (Companies Act 2006, section 399(2)).

204 The copy of the auditor's report must state the name of the auditor (and where the auditor is a firm) the name of the person who signed it as *senior statutory auditor* and be signed[36] by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign on its behalf. In

[36] The requirement for signature is to be repealed from 1 October 2009 (when regulation 6 of the Eighth Commencement Order will repeal the transitional amendment in paragraph 6, Schedule 1 of the Fifth Commencement Order). Companies House will in due course issue rules for the authentication of documents after that date.

circumstances where the auditor's name can be omitted under section 506 of the *Act*, it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 446(4)).

Quoted companies

205 The directors of a *quoted company* must deliver to the Registrar of Companies for each financial year a copy of the company's *annual accounts* (that include its *group accounts*, where applicable), the directors' remuneration report and the directors' report (all as prepared for members). Where the *annual accounts* include the company's *group accounts*, the company's individual profit and loss account may be omitted and the notes need not include information on the company's employee numbers and costs provided that the *annual accounts* disclose that advantage has been of the exemption (Companies Act 2006, section 408). This applies irrespective of whether the *group accounts* are *Companies Act accounts* or *IAS accounts*.

206 The directors must also deliver a copy of the auditor's report on those accounts (and on the directors' remuneration report and directors' report) (Companies Act 2006, section 447(1) and (2)). The copies of the balance sheet, directors' remuneration report and directors' report must state the name of the person who signed it on behalf of the board under sections 414, 422 and 419 of the *Act* respectively. They must also be signed on behalf of the board by a director of the company or, in the case of the directors' remuneration report and directors' report, by the company secretary Companies Act 2006, section 447(3), (3A) and (3B)).

207 The copy of the auditor's report must state the name of the auditor (and where the auditor is a firm) the name of the person who signed it as *senior statutory auditor* and be signed by the auditor or (where the auditor is a firm) in the name of the firm by a person authorised to sign on its behalf. In circumstances where the auditor's name can be omitted under section 506 of the *Act*, it must state that the necessary resolution of the company has been passed and notified to the Secretary of State (Companies Act 2006, section 447(4)).

Document quality

208 Section 1068 of the Companies Act 2006 gives the Registrar of Companies the ability to impose requirements as to the form, authorisation, authentication and manner of delivery of documents (for example, *annual accounts and reports* and the annual return) required to be filed with the Registrar under any enactment. This means the Registrar is able to make rules about, for example, the size and quality of paper to be used in order to facilitate the scanning of documents submitted. The detailed requirements can be obtained from the Companies House website and should be consulted to ensure compliance. Failure to comply with the requirements will mean the document being rejected and consequently may render the company liable to civil penalties and its directors and officers liable to fines and prosecution for late filing.

Publication of statutory accounts

209 If a company publishes any of its statutory accounts, they must be accompanied by the auditor's report on those accounts (unless the company is exempt from audit and the directors have taken advantage of that exemption) (Companies Act 2006, section 434(1)).

210 A company is not allowed to publish its individual statutory accounts without publishing with them its statutory *group accounts*, where relevant (Companies Act 2006, section 434(2)).

211 Statutory accounts are the company's accounts that are required to be delivered to the Registrar of Companies (see paragraph 180 *et seq*). Therefore, they can be the *annual accounts* as prepared for members, which comprise a company's *individual accounts* and any *group accounts*, or other permitted forms such as abbreviated *Companies Act accounts* (Companies Act 2006, sections 434(3), 441 and 471).

212 All companies' balance sheets and directors' reports and *quoted companies*' directors' remuneration reports that are published by or on behalf of the company must state the name of the person who signed them on behalf of the board (Companies Act 2006, section 433). If a copy is published without the required statement of the signatory's name, an offence is committed by the company and every officer of the company who is in default and is liable to fines on summary conviction.

213 For the purposes of sections 433 (statement of name of signatory) and 434 (publication of statutory accounts) discussed above and section 435 (publication of non-statutory accounts) discussed below, a company is regarded as publishing a document if it publishes, issues or circulates it or otherwise makes it available for public inspection in a manner calculated to invite members of the public generally or any class of members of the public, to read it (Companies Act 2006, section 436).

Publication of non-statutory accounts

214 If a company publishes any balance sheet or profit and loss account relating to, or purporting to deal with a financial year of the company otherwise than as part of its statutory accounts, it must state that they are not statutory accounts. This statement is also required where an account is published in any form purporting to be the group balance sheet or profit and loss account relating to, or purporting to deal with, a financial year of the company (Companies Act 2006, sections 435(1)(a) and (3)). The statement must also say whether statutory accounts dealing with any financial year with which the non-statutory accounts purport to deal have been delivered to the Registrar of Companies, whether the auditors have reported on the statutory accounts and, if so, whether their report was qualified or unqualified, or contained a matter of emphasis, or any reservations about accounting records or returns or obtaining necessary information (Companies Act 2006, section 435(1)(b) and (c)).

215 Where published non-statutory accounts deal with more than one year the document may contain two (or more) sets of non-statutory accounts (for example, preliminary statements of the annual results of *listed companies* have two years that must be covered – the current year and the comparative previous year). Where this applies, the wording of the statement should be adapted so that it confirms that the statutory accounts for any previous year had been delivered to the Registrar of Companies and those for the current year will be delivered. Half yearly reports issued in compliance with the *DTR* contain a set of non-statutory accounts – the comparative information for the last full financial year.

216 Published non-statutory accounts must not include the auditors' report on the company's *annual accounts* (Companies Act 2006, section 435(2)). A company and any of its officers that does not comply with all the requirements for publishing non-statutory accounts will be guilty of an offence and liable to a fine on summary conviction (Companies Act 2006, sections 435(5) and (6)).

Defective accounts

217 *Annual accounts* or the directors' report or, for *quoted companies*, the directors' remuneration report are defective if they do not comply with the requirements of the Companies Act 2006 or, where applicable, Article 4 of the *IAS Regulation*. In summary, the *Act* provides for:

- the directors voluntarily to revise the *annual accounts* or directors' report or directors' remuneration report or a summary financial statement (Companies Act 2006, section 454);
- the Secretary of State to request directors either to revise the *annual accounts* or directors' report or to explain the apparent non-compliance (Companies Act 2006, section 455); and
- the Secretary of State, or another person authorised for the purpose, to apply for a court order requiring directors to revise the *annual accounts* or directors' report (Companies Act 2006, section 456). The Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008 (SI 2008/623) appoints the *FRRP* as the authorised person under section 456.

218 The *Revised Accounts Regulations 2008* set out how the provisions of the *Act* are to be applied to *annual accounts*, directors' reports, directors' remuneration reports or summary financial statements that are being revised (otherwise than as ordered by the court) because the originals do not comply with statutory requirements.

219 The Regulations also provide for the revision of abbreviated accounts where these are affected by a revision of a small or medium sized company's accounts prepared for members that either means that the company would not have qualified as a small or (as the case may be) medium-sized company or because the accounts have been revised in a manner which affects the content of the abbreviated accounts (*Revised Accounts Regulations 2008*, Reg 15(2)).

Even if the revision of the accounts prepared for members has no consequential effect on the abbreviated accounts, the directors of the company must deliver to the Registrar of Companies:

(a) a note stating that the *annual accounts* of the company for the relevant financial year (specifying it) have been revised in a respect which has no bearing on the abbreviated accounts delivered for that year, together with
(b) a copy of any auditor's report on the revised *annual accounts*.

220 A small or medium-sized company's abbreviated accounts may[37] be revised if they do not comply with requirements of the *2006 Act* (*Revised Accounts Regulations 2008*, Reg 16). The *Act* and the Regulations should be consulted on the detailed procedures relating to the revisions applicable to the various accounts, reports and statements.

221 As soon as the revised accounts (including abbreviated accounts, where applicable), revised directors' report or revised directors' remuneration report (as the case may be) are approved by the directors, they replace the defective originals for all Companies Act purposes. For example, regarding the publication of statutory accounts, the provisions of section 434(3) of the *2006 Act* will apply to the revised accounts.

222 If the original accounts or reports have already been sent to *entitled persons*, the directors must send to those *entitled persons* copies of the revised accounts and/or report(s) together with the auditors' report (where applicable) thereon. These copies of the revised accounts etc. have to be sent out within 28 days of the approval of the revision. In cases where accounts or reports were laid before members, the revised accounts and reports also have to be so laid at the next *accounts meeting* or at an earlier general meeting. Where the original accounts (including abbreviated accounts, where applicable) or reports had been delivered to the Registrar of Companies, the replacements (or in the case of a note stating that a company's abbreviated accounts are unaffected by a revision to the accounts prepared for members) must be filed with the Registrar within 28 days of the date of the revision.

223 The *FRRP*'s authority under the *2006 Act* allows it to mount challenges in the courts to accounts or directors' reports (including business reviews) as defective. For the purposes of facilitating the *FRRP* in discovering whether there are any grounds for, or deciding to make, an application to the courts, section 458 to the *2006 Act* authorises HMRC to disclose pertinent information to the *FRRP*. This authority overrides any other statutory or other restriction on the disclosure of information, other than personal data that is protected from disclosure by the Data Protection Act 1998. Where a

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[37] We note that Regulation 16 of the *Revised Accounts Regulations 2008* uses the word 'shall', but this does not override the voluntary nature of the regime under *CA 2006,* s.454, and thus this guidance uses the word 'may'.

case concerns accounts subject to the *DTR*, the *FRRP*, as the supervising body for issuers of listed securities, may report its findings to the *FSA*. See paragraph 225 below.

