

Pensions Legal Alert

Companies Act 2006

Trustee companies: conflicts of interest

The Companies Act 2006 makes a number of changes that directors of all companies, including pension trustee companies, should be aware of. Some parts of the Companies Act 2006 are already in force, others come into force in October 2008, others in October 2009.

This alert focuses on changes companies may wish to make to their Articles of Association.

Conflicts of interest

THE OBLIGATION

One particularly important change comes into force from 1 October 2008. From this date the Companies Act 2006 introduces a statutory obligation on every company director to avoid a situation in which he has or may have a direct or indirect interest that conflicts, or may conflict, with the interests of the company. Applied to pension trustee companies, this means that a trustee director must avoid conflicts of interest that affect or may affect the company's role as corporate trustee of the pension scheme.

Exceptions

However, a director will not be in breach of that obligation if:

- the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
- the other (non-conflicted) directors authorise the director to act despite the conflict (it is important to note that the conflicted director cannot vote or count in the quorum); or
- the Articles of Association include provisions which deal with conflicts of interest and the relevant director acts in accordance with those provisions; or
- the company's shareholders authorise the director to act despite the conflict; (for many pension trustee companies the only shareholder will be the sponsoring employer).

Authorisation by the directors – change to Articles

The most flexible way of dealing with most conflicts is likely to be authorisation by the non-conflicted directors. This approach would mean that members of the trustee board actively consider conflicts themselves, as they arise, taking into account the circumstances at the time.

Before the directors can authorise conflicts, the trustee company's shareholders/members will need to pass an enabling resolution. Clients may therefore want to arrange for a resolution to be passed. It would be sensible to include a specific provision in the Articles to provide a framework for authorisation at the same time.

In addition to the conflicts requirements under the Companies Act 2006, the Pensions Regulator has made it clear that trustees and trustee companies should also have effective processes in place for identifying, monitoring and managing conflicts of interest as part of the Regulator's aim of promoting good pension scheme governance. See the draft guidance issued by TPR in February this year (<http://www.thepensionsregulator.gov.uk/pdf/ConflictsOfInterestConsultation.pdf>).

Other (optional) changes to Articles

If amending the Articles to address the conflict issue, amendments might also be made to:

DISPENSE WITH THE ANNUAL GENERAL MEETING

Private companies are no longer required to hold an AGM. If a company no longer wishes to hold an AGM, any requirement in the Articles for an AGM needs to be removed.

DISPENSE WITH THE APPOINTMENT OF A COMPANY SECRETARY

Private companies are no longer obliged to have a secretary. If a company no longer wishes to have a secretary, then any requirement in the articles to appoint a secretary needs to be removed.

REAPPOINT AUDITORS AUTOMATICALLY

Auditors are deemed to be reappointed at the end of the year unless the Articles require actual reappointment. If the company wants the auditors to be reappointed each year without needing to take any action, any requirement in the Articles for actual reappointment needs to be removed.

INCLUDE PROVISIONS FOR ELECTRONIC COMMUNICATION

This is not strictly a new requirement but this could be an opportunity to update the provisions about, for example, notices and circulation of written resolutions.

If you would like to discuss the implications of the proposals, or have any comments for our consultation response, please do not hesitate to get in touch with your usual Mayer Brown International LLP contact or Philippa James (pjames@mayerbrown.com or 020 7782 8700).

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