224 Where it appears to the *FRRP* that there may be a question as to whether a company's *annual accounts* or directors' report is defective, it has powers under section 459 of the *2006 Act* to require any documents, information and explanations that are reasonable and relevant to discovering any grounds for, or deciding to make, an application to the court. The documents, information and explanations can be obtained from the company, any officer, employee or auditor of the company or previous officers, employees or auditors. The *FRRP* can apply to the court if necessary to force such persons to produce the documents or provide the information and explanations. The section gives some comfort to such persons by providing that any statement made by a person under these powers cannot be used in evidence in criminal proceedings. Furthermore, documents or information that are subject to legal professional privilege (or equivalent in Scotland) cannot be compelled to be disclosed.

225 Any information (in whatever form) that relates to the private affairs of an individual or to any particular business may not be disclosed, without consent, by the *FRRP* during the lifetime of that individual or so long as the business continues to be carried on. This prohibition does not extend to information that was available to the public. In addition, section 461 of the *2006 Act* specifies a number of persons with whom the *FRRP* is entitled to share information which would otherwise be confidential under the *Act*. These persons include the Secretary of State, the Treasury, the Bank of England, *FSA* and HMRC. If requested by one of these authorities the *FRRP* is normally prepared to review a set of accounts and to report its findings to the authority concerned[38]. The *FRRP* will draw to the attention of that authority any matters apparent from its review that the *FRRP* believes to be relevant to that authority's regulatory function. Whether the *FRRP* opens a full enquiry itself is a matter decided by the *FRRP* in each case. The *FRRP* is also authorised to assist similar organisations in other countries or territories outside the UK, subject to certain safeguards (Companies Act 2006, section 461(5) and (6)). The *FRRP* is also authorised to assist the auditing and accounting disciplinary bodies in developing a case against an auditor or accountant for failing in their professional duties (Companies Act 2006, section 461(4)(b)).

226 Following an application by the Secretary of State or the *FRRP*, if the court orders the preparation of revised accounts it may give directions as to the auditing of the accounts, the revision of any directors' remuneration report, directors' report or summary financial statement, and the taking of steps by the directors to bring the making of the order to the notice of persons likely to rely on the previous (defective) accounts. Similarly, where the court

[38] http://www.frc.org.uk/frrp/how/

orders the preparation of a revised directors' report it may give directions as to the review of the report by the auditors, the revision of any summary financial statement, and drawing the order to the attention of any person that might rely on the previous (defective) report. The court is also empowered in each case to give directions on such other matters as it thinks fit.

227 If the court finds the *annual accounts* or directors' report do not comply with the requirements of the *Act* or, where applicable, Article 4 of the *IAS Regulation*, it may order that all or part of the costs of the application and any reasonable expenses incurred in connection with or in consequence of the preparation of revised accounts or report shall be borne by the directors who were party to the approval of the defective accounts or report. For this purpose, every director of the company at the time of their approval is taken to have been a party to their approval unless they can show that they took all reasonable steps to prevent them being approved.

FSA and market requirements

228 Companies whose transferable securities are admitted to trading on a *regulated market* are subject to *DTR* disclosure requirements in relation to periodic financial reporting (*DTR* 4 – see paragraph 237 below) and, if incorporated in the UK, also in relation to corporate governance (*DTR* 7 – see paragraph 232 below).

229 Companies included in the *Official List* of the Financial Services Authority are under additional obligations to the *FSA* as regards their *annual accounts and reports*. *Listing Rule* 9.8 sets out the requirements. Similarly, those traded on *exchange-regulated market*s, such as the *AIM* or *PLUS-quoted market*s have obligations in respect of their accounts and reports under the relevant rules of their respective markets.

230 Directors of companies traded on a *regulated market* should therefore be familiar with the obligations set out in the *DTRs*, and directors of *listed companies* should be familiar with the obligations set out in the *Listing Rules*. Some companies will be subject to both of the *DTR* and the *Listing Rules*. Directors of those companies traded on *exchange-regulated market*s should refer to their respective market rule books (these rules should not be confused with the *Listing Rules* or *DTR*s).

Corporate governance requirements

The Combined Code

231 Disclosures on corporate governance in *annual accounts and reports* of *listed companies*, under what is now the *Combined Code*, were originally prompted in 1992 by the recommendations of the Committee on the Financial Aspects of Corporate Governance (the Cadbury Committee). Responsibility for updating the corporate governance requirements and associated guidance on internal controls now rests with the Financial Reporting Council.

232 The *Combined Code* comprises principles and provisions. The *Listing Rules* (LR9.8.6(5)) require a statement in the company's annual report and accounts of how the *listed company* has applied the principles set out in Section 1 of the *Combined Code*, in a manner that would enable shareholders to evaluate how the principles have been applied. In addition, LR9.8.6(6) requires a statement by the directors to confirm compliance throughout the accounting period with all the *Combined Code*'s provisions, or, if there are elements that are not met, state that they did not comply and give the reasons for non-compliance, and say for which period they were not in compliance (and therefore it is referred to as a 'comply or explain' regime). It is then left to market participants to consider and react as to whether the reason for non-compliance is one that affects their appetite to invest in the company.

DTRs

233 Following the implementation of the Statutory Audit Directive (2006/43/EC) and the Company Reporting Directive (2006/46/EC) in 2008, the *DTRs* are amended to include *DTR* 1B and *DTR* 7 on Corporate Governance[39]. These requirements apply to a UK incorporated company that has any of its transferable securities admitted to trading on any *regulated market*. The requirements that relate to financial reporting are:

- a statement that must be available to the public that discloses that the company has an Audit Committee (or equivalent body) and the members of that committee and how it meets the independence and competence in accounting requirements. These may be met by the same or different members of the committee. In the *FSA*'s view, compliance with the relevant provisions of the *Combined Code* will result in compliance with these requirements (*DTR* 7.1.7);
- a Corporate Governance Statement that must be included as a specific section of the directors' report, or in a separate report published together with and in the same manner as *its annual accounts and reports*, or by means of a reference in its directors' report as to where such document is publicly available on the company's website (*DTR* 7.2.1 and 7.2.9).

234 The Corporate Governance Statement must contain the following:

- a reference to the corporate governance code to which the company is subject or which it has voluntarily decided to apply or provide all relevant information about the corporate governance practices applied beyond the requirements of national law (*DTR* 7.2.2). If the company does not apply a corporate governance code, it must explain its reasons for deciding not to do so, and must make a statement of its corporate governance practices publicly available and state in the directors' report where that statement can be found (*DTR* 7.2.3);
- a statement as to where the relevant corporate governance code is publicly available and, to the extent that the company departs from that code,

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[39] The amendments to the *DTR* are applicable for financial reporting periods beginning on or after 29 June 2008 (*FSA* Policy Statement 08/6).

explain which parts of the code it departs from and the reasons for doing so. In the *FSA*'s view, a company that complies with LR9.8.6(6) (the comply or explain rule in relation to the *Combined Code*) will satisfy the requirements where a code is followed (*DTR* 7.2.4);

- a description of the main features of the company's and, where applicable, its group's internal control and risk management systems in relation to the financial reporting process (including those in relation to preparing consolidated accounts) (*DTR* 7.2.5 and 7.2.10);
- information about share capital required under the *Takeover Directive* that must be given in the directors' report in accordance with Schedule 7 to the *Large/Medium Companies Accounts Regulations 2008* (where the company is subject to those disclosure requirements – see paragraph 173) (*DTR* 7.2.6); and
- a description of the composition and operation of the company's administrative, management and supervisory bodies and their committees (*DTR* 7.27). In the *FSA*'s view, the information specified in the relevant provisions of the *Combined Code* will satisfy this requirement (*DTR* 7.2.8).

Directors' and their connected persons' interests

235 A *listed company* is required to disclose the total interests of a director and his or her connected persons as at the end of the end of the financial year (including certain information to update it as at a date not more than a month before the date of the notice of the annual general meeting) (LR9.8.6(1)). These interests cover holdings of shares in the company and derivatives or any other financial instruments relating to those shares. These are the same interests in which transactions are required to be notified to the company under *DTR* 3.1.2 (LR9.8.6A).

Annual financial statements, half-yearly reports, interim management statements and preliminary announcements

236 A company with any securities admitted to trading on a *regulated market* is required to prepare an annual financial report, comprising accounts, management report (which has very similar requirements to the directors' report) and a responsibility statement (*DTR* 4.1.5), which must be published within four months of the year end (see *DTR* 6 and List!14 and List!18[40] for requirements and guidance for publication). For *listed companies*, there are some additional minor content requirements in the *Listing Rules*.

237 A company with shares or debt admitted to trading on a *regulated market* is (subject to certain exceptions) required to prepare a half-yearly report which sets out specific information relating to the company's activities and profit and loss during the relevant 6-month period. The half-yearly report must be published within 2 months of the end of the period (*DTR* 4.2, and see *DTR* 6 and List!14 and List!16[41] for requirements and guidance for publication). It should include a condensed set of financial statements (in

[40] Available on the *FSA* website.
[41] Available on the *FSA* website.

accordance with IAS 34[42]) an interim management report and responsibility statements. In addition (where the traded securities are shares), approximately at the end of the first and third quarter there should be an interim management statement. No financial statements are required but some companies, particularly those with US shareholders, provide quarterly interim statements.

238 *Exchange-regulated market*s may have their own disclosure rules. For example, the *AIM* rules require publication of *annual accounts and reports* within 6 months and half-yearly reports within 120 days for companies traded on *AIM*.

False or misleading statements in listed companies' accounts and reports

239 The *FRRP*'s[43] powers to review and investigate for compliance with reporting requirements (see paragraph 217 *et seq* above) extend to the half yearly reports issued pursuant to the *DTR* (*2004 Act*, section 14). In its capacity as the prescribed body, the *FRRP* has to report any findings on those companies that it has investigated to the *FSA* for action by the *FSA* against the offending company.

240 *FSMA2000* provides that UK incorporated public companies that have any of their securities traded on a *regulated market* that make false or misleading statements in their periodic financial information (*FSMA2000*, section 90A(2)), or which omit matters which are required to be included in such information, will be liable to compensate investors who have suffered loss as a result of such default. The periodic financial information concerned is a company's *annual accounts*, half yearly reports or interim management statements required by the *DTR* and any mandatory or voluntary preliminary statements of results made under *Listing Rule* 9.7 or 9.7A respectively.

241 The *listed company* is liable to pay compensation to a person that has acquired any of its securities and has suffered a loss on them as a result of any untrue or misleading statements in the publications noted above, or as a result of an omission of a matter required to be included in the relevant publication (see paragraphs 57 to 59 above).

Part 3: Other Financial Responsibilities

242 As well as directors' general duties discussed in part 1 of this statement and their specific duties in relation to accounts and reports discussed in part 2,

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[42] For those companies not preparing consolidated accounts, similar provisions to IAS 34 apply via specific provisions in the *DTR*s that link to *ASB* guidance.

[43] The *FRRP*'s appointment as the prescribed body under section 14(1) of the Companies (Audit, Investigations and Community Enterprise) Act 2004 has been reaffirmed by The Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008 (SI 2008/623).

there are other areas of the law that have a financial aspect for directors. In this part 3 of this statement (paragraphs 243 to 313) there follows an overview in relation to annual returns, matters to do with share capital including its issue to the public, and takeovers, regulated financial services activities, taxation, inspections and investigations and the winding up of a company.

Responsibilities of directors of holding or subsidiary companies

243 A subsidiary company's directors should not act in accordance with the instructions of the directors of the holding company unless they are satisfied that the act that is required to be done is prudent, will promote the success of the subsidiary and is in the interests of the subsidiary. To act blindly in accordance with instructions will expose those directors to liability in respect of breach of duty as well as wrongful trading (see paragraphs 310 *et seq*). In addition, the directors of the holding company, and indeed the holding company itself, may be deemed to be shadow directors of the subsidiary and thus may be liable to an action for wrongful trading if the subsidiary goes into liquidation. Again, it is important that all instructions given by the holding company are fully minuted and that legal advice is sought where appropriate.

Annual return

244 All companies are required to deliver to the Registrar of Companies an annual return (Companies Act 2006, section 854(1)). The return has to be authenticated in a manner required by the Registrar of Companies (Companies Act 2006, section 1068) and depends on whether the return is delivered electronically or in hard copy. If it is delivered electronically, the return has to be authenticated by a means of a password provided by Companies House. In the latter case, it has to be signed by a director or the company secretary. The return must be delivered within 28 days of the return date' and must contain the prescribed information (Companies Act 2006, sections 855, 856, 857 or 858). Reference should also be made to the Companies Act 2006 (Annual Return and Service Addresses) Regulations. In particular, the annual return of companies with share capital must include a statement of capital (Companies Act 2006, section 856(1)).

245 Where a company has taken advantage of the exemption to omit information from its *annual accounts* on certain subsidiaries, joint ventures and associates, the full information (including that disclosed in the notes to the *annual accounts* and the information excluded from those accounts) must be annexed to the company's next annual return. This return is the return delivered to the Registrar after the *annual accounts* in question have been approved under section 414 of the Companies Act 2006. The *annual accounts* must contain a statement that the information is given only in respect of the undertakings whose results or financial position, in the opinion of the directors, principally affected the figures shown in the *annual accounts* (including those undertakings excluded from consolidation) (Companies Act 2006, section 410(2)).

246 A company's 'return date' is the anniversary of the company's incorporation. However, the annual return can be made up to a date earlier

than the return date, which then becomes the annual return date for future returns (Companies Act 2006, section 854).

247 Failure to observe these provisions will make the company and every director, company secretary (where applicable) and every other officer liable to fines and a criminal conviction, unless the relevant director or secretary shows that he took all reasonable steps to avoid the commission or continuation of the offence. Where a public company is late in delivering its annual return, the Registrar may write to its directors at their home addresses (even if overseas) reminding them of their liability to prosecution.

Shares and dividends

Share issues

248 The directors of a private company which has only one class of shares may allot shares of that class (or grant rights to subscribe for, or convert any security into, such shares) except to the extent that they are prohibited by the company's *Articles* (Companies Act 2006, section 550). In other cases (including public companies), the directors may only allot shares (or grant such rights) if they are authorised to do so by the company's *Articles* or by resolution of the company. The authorisation may be general or specific but must state the maximum number of shares that may be allotted under it. It must state the date on which it will expire, which must not be more than five years from the date the resolution was passed (or the date of incorporation where the authorisation was contained in the *Articles* on incorporation) (Companies Act 2006, section 551).

249 If it is proposed to make a new issue of shares for cash the existing shareholders will have certain statutory rights of pre-emption, but these rights can be excluded or disapplied (Companies Act 2006, sections 561 to 577). In exercising their powers to allot shares, as with all fiduciary powers, they must only do so for proper purposes.[44]

250 A company's ability to promote a share issue is restricted under the rules on financial promotion. The restriction takes the form of a bar on communicating an invitation or inducement to engage in investment activity in the course of business, unless either done by an authorised person or approved by an authorised person (*FSMA2000,* section 21). There are many exemptions to this general bar; reference to the Financial Services and Markets Act (Financial Promotion) Order, SI 2005/1529, will give the detailed conditions on making use of these exemptions.

251 Payment for shares may be in cash or non-cash consideration, including goodwill and know-how (Companies Act 2006, section 582). However, a public company may not accept, in payment for its shares, an undertaking by a person to do work or perform services for the company or any other person

[44] *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821.

(Companies Act 2006, section 585). Where a public company accepts non-cash consideration, (subject to certain exceptions) an expert must value the consideration and report on it (Companies Act 2006, sections 593 and 1150). Further, there is a prohibition in relation to all companies on the allotment of shares at a discount to their nominal value (Companies Act 2006, section 580). Shares of a public company may not be allotted except as paid up to at least one quarter of the nominal value and the whole of the premium (Companies Act 2006, section 586). See also paragraph 266 below for minimum capital requirements.

Financial assistance

252 The general rule is that it is not lawful for a public company or its subsidiary (whether public or private) to give financial assistance, directly or indirectly, for the purpose of the acquisition of shares in the public company, or for the purpose of reducing or discharging a liability incurred by any person for the purpose of such an acquisition. Reducing or discharging such a liability is defined to include wholly or partly restoring the person's financial position to what it was before the acquisition took place. Thus the prohibition is on the provision of financial assistance before, at the same time as, or after the acquisition takes place. Financial assistance is widely defined and includes such things as gifts, guarantees and loans (Companies Act 2006, sections 677 and 678).

253 It is also not lawful for a public company to give financial assistance, directly or indirectly, for the purpose of the acquisition of shares in its private holding company (Companies Act 2006, section 679).

254 There are exceptions to these general prohibitions on providing financial assistance by public companies and their subsidiary companies. For example: distributions by way of dividend lawfully made; financial assistance for the purposes of an employees' share scheme; loans to employees other than directors for the purpose of acquiring shares in the company; and money lending where this is in the ordinary course of business of the company (Companies Act 2006, sections 681 and 682). Any company, acting in good faith, may give financial assistance if its principal purpose is not to give financial assistance for the purpose of the acquisition of its own or a holding company's shares or to reduce or discharge such a liability, or if the giving of the financial assistance for that purpose or the reduction or discharge of such liability is only an incidental part of a larger purpose of the company (Companies Act 1985, sections 678 and 679), however it is notoriously difficult to come within these exceptions.[45] Sections 677 to 683 of the *Act* only apply to UK public companies and their UK subsidiary companies, and so they do not prohibit a foreign subsidiary from giving financial assistance for the acquisition of shares in its UK holding company (although the UK holding company will be commiting an offence if it procures the financial

[45] However, note the relatively restrictive interpretation of this provision by the House of Lords in *Brady v. Brady* [1989] 1 AC 755.

assistance by the subsidiary, or if it indirectly provides financial assistance by, for example, hiving down an asset to be used to finance the acquisition of the holding company's shares).[46]

255 A significant change made by the Companies Act 2006 is that it repealed the statutory prohibition on private companies giving financial assistance for the purchase of their own shares. The 'whitewash' procedure for private companies under section 155 to 158 of *the 1985 Act* (which permitted financial assistance to be given subject to safeguards including a statutory declaration by the directors and a report by the auditors) therefore became redundant and was also repealed. However, in some circumstances, it may still be unlawful for a private company to give financial assistance for the acquisition of its own shares under common law. This would be so if, for example, the financial assistance amounted to an unlawful reduction of capital.[47] For example, this might arise if a company makes a gift (or a loan which is unlikely to be repaid) to a shareholder with which to purchase further shares in the company and the company does not have sufficient distributable reserves to cover the payment. [48]

Acquisition of own shares

256 Companies may acquire their own shares provided that they meet certain conditions. The conditions relate to procedure and to the funds out of which the acquisition can be made. A company may acquire its own shares either by redemption or purchase provided this is not restricted by the *Articles* or, for public companies wishing to issue redeemable shares, provided such issue is authorised by its *Articles* (Companies Act 2006, sections 684 and 690).

257 When a company is considering acquiring its own shares, it must follow a detailed timetable of action which depends, in general, on whether or not the shares are to be acquired on a *recognised investment exchange* (Companies Act 2006, sections 693 to 701). The aim of the rules is to ensure that the interests of shareholders and creditors are protected.

258 The funds available for the acquisition must be from distributable profits or the proceeds of a fresh issue of shares made for the purposes of the acquisition. Special rules designed to protect the company's capital relate to the acquisition of shares at a premium (Companies Act 2006, sections 687 and 692).

259 However, a private company may acquire its own shares out of capital unless prohibited by its *Articles* (Companies Act 2006, sections 709 to 723). The provisions are designed to ensure that publicity is given to the payment and that the interests of creditors and shareholders are protected.

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[46] *Arab Bank plc v Mercantile Holdings Ltd* [1994] Ch 71.

[47] See, for example, *Trevor v. Whitworth* [1887] 12 AC 409, HL.

[48] See Schedule 4, paragraph 51 of the Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495 and paragraph 7 of the explanatory memorandum to that Order.

260 When a company acquires its own shares they are thereby cancelled except in the case of treasury shares (see paragraph 265 below) (Companies Act 2006, sections 688 and 706).

Capital reductions
261 A company may reduce its share capital, or share premium, capital redemption reserve or share redenomination reserve, in any way by special resolution with the confirmation of the court (Companies Act 2006, sections 283, 641 and 645 to 651).

262 A private company may also reduce its share capital, or share premium, capital redemption reserve or share redenomination reserve, by special resolution supported by a solvency statement. The solvency statement must be made by each of the directors in accordance with prescribed requirements which require consideration of the assets and liabilities of the company at the date of the statement and a forward looking test concerning the company's ability to pay its debt as they fall due within twelve months (Companies Act 2006, sections 642 to 644).

263 An unlimited private company may reduce its share capital in any way without leave of the court provided the necessary power is contained in its *Articles*[49]. However, the directors should have regard to those matters to which under the common law directors of a limited liability company will have to have regard.

264 A capital reduction may involve payment immediately or on deferred terms to shareholders, or may result in a credit to a reserve. (An immediate payment or one made on a deferred terms basis does not fall within the distribution rules of Part 23 of the *Act*.) Regulations made under section 654 of the *2006 Act*[50] provide that, subject to anything to the contrary in the court order, the resolution for the reduction of capital or the company's *Articles,* a reserve arising (including a reserve arising on a reduction that occurred prior to the commencement of the *2006 Act*) is to be treated as a realised profit and therefore, subject to the normal rules on distributions in Part 23 of the *Act* (see paragraphs 269 to 271 below), distributable.

Treasury shares
265 The *Act* allows certain public companies, that purchase their own shares out of distributable profits, the option of holding them as 'treasury shares' for sale at a later date. They may also be transferred for the purposes of, or pursuant to, an employee share scheme. Only 'qualifying shares' may be held in treasury. These are, broadly, shares that are included in the *Official List* or officially listed in another EEA state, or traded on *AIM*. There are detailed provisions that apply to treasury shares. In particular, if they are reissued at

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[49] *Re Borough Commercial and Building Society* [1893] 2 Ch 242. For an example article, see regulation 4(e) of *Table E.*
[50] The Companies (Reduction of Share Capital) Order 2008, SI 2008/1915.

more than their purchase price, the excess must be transferred to share premium account (Companies Act 2006. sections 724 to 732).

Capital requirements

266 To do business or exercise any borrowing powers[51], a public company must satisfy various conditions, one of which is that its allotted share capital must be at least £50,000 (or the 'prescribed euro equivalent'[52]) which have to be at least a quarter paid up (Companies Act 2006, sections 586 and 761 to 767). If the nominal value of the company's allotted share capital falls below that minimum amount, the company will have to re-register as private (Companies Act 2006, sections 650 and 662).

267 If a public company's net assets fall to half or less of the amount of its called-up share capital, its directors are under a duty to convene a general meeting of the company. The directors have 28 days, from the earliest day on which the fact is known to one of their number, in which to convene the meeting and the meeting must take place within 56 days of that day (Companies Act 2006, section 656).

268 There are no provisions specifying what action should be taken by the meeting; this will be for the directors to recommend. They should, however, bear in mind the provisions of the *IA86* and the *2006 Act* with regard to fraudulent and wrongful trading (*IA86*, sections 213 and 214, Companies Act 2006, section 993) (see paragraphs 296, 298 and 309 to 312 below).

Dividends

269 A company's *Articles* will usually provide that the members may declare dividends by ordinary resolution. A dividend must not be declared in this way unless the directors have made a recommendation as to its amount. The dividend must not exceed the amount recommended by the directors. The *Articles* will usually also provide that the directors may decide to pay dividends on their own authority (usually called 'interim dividends'). These do not require approval by ordinary resolution (*Table A*, regulations 102 and 103). In paying a dividend, or making any other distribution, only profits available for the purpose may be used. The profits of a company so available are defined as 'its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or re-organisation of capital duly made'. In addition, public companies must ensure that a distribution does not cause their net assets to fall below their share capital plus undistributable reserves (Companies Act 2006, sections 830 and 831).

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[51] There is no model article dealing with restrictions on borrowing capacity, nor any restriction in legislation. However, there is a strong recommendation from the Association of British Insurers (ABI) that listed companies should restrict borrowing by reference to a formula based on a multiple of capital and reserves.

[52] At the time of writing this amount is unknown. It will be prescribed in the Companies (Shares, Share Capital and Authorised Minimum) Regulations 2008, which are draft Regulations expected to be made under section 763(2) of the *Act* in 2008 and to come into force from 1 October 2009.

270 The *Act* preserves existing rules of law restricting the making of distributions (Companies Act 2006, section 851). Thus in recommending or paying a dividend directors must take note of the common law (see paragraph 26 above) which would generally preclude payment of an imprudent dividend as not being in the best interests of the company. There is also a common law rule that dividends may not be paid out of capital which would require directors to consider whether losses incurred since the 'relevant accounts' (usually the last *annual accounts*) had eroded the distributable profits.

271 Companies reporting under *IFRS*s (and UK standards such as FRS 25 and FRS 26 which are converged with *IFRS*s) are likely to find greater differences between profits reported in their accounts and those that are realised profits that are potentially available for distribution.

272 For further guidance on realised and distributable profits, members should refer to the guidance issued by the Institute jointly with ICAS, which has been consolidated and issued as TECH 01/08. An Exposure Draft containing updated draft guidance reflecting the provisions of the Companies Act 2006 was issued during 2008 as TECH 07/08 *Draft Guidance on the Determination of Realised Profits and Losses in the context of Distributions under the Companies Act 2006*[53].

Public issues, takeovers and mergers

Public issues

273 A private company must not offer any securities of the company to the public or allot or agree to allot any securities of the company with a view to their being offered to the public subsequently (Companies Act 2006, section 755). When a public company wishes to make a public issue of shares for the first time or to make a subsequent issue, there are several methods of doing so. The purpose of this statement is, however, to examine the duties placed upon directors with regard to the issue of prospectuses and similar documents, rather than to provide guidance on the methods of issue. It is important that professional advice be taken as soon as an issue is envisaged. It should also be noted that there is a restriction on financial promotion so that generally a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless the person is authorised to do so or the content is approved by someone authorised to do so (*FSMA2000*, section 21). Authorisation is dealt with by Part III of *FSMA2000*.

274 If a company wishes (a) to make a public offer of securities or (b) to apply for admission of securities to trading on a *regulated market*, it must produce a prospectus that complies with the *Prospectus Rules* in the *FSA Handbook*. *Regulated Markets* in the UK include the main market of the *LSE*, the Specialist Fund Market and the *PLUS-listed market*. The *Prospectus*

[53] Available from the ICAEW website at http//www.icaew.com/index.cfm/route/161949

Rules implement the *Prospectus Directive,* the aim of which is to standardise the disclosure requirements for public offers of securities. The *Prospectus Rules* require a prospectus to contain a declaration by the directors of the issuer that to the best of their knowledge the information contained in the prospectus is in accordance with the facts and contains no omission likely to affect its import.

275 A company that is required to produce a prospectus must obtain prior approval of its prospectus from the *FSA* (*FSMA2000*, section 85 and PR 3.1.10R).

276 *Non-regulated markets* in the UK (also known as 'exchange-regulated' markets) include *AIM*, the Professional Securities Market (although see paragraph 278 below regarding admission to this market) and the *PLUS-quoted market*. A prospectus (and *FSA* approval) is not required for admission to trading on a *non-regulated market* where there is no public offer of securities (although such markets may nevertheless still require the preparation of a document in connection with the admission). For example, a company making an application for admission to *AIM*, in circumstances where there is no public offer, will need to prepare an admission document in accordance with the requirements of the *AIM* Rules for companies.

277 Additional rules (the *Listing Rules)* apply to securities admitted to the *Official List* or in respect of which such admission is sought. Companies seeking the admission of their securities to the *Official List* must comply with the *Listing Rules* and, once officially listed, such companies then apply for admission of their securities to trading on one of the UK markets for listed securities. These include some *regulated markets*, for example, the main market of the *LSE* and the *PLUS-listed market*, and some *non-regulated market*s, for example, the Professional Securities Market.

278 When applying for Official Listing on the Professional Securities Market, which is not a *regulated market*, the *Listing Rules* require that if the issuer is not otherwise required to prepare a prospectus it must prepare and publish 'listing particulars', which must be approved by the *FSA* (*FSMA2000*, section 79) in connection with the application. There is a general duty of disclosure requiring such 'listing particulars' to contain all such information as investors may reasonably require or expect for the purposes of making an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer of securities and the rights attaching to the securities (*FSMA2000*, section 80). The *Listing Rules* specify that the listing particulars must be in a format that complies with the requirements for prospectuses as contained in the *Prospectus Rules* as if those requirements applied to the listing particulars. Listing particulars are also required in relation to certain specialist securities for which a prospectus is not required under the *Prospectus Rules.*

279 There are penalties for knowingly being concerned with a contravention of the *Listing Rules* (*FSMA2000*, section 91) and directors have a civil liability

under section 90 of *FSMA2000*. The Misrepresentation Act 1967 provides civil remedies for misrepresentation and there is a common law right to sue for negligent mis-statements where there has been a breach of a duty of care to the plaintiff. In addition, any person who knowingly or recklessly makes a false or misleading statement, promise or forecast or dishonestly conceals any material facts for the purpose of inducing another person to enter into an investment transaction or refrain from doing so, commits an offence (*FSMA2000*, section 397).

280 It is also possible to register securities in the USA and join the New York, American or NASDAQ exchanges. However, there are additional documentational requirements which have to be complied with as well as the *Prospectus Rules* together with detailed review by the SEC which can be a lengthy and detailed process. One other possibility is to offer securities in the USA under Rule 144A of the US Securities Act. Such an offer can only be made to, and shares can only be traded by, professional investors but there are no additional disclosure or registration requirements. In practice, so as to provide information that US investors expect, the prospectus will be formatted and include disclosure similar to a US registration document while complying with the *Prospectus Rules*. There will be no SEC review of a Rule 144A prospectus.

281 The directors of companies traded on markets will also need to ensure compliance with the ongoing obligations of the relevant market. For instance, there are likely to be ongoing disclosure obligations, such as requirements for the timely disclosure of new information relating to, for example, material changes from profit forecasts.

Takeovers and mergers

282 The Panel on Takeovers and Mergers has been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers under the *Takeover Directive*. Its statutory functions are set out in and under Chapter 1 of Part 28 of the Companies Act 2006, sections 942 to 965.

283 The Panel's main functions are to issue and administer the *Takeover Code* and to supervise and regulate takeovers and other matters to which the *Takeover Code* applies. The *Takeover Code* is designed principally to ensure that shareholders are treated fairly and equally in the same class and are not denied an opportunity to decide on the merits of a takeover, and it applies to all public companies including unquoted public companies. The Rules of the *Takeover Code* are set out as a series of general principles which directors must follow if they are involved in a takeover or merger whilst being a director of a public company being taken over or a company taking over a public company. Coverage of the *Takeover Code* includes secrecy, timing of announcements, the need for independent advice, share dealings, documents required and conduct during the offer.

284 The *Listing Rules* (LR 10) contain specific provisions relating to acquisitions, disposals and reverse takeovers. Different requirements are

imposed in different situations, depending on the size of the transaction. Transactions are classified by class, each one defined by a percentage test, and the requirements increase as each new class is triggered starting from notification and moving up to a requirement for a circular and shareholder approval.

285 Chapter 3 of Part 28 of the Companies Act 2006 (sections 974 to 991) deals with the right of an offeror to buy out a minority shareholder (a squeeze-out) and the right of a minority shareholder to be bought out by the offeror (a sell-out) once 90% of shares have been acquired. There are additional powers given to offerors that are conditional on the offeree opting in to the provisions of Chapter 2 of Part 28 of The Companies Act 2006.

Regulated activities

286 The conduct of regulated financial services activities is regulated by *FSMA2000*, which makes it an offence for any person to carry on a regulated activity unless he is authorised or exempt under Part III of *FSMA2000*. Regulated activities are extremely widely defined and include, for example, dealing in investments, accepting deposits and providing investment advice (*FSMA2000*, section 22 and Schedule 2). Any agreement in contravention of the regulated activities provisions entered into by an unauthorised person in contravention of the regulated activities provisions is unenforceable, and investors who suffer losses may be able to obtain compensation from him (*FSMA2000*, section 26). There are a number of other areas of regulated activities, pursuant to various other statutes and enforced by various other regulators, and directors need to ensure compliance as required.

Taxation

287 The duties in tax legislation, such as making tax returns and retaining records, fall mainly on the company and rarely specifically upon directors. Nevertheless, it is a director's general obligation to oversee that the company complies with relevant law. Breaches of such obligations can, in limited circumstances, result in the commital of a criminal offence by directors and others involved in such transactions.[54] Note also that in a limited number of circumstances tax and interest which remain unpaid can be assessed upon and collected from other persons, depending upon the circumstances.[55]

288 In this respect, directors are responsible for ensuring compliance with a company's tax obligations including Corporation Tax and VAT set out in the various Taxes Acts. Directors are also ultimately responsible for ensuring

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[54] See section 765 of the Taxes Act 1988, which prohibits migration of companies in limited circumstances. A director who is knowingly involved in transactions which happen to breach this prohibition will commit an offence under section 766.

[55] See sections 346(2) and 347(1) of the Taxes Act 1988, sections 137(4), 139(7) and 190 of the Taxation of Chargeable Gains Act 1992, paragraph 75A(2) of Schedule 18 to the Finance Act 1998, Schedule 28 to the Finance Act 2000 and paragraph 69 of Schedule 29 to the Finance Act 2002.

appropriate accounting for Pay As You Earn and National Insurance contributions and for ensuring remittances are made on a timely basis. For those with operations overseas there are local rules that need to be complied with. In particular, the US has stringent rules concerning tax shelters and denying privacy surrounding tax advice, which need to be understood.

Inspections and Investigations

Inspection of a company's documents
289 The Secretary of State may at any time order the production of a company's documents. This power includes the right to take copies of any such documents (recorded, for example, on paper or electronically) and to require an explanation of them from any past or present officer or employee of the company and require answers to questions unrelated to the documents produced. The Secretary of State can authorize a person to start an investigation of a company. That person is known as an investigator who will have the same powers referred to above and can require a person to explain his conduct or give his opinion about something (Companies Act 1985, section 447). Any company or person who fails to comply with a requirement to produce documents or to provide an explanation of them or who impedes the entering of premises is liable to proceedings in a civil court (Companies Act 1985, section 453C). Where there are reasonable grounds for believing that documents not produced are on any premises, the Secretary of State may obtain a warrant for the entry and search of those premises (Companies Act 1985, section 448). This is one of the few parts of the Companies Act, 1985, which remains after implementation of the *2006 Act*.

Investigation of a company's affairs
290 The Secretary of State must appoint inspectors when ordered to do so by the court and may make such an appointment in a number of situations (Companies Act 1985, sections 431 and 432). The situations of particular relevance to directors are if it appears that:

(a) the business of the company is being or has been conducted with the intent of defrauding its own creditors, the creditors of any other person or for another fraudulent or unlawful purpose, or in a manner which is unfairly prejudicial to some part of its members;
(b) the company was formed for a fraudulent or unlawful purpose;
(c) the promoters or officers of the company have been guilty of fraud, misfeasance or other misconduct towards the company or its members; or
(d) the company's members have not been given all the information that they might reasonably expect.

291 It is the duty of all officers and agents of the company to give inspectors all assistance which they are reasonably able to give, including the production of all documents of or relating to the company, and they may be examined on oath by the inspectors. An inspector may also require any person to produce documents relating to a matter relevant to the investigation. Any officer or agent of the company who fails to assist an inspector may be reported to the

High Court and punished as if he had been in contempt of court (Companies Act 1985, sections 434 and 436).

292 The *FSA* may appoint investigators if it appears to them that there are circumstances suggesting that there may have been a breach in the *Listing Rules* or that a person who was at the material time a director of an issuer has been knowingly concerned in a breach of the *Listing Rules* by the issuer (*FSMA2000,* section 97) or there may have been a breach of sections 83, 85 or 98 of *FSMA2000*

- registration of listing particulars (section 83)
- publication of prospectus (section 85)
- advertisements etc. in connection with listings applications (section 98).

Investigation into membership and share dealings
293 The Secretary of State has wide powers to investigate the ownership of a company whenever he thinks there is good reason to do so for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially influence its policy (Companies Act 1985, section 442).

294 If it appears to the Secretary of State that there have been breaches of the requirements concerning directors' share dealings or of the duty of directors to notify interests in shares and debentures (see paragraphs 61 *et seq* above), he may investigate in order to establish whether or not such breaches have occurred (Companies Act 1985, section 446).

FSA enforcement rules
295 The *FSA* is given an enforcement responsibility by Schedule 1 of *FSMA2000* which, amongst other things, gives the *FSA* powers to bring criminal prosecutions for insider dealing (see paragraph 63 above) and misleading statements and practices and to impose financial penalties for market abuse (see paragraph 64 above). The *FSA*'s Enforcement Manual describes the policies and procedures for the exercise of the enforcement powers given to it.

Fraudulent trading
296 Directors, as persons involved in running the company's business, will be responsible should the company trade with intent to defraud creditors if they are knowingly party to such conduct, and may be liable to a fine or imprisonment or both. Responsibility for fraudulent trading will arise whether or not the company is in the course of winding up (Companies Act 2006, section 993). In a winding up, however, the court may impose additional liabilities on those guilty of fraudulent trading (see paragraph 309 below).

Theft and Fraud Acts
297 Criminal liability is imposed for obtaining property or pecuniary advantage by deception and for false accounting. Where such an offence is committed by a company with the consent or connivance of a director or

other officer, that person will be liable as well as the company. Also, an offence will be committed by an officer of a company who, with intention of deceiving members or creditors of the company, publishes, or concurs in publishing any written statement or account which he knows is or may be misleading, false or deceptive in a material particular (including by way of omission) (Fraud Act 2006, sections 1 to 4 and 12; Theft Act 1968, sections 17 to 19; and Theft Act 1978).

Winding up (liquidation) and other forms of insolvency

298 When a company gets into financial difficulties it is important that directors take legal advice concerning their position and duties so that they avoid, amongst other things, fraudulent or wrongful trading under *IA86* sections 213 and 214, which refers to business carried on with intent to defraud creditors (see also paragraph 296 above and 309 below) or continuing to trade where there was no reasonable prospect that the company would avoid going into insolvent liquidation (see also paragraphs 310 to 312 below). Advice when a company gets into financial difficulties can also be sought from restructuring specialists who can provide turnaround advice if applicable.

Duty to co-operate

299 Where a company has entered administration, administrative receivership or liquidation (including provisional liquidation) the past and present directors of the company have a duty to co-operate with the administrator, administrative receiver or liquidator. The duty to co-operate can include providing the office holder with information or attending on him or her, and the obligations can be enforced by the court. The penalty for failure to comply without reasonable excuse is a fine and, for continued contravention, a daily default fine (*IA86*, section 235).

Duty to provide a statement of affairs

300 In a creditors' voluntary liquidation, the directors are required to prepare and verify by affidavit a statement as to the affairs of the company in a prescribed form, and to lay it before a meeting of creditors (*IA86*, section 99). In an administrative receivership the directors (and others) may be given notice requiring them to provide a sworn statement of affairs, which must be submitted within 21 days of that notice (*IA86*, section 47). Similar provisions apply to directors of a company in compulsory liquidation (*IA86*, section 131). Directors of a company in administration may be required to submit a statement of affairs within 11 days of being given notice (*IA86*, paragraphs 47 and 48, Schedule B1). If the directors of a company propose a voluntary arrangement they must provide a statement of affairs to the nominee of the arrangement (Insolvency Rules 1986, rule 1.5). Directors who fail to comply with their statutory obligations to provide a statement of affairs are (with the exception of a breach of rule 1.5) liable to a fine and in some instances, for continued contravention, to a daily default fine.

Duty to provide a declaration of solvency

301 In a members' voluntary winding up (solvent liquidation) all or the majority of the directors of the company are required to prepare and verify by

affidavit a declaration of solvency in a prescribed form. In the declaration of solvency the directors must state that they have made a full enquiry into the company's affairs and that, having done so, they have formed the opinion that the company will be able to pay its debts in full with interest within a specified period not exceeding 12 months from the date of commencement of winding up. A director making a declaration of solvency without reasonable grounds for doing so is liable to imprisonment or a fine or both. If the company is subsequently found to be unable to pay all its debts within the period prescribed, the director is deemed not to have had reasonable grounds for the opinion (*IA86*, section 89).

Duty to attend meetings in insolvency proceedings

302 In a creditors' voluntary liquidation, the directors must appoint one of their number to preside at the first meeting of creditors (*IA86*, section 98). Directors who fail to comply with their obligations under this section are liable to a fine. They may be required to attend other meetings of creditors and members in an insolvent liquidation if the liquidator sees fit (Insolvency Rules 1986, rule 4.58). Directors of a company proposing a voluntary arrangement are required to attend the creditors' and members' meetings convened to consider the proposals and in some instances former directors may also be required to attend (Insolvency Rules 1986, Rule 1.16).

Reports on directors

303 An administrative receiver, administrator or liquidator of an insolvent company has a duty to submit a return or report to the Secretary of State in respect of every person who was a director or shadow director of the company at any time in the three years before the insolvency process started. A report, rather than a return, is submitted if the insolvency practitioner is of the opinion that the conduct of the director or shadow director is such that it makes him or her unfit to be concerned in the management of a company. On receipt of the report the Secretary of State may decide to make an application to the court for a disqualification order (*CDDA86*, sections 6 to 9 and the Insolvent Companies (Reports on Conduct of Directors) Rules 1996). In deciding whether to make a disqualification order, the court will have regard to the matters listed in Schedule 1 of the *CDDA86*.

Additional reporting in an insolvent winding up or voluntary arrangement

304 If during the course of an insolvent winding up it appears that any past or present director has been guilty of any criminal offence in relation to the company, the liquidator has a duty to report the matter to the official receiver or the Secretary of State (*IA86*, section 218). This may lead to an investigation by the Secretary of State, in which case the directors concerned are under the same obligation to produce documents or to provide information as would be the case in a Companies Act investigation (*IA86*, section 219).

305 Similar provisions apply if a moratorium has been obtained for a company under section 1A of the *IA86* or a voluntary arrangement has taken effect under section 4A or paragraph 36 of Schedule A1 to the *Act* (*IA86*, section 7A).

Liability for malpractice before or during winding up
306 Directors or former directors can be held to be criminally liable for certain types of malpractice under the *IA86* if they are found to have committed a criminal offence either before or during the liquidation. The types of malpractice giving rise to criminal penalties are as follows:

a. fraud in anticipation of, or after, winding up (*IA86*, section 206)
b. transactions in fraud of creditors (*IA86*, section 207)
c. misconduct in the course of winding up (*IA86*, section 208)
d. falsification of company books (*IA86*, section 209)
e. material omissions from any statement relating to the company's affairs (*IA86*, section 210)
f. false representations to creditors (*IA86*, section 211)
g. acting as a director or being involved in any way in the promotion, formation or management of any company or business carried on under a prohibited name (*IA86*, section 216). See also the civil penalties at paragraph 313 below.

The *2006 Act* also contains a fraudulent trading criminal offence for knowingly being a party to the carrying on of business with intent to defraud creditors or any other person, or for any fraudulent purpose (Companies Act 2006, section 993).

In each case the penalty is imprisonment or a fine or both.

307 There are also types of malpractice which (unless mentioned at paragraph 306 above) are not criminal offences but give rise to a civil liability to pay compensation. They are described in paragraphs 308 to 313 below.

Misapplication of company money or property or other breach of duty or trust
308 The liquidator, official receiver or any creditor or contributory of a company being wound up may apply to the court for the examination of a director, officer or other person concerned in the management of the company, past or present, if it appears that he or she has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any duty in relation to the company. The court may then order a delinquent director to repay or restore company money or property or contribute such a sum to the company's assets by way of compensation as the court thinks just (*IA86*, section 212).

Fraudulent trading
309 The liquidator can apply to the court for a declaration that persons knowingly party to trading with intent to defraud creditors are to be liable to make such contribution to the company's assets as the court thinks proper (*IA86*, section 213) (see also paragraph 296 above). The court may also make a disqualification order (*CDDA86*, section 4).

Wrongful trading
310 Where the company is in the course of winding up, the provisions of section 214 of the *IA86* regarding wrongful trading may also apply. An action

for wrongful trading may be brought against a director (or a former director) if at some time before the commencement of the winding up of the company that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into an insolvent liquidation. In section 214 of the *IA86*, director includes shadow director. Although an action cannot be commenced until a company is in insolvent liquidation, it is based on events and conclusions drawn prior to the commencement of the winding up. Directors should have regard to the implications of section 214, and ensure that the accounting records kept by the company are sufficient to enable them to draw their own conclusions about the position of the company (see also paragraph 71 above). The liability for wrongful trading is a personal one, and a director or former director may be directed to make such contribution to the company's assets as is felt proper by the court (*IA86*, section 214), and is also liable to disqualification (*CDDA86*, section 10).

311 The only defence available to a director is that, from the time when he knew or should have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, he took every step that he should have taken towards minimising potential losses to creditors. In assessing the conduct of the director, the court must assume that the facts that the director ought to have known or ascertained, the conclusions that he ought to have reached and the steps that he ought to have taken were those that would have been known or ascertained or reached or taken by a reasonably diligent person with both the general knowledge, skill and experience which the director actually has and the general knowledge, skill and experience which could reasonably be expected of a person carrying out the same function as the director carried out in relation to the company (*IA86*, section 214).

312 Where there is a real possibility of an insolvent liquidation the directors should consult a licensed insolvency practitioner and/or take legal advice (see paragraph 26). Further it should be remembered that directors are required to maintain minutes of all proceedings at meetings of the directors (Companies Act 2006, section 248). In these circumstances it is particularly important that a full record is kept of all decisions taken and the reasons for them. If the directors disagree on material questions the dissentients should ensure that their views are clearly recorded as well and they may need to consider taking independent legal advice about their position.

Carrying on a business under a prohibited name

313 Any person who was a director during the period of 12 months prior to commencement of its insolvent liquidation is prohibited, for a period of 5 years from the date of that commencement, from being involved in any way with any company or business carried on with the same name as that by which the company in liquidation was known within that 12-month period, or one so similar as to suggest an association (*IA86*, section 216). There are three exceptions to this general prohibition. The first exception occurs where the new company or business is using the name under arrangements made with the liquidator, administrator, administrative receiver or supervisor of the

insolvent company and the required notice has been given to creditors (Insolvency Rules 1986, rule 4.228). The second exception applies where the director has been granted leave by the Court to use the prohibited name (Insolvency Rules 1986, rule 4.229) and the third occurs if the new company had been known by the name throughout the period of 12 months leading up to the date of liquidation of the insolvent company (Insolvency Rules 1986, rule 4.230). Unless one of the three exceptions applies, contravention of section 216 of the *IA86* will lead to the director being personally liable for the debts of the new company incurred during the period of his or her involvement (*IA86*, section 217).

APPENDIX A

Small and medium-sized companies (Size and Eligibility) Criteria

A1 For a company to be within the small companies regime, or to be able to use the exemption for medium-sized companies, it must meet both the relevant size test (small or medium) (see paragraph A3 *et seq*) and the eligibility test (see paragraph A11 *et seq*).

A2 The small companies exemption in relation to the directors' report (see paragraph 123) requires the company to meet the small size test and to meet the eligibility test only in relation to itself (i.e. not its wider group).

Small and medium-sized companies – size qualifications

A3 A company qualifies as a small company in a financial year if for that year it satisfies two or more of the following conditions:

(a) its turnover does not exceed £6.5 million;
(b) its balance sheet total does not exceed £3.26 million;
(c) the average number of its employees does not exceed 50.

(Companies Act 2006, section 382).

A4 A company qualifies as a medium-sized company in a financial year if for that year two or more of the following conditions are satisfied:

(a) its turnover does not exceed £25.9 million;
(b) its balance sheet total does not exceed £12.9 million;
(c) the average number of its employees does not exceed 250.

(Companies Act 2006, section 465).

A5 A company qualifies as small or medium-sized in relation to a financial year if the qualifying conditions are met:

(a) in the case of the company's first financial year, in that year; and
(b) in the case of any subsequent financial year:

(i) in that year and the preceding year;
(ii) in that year and the company qualified as small in relation to the preceding financial year; or
(iii) were met in the preceding financial year and the company qualified as small in relation to that year.

(Companies Act 2006, sections 382 and 465.)

A6 In practice, this means that a company is small or is medium-sized if it meets the size tests for 2 consecutive years and it is not small or is medium-sized if it fails the size tests in 2 consecutive years.

Small and medium-sized groups – size qualifications

A7 A *parent company* can only qualify as a small company in relation to a financial year if the group headed by it qualifies as a small group, and can only qualify as a medium-sized company in a financial year if the group qualifies as a medium-sized group (Companies Act 2006, sections 383 and 466).

A8 A small group is one which satisfies two or more of the following conditions:

(a) its turnover does not exceed £6.5 million net or £7.8 million gross;
(b) its balance sheet total does not exceed £3.26 million net or £3.9 million gross;
(c) the average number of its employees does not exceed 50.

(Companies Act 2006, section 383(4).)

A9 A medium-sized group is a group that satisfies two or more of the following conditions:

(a) its turnover does not exceed £22.8 million net or £27.36 million gross;
(b) its balance sheet total does not exceed £12.9 million net or £15.5 million gross;
(c) the average number of its employees does not exceed 250.

(Companies Act 2006, section 466(4).)

A10 In the group figures:

(a) 'net' means after any set-offs and other adjustments made to eliminate group transactions (i.e. elimination of intra-group turnover, balances and profit or losses) as required by either in the case of:
    (i) *Companies Act accounts* in accordance with Schedule 6 of the *Small Companies Accounts Regulations 2008* or Schedule 6 of the *Large/Medium Companies Accounts Regulations 2008* respectively; or
    (ii) *IAS accounts* in accordance with international accounting standards.

(b) 'gross' means without those set offs and other adjustments.

A group may satisfy the relevant requirements on the basis of either the net or the gross figure.

(Companies Act 2006, sections 383(6) and 466(6).)

Small and medium-sized companies – eligibility criteria

A11 Once a company has qualified as small or medium according to the application of the size tests (see paragraph A3), it must address also the eligibility criteria.

A12 The small companies regime is not available to a company that is either:

- itself a public company, banking or authorised insurance company, e-money issuer, MiFID investment firm or UCITS management company (as defined by *FSMA2000*), or carrying on insurance market activity; or
- is a member of a group that includes a public company, a body corporate (other than a company) with shares admitted to trading on a *regulated market*, a small company that is a banking or authorised insurance company, an e-money issuer, a MiFID investment firm or UCITS management company (as defined by *FSMA2000*), a non-small company with a Part 4 permission under *FSMA2000* to carry on regulated activity, or a person carrying on insurance market activity.

A13 Exemptions for medium-sized companies are not available to a company that is either:

- itself a public company, has permission under Part 4 of *FSMA2000* to carry on regulated activity, or carries on insurance market activity; or
- is a member of a group that includes a public company, a body corporate (other than a company) with shares admitted to trading on a *regulated market*, a small company that is a banking or authorised insurance company, an e-money issuer, a MiFID investment firm or UCITS management company (as defined by *FSMA2000*), a non-small company with a Part 4 permission under *FSMA2000* to carry on regulated activity, or a person carrying on insurance market activity.

APPENDIX B

Table of Commencement Dates for Companies Act 2006 taken from the Final Implementation Timetable published by BERR in December 2007

The attached table is intended to provide guidance on the commencement timetable for the Companies Act 2006. It cannot however provide a definitive guide: you may therefore also wish to refer to the relevant commencement order. (The first six commencement orders are published on the OPSI website, with links from this website.)

The Government announced details of the final commencement timetable for the 2006 Act by Written Statement on 13 December 2007. The Statement is available as a link from the BERR website.

Unless otherwise stated in the table, provisions relating to accounts and reports have been commenced for financial years beginning on or after the relevant date (e.g. paragraph 43 in Schedule 3 to the Third Commencement Order provides that 'Section 417 of the Companies Act 2006 (contents of directors' report: business review) applies to directors' reports for financial years beginning on or after 1st October 2007').

The commencement of powers to make orders or regulations by statutory instrument does not necessarily mean that the Government intends to use the powers as part of its implementation of the Act.

Some provisions (e.g. definitions) may initially be brought into force only so far as necessary for the purposes of provisions which are being commenced before October 2009.

Part	Title	Date
1	**General introductory provisions (1–6)**	**1 October 2009**
	Section 2	6 April 2007
2	**Company formation (7–16)**	**1 October 2009**
3	**A company's constitution (17–38)**	**1 October 2007**
	Sections 29 & 30	1 October 2009
4	**A company's capacity and related matters (39–52)**	**1 October 2009**
	Section 44	6 April 2008
5	**A company's name (53–85)**	**1 October 2009**
	Sections 69 to 74	1 October 2008
	Sections 82 to 85	1 October 2008
6	**A company's registered office (86–88)**	**1 October 2009**
7	**Re-registration as a means of altering a company's status (89–111)**	**1 October 2009**
8	**A company's members (112–144)**	**1 October 2009**
	Sections 116 to 119	1 October 2007
	Sections 121 & 128	6 April 2008
9	**Exercise of members' rights (145–153)**	**1 October 2007**
10	**A company's directors (154–259)**	**1 October 2007**
	Sections 155 to 159	1 October 2008
	Sections 162 to 167	1 October 2009
	Sections 175 to 177	1 October 2008
	Sections 180(1), (2)(in part), & (4)(b), and 181(2) & (3)	1 October 2008
	Sections 182 to 187	1 October 2008
	Sections 240 to 247	1 October 2009

11	**Derivative claims and proceedings by members (260–269)**	**1 October 2007**
12	**Company secretaries (270–280)** Section 270(3)(b)(ii) Sections 275 to 279	**6 April 2008** 1 October 2009 1 October 2009
13	**Resolutions and meetings (281–361)** Sections 308 & 309 Section 333 Sections 327(2)(c) & 330(6)(c) are not being commenced for the time being.	**1 October 2007** 20 January 2007 20 January 2007
14	**Control of political donations and expenditure (362–379)** Provisions relating to independent election candidates Part 14 comes into force in Northern Ireland on 1 November 2007, except for provisions relating to independent election candidates.	**1 October 2007** 1 October 2008
15	**Accounts and reports (380–474)** Section 417 Section 463 (for reports and statements first sent to members and others after this date)	**6 April 2008** 1 October 2007 20 January 2007
16	**Audit (475–539)** Sections 485 to 488	**6 April 2008** 1 October 2007
17	**A company's share capital (540–657)** Section 544 Sections 641(1)(a) & (2)–(6), 642–644, 652(1) and (3) & 654	**1 October 2009** 6 April 2008 1 October 2008
18	**Acquisition by limited company of its own shares (658–737)** Repeal of the restrictions under the Companies Act 1985 on financial assistance for acquisition of shares in private companies, including the "whitewash" procedure	**1 October 2009** 1 October 2008
19	**Debentures (738–754)**	**6 April 2008**
20	**Private and public companies (755–767)**	**6 April 2008**
21	**Certification and transfer of securities (768–790)**	**6 April 2008**
22	**Information about interests in a company's shares (791–828)** Sections 811(4), 812, 814	**20 January 2007** 6 April 2008
23	**Distributions (829–853)**	**6 April 2008**
24	**A company's annual return (854–859)**	**1 October 2009**
25	**Company charges (860–894)**	**1 October 2009**
26	**Arrangements and reconstructions (895–901)**	**6 April 2008**
27	**Mergers and divisions of public companies (902–941)**	**6 April 2008**

28	**Takeovers etc (942–992)**	**6 April 2007**
29	**Fraudulent trading (993)**	**1 October 2007**
30	**Protection of members against unfair prejudice (994–999)**	**1 October 2007**
31	**Dissolution and restoration to the register (1000–1034)**	**1 October 2009**
32	**Company investigations: amendments (1035–1039)**	**1 October 2007**
33	**UK companies not formed under the Companies Acts (1040–1043)**	**1 October 2009**
	Section 1043	6 April 2007
34	**Overseas companies (1044–1059)**	**1 October 2009**
35	**The registrar of companies (1060–1120)**	**1 October 2009**
	Section 1063 (in respect of England, Wales and Scotland)	6 April 2007
	Section 1068(5)	1 January 2007
	Sections 1077 to 1080	1 January 2007
	Sections 1085 to 1092	1 January 2007
	Sections 1102 to 1107	1 January 2007
	Section 1111	1 January 2007
36	**Offences under the Companies Acts (1121–1133)**	**With relevant provisions**
	Section 1124	1 October 2007
	Section 1126	6 April 2008
37	**Companies: supplementary provisions (1134–1157)**	**With relevant provisions**
	Section 1137(1), (4), (5)(b) and (6)	30 September 2007
	Sections 1143 to 1148	20 January 2007
	Section 1157	1 October 2008
38	**Companies: interpretation (1158–1174)**	**With relevant provisions**
	Sections 1161, 1162, 1164, 1165, 1169 and 1172	6 April 2008
	Section 1167	30 September 2007
	Section 1170	6 April 2007
39	**Companies: minor amendments (1175–1181)**	**6 April 2007**
	Section 1175 (only for Part 1 of Schedule 9)	1 April 2008
	Sections 1180	1 October 2009
	Section 1181	1 October 2009
40	**Company directors: foreign disqualification etc (1182–1191)**	**1 October 2009**
41	**Business names (1192–1208)**	**1 October 2009**
42	**Statutory auditors (1209–1264)**	**6 April 2008**
	Sections 1242 to 1244	29 June 2008

43	**Transparency obligations and related matters (1265–1273)**	**Royal Assent**
44	**Miscellaneous provisions (1274–1283)**	
	Sections 1274 and 1276	Royal Assent
	Section 1275	1 October 2009
	Sections 1277 to 1280	1 October 2008
	Section 1281	6 April 2007
	Section 1282	6 April 2008
	Section 1283	1 October 2009
45	**Northern Ireland (1284–1287)**	**With relevant provisions**
46	**General supplementary provisions (1288–1297)**	**Royal Assent**
	Section 1295	With relevant provisions
47	**Final provisions (1298–1300)**	**Royal Assent**

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GLOSSARY

All section numbers are references to the Companies Act 2006 unless otherwise stated. Terms printed in italics in the glossary indicates a separate entry under that heading.

the 1985 Act	the Companies Act 1985
the 2004 Act	the Companies (Audit, Investigation and Community Enterprise) Act 2004
the 2006 Act, CA 2006 or the Act	the Companies Act 2006
accounting reference date	The accounting reference date of a company incorporated in Great Britain on or after 1st April 1996 and before the commencement of this Act, or after the commencement of this Act, is the last day of the month in which the anniversary of its incorporation falls (*CA 2006,* s.191)
accounting reference period	Accounting reference periods are usually successive periods of twelve months beginning immediately after the end of the previous accounting reference period and ending with its *accounting reference date* (*CA 2006,* s.391)
accounts meeting	The general meeting of the company before which the company's *annual accounts* for the financial year are to be laid

AIM	Alternative Investment Market of the London Stock Exchange
annual accounts	(a) company's *individual accounts* for that year subject to the omission of the individual profit and loss account in certain cases (*CA 2006,* ss.394 and 408), and (b) any *group accounts* prepared by the company for that year (*CA 2006,* ss.398 and 399) (*CA 2006,* s.471(1))
annual accounts and reports	the *annual accounts* together with the directors' report, the auditor's report and, for *quoted companies*, the directors' remuneration report (*CA 2006*, s.471)
Articles	Articles of Association
ASB	Accounting Standards Board
associated body corporate	For the purposes of *CA 2006*, Part 10: (a) bodies corporate are associated if one is a subsidiary of the other or both are subsidiaries of the same body corporate, and (b) companies are associated if one is a subsidiary of the other or both are subsidiaries of the same body corporate. (*CA 2006*, s.256) Note that this is different from the definition of an associate (or associated undertaking) for accounting purposes.
BERR	Department for Business, Enterprise & Regulatory Reform
Combined Code	The Combined Code on Corporate Governance (June 2008)
Companies Act accounts	Accounts prepared in accordance with the form and content requirements of regulations made under the *2006 Act*, which includes compliance with accounting standards and related literature issued by the *ASB* (UK GAAP) by virtue of the analysis summarised at paragraph 85
CDDA86	Company Director Disqualification Act 1986
company associated with a public limited company	A subsidiary or parent company of a public company, or a sister subsidiary of a public company (where both the company and the public company are subsidiaries of a third company). Note that this is different from the definition of an associate (or associated undertaking) for accounting purposes.
DTI	Department of Trade and Industry (since June 2007, replaced by the Department for Business, Enterprise & Regulatory Reform)

DTRs	Disclosure and Transparency Rules
entitled persons	shareholders, debenture holders and other persons entitled to receive notice of general meetings, including • any person nominated by a member under a power in the *Articles* (*CA 2006*, s.145) and • for *traded companies*, those persons that have been nominated by registered shareholders to enjoy information rights, such as indirect investors whose investments are held through intermediaries (*CA 2006*, s.146)
EU-adopted IFRS	the international accounting standards, within the meaning of the *IAS Regulation* (including IFRS, IAS, IFRICs and SICs), adopted from time to time by the European Commission in accordance with that Regulation.
Exchange-regulated (or non-regulated) market	A financial instruments market that is not a *regulated market.*
FRC	Financial Reporting Council
FRRP	Financial Reporting Review Panel
FSA	Financial Services Authority
FSA Handbook	A publication issued by the *FSA*, which sets out all the rules and guidance made by the *FSA* under *FSMA2000*
FSMA2000	Financial Services and Markets Act 2000
Group accounts	Consolidated accounts comprising a consolidated balance sheet and a consolidated profit and loss account, in each case relating to the *parent company* and its *subsidiary undertakings* (*CA 2006*, s.404)
IA86	Insolvency Act 1986
IAS accounts	Accounts prepared in accordance with *EU-adopted IFRS*
IAS Regulation	EC Regulation 1606/2002 of the European Parliament and of the Council on the application of international accounting standards
IFRS	International Financial Reporting Standards
Individual accounts	The accounts that directors of every company are required prepare for the company for each of its financial years (*CA 2006,* s.394)
Large/Medium Companies Accounts Regulations 2008	The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410
Listing Rules	The Listing Rules issued by the *FSA*
Listed company	A company with securities admitted to the *Official List* maintained by the *FSA* in accordance with section 74 of *FSMA2000*

LSE	the London Stock Exchange
Memorandum	Memorandum of Association
Model Code	The Model Code on directors' dealings in securities set out in LR 9 Annex 1 R
Non-regulated market	See *exchange-regulated market*
Official List	the Official List, maintained by the *FSA*, which comprises shares with a primary listing on the main market of the *LSE*, shares listed on the professional securities market and shares listed on the *PLUS-listed market*.
Parent company (or parent undertaking)	An undertaking that, in relation to another undertaking (a 'subsidiary undertaking'): (a) holds a majority of the voting rights in the undertaking, or (b) is a member of the undertaking and has the right to appoint or remove a majority of its board of directors, or (c) has the right to exercise a dominant influence over the undertaking (i) by virtue of provisions contained in the undertaking's *articles* or (ii) by virtue of a control contract, or (d) is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking. For these purposes an undertaking is treated as a member of another undertaking: (a) if any of its subsidiary undertakings is a member of that undertaking, or (b) if any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings. An undertaking is also a parent undertaking in relation to another undertaking (a 'subsidiary undertaking'), if– (a) it has the power to exercise, or actually exercises, dominant influence or control over it, or (b) it and the subsidiary undertaking are managed on a unified basis. A parent undertaking is treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings; and references to its subsidiary undertakings are construed accordingly. (*CA 2006,* s.1162)

PLUS-listed market	The *regulated market* operated by PLUS Markets plc
PLUS-quoted market	The *non-regulated market* operated by PLUS Markets plc
Prospectus Rules	Rules issued by the *FSA* pursuant to *FSMA2000*
Quoted company	a company whose 'equity share capital' has been included in the *Official List* in accordance with the provisions of Part 6 of *FSMA2000* (ie a primary listing on the *LSE* or a listing on the *PLUS-listed market*), or is officially listed in an EEA State, or is admitted to dealing on either the New York Stock Exchange or the exchange known as Nasdaq (Companies Act 2006, section 385(2)). For these purposes, 'equity share capital' is defined in section 548 of the *Act* and differs from the definition in accounting standards.
Regulated market	A multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in the system and in accordance with its non-discretionary rules in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of the Markets in Financial Instruments Directive (MiFID) (*Article 4.1(14), MiFID*, reproduced in the *FSA Handbook*). A list of regulated markets within the EEA is maintained on the website of the European Commission. UK regulated markets are listed on the websites of the Takeover Panel and the *FSA*. At the time of writing, UK regulated markets include the *LSE*, SWX Europe Ltd, EDX, LIFFE, London Metal Exchange, ICE Futures Europe and the *PLUS-listed market*
Revised Accounts Regulations 2008	The Companies (Revision of Defective Accounts and Reports) Regulations 2008, SI 2008/373
SCR Company	A company subject to the small companies regime
Senior statutory auditor	the individual identified by the firm as senior statutory auditor in relation to the audit in accordance with guidance issued by the *FRC* (see 'The Senior Statutory Auditor under the UK Companies Act 2006', APB Bulletin 2008/6). The person identified as senior statutory auditor must be eligible for appointment as auditor of the company in question (see Chapter 2 of Part 42 of the *2006 Act*).

Small Companies Accounts Regulations 2008	The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409
Special Notice	Notice of a resolution that must be given by the proposer to the company at least 28 days before the meeting at which the resolution is to be moved. The company must then, where practicable, give its members notice of any such resolution in the same manner and at the same time as it gives notice of the meeting. (*CA 2006,* s.312)
Subsidiary undertaking	See *parent company* definition above.
Summary Financial Statement Regulations 2008	The Companies (Summary Financial Statement) Regulations 2008, SI 2008/374
Table A	Table A as set out in the Companies (Tables A–F) Regulations 1985
Table E	Table E as set out in the Companies (Tables A–F) Regulations 1985
Takeover Code	The City Code on Takeovers and Mergers
Takeover Directive	EC Directive on Takeover Bids (2004/25/EC)
traded company	a public company whose shares are admitted to trading on at least one *regulated market*
Transparency Obligations Directive	Directive 2004/109/EC of The European Parliament And Of The Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a *regulated market* and amending Directive 2001/34/EC