

March 24 2009

Companies (Amendment) Bill 2008

The Companies (Amendment) Bill 2008, when in force, will make a number of changes in relation to Isle of Man company law. The Bill should receive Royal Assent in late May or early June, following which it will be brought into operation by the Treasury. Accordingly, it should be in force by the middle of June 2009 or possibly earlier. A brief overview of the changes to be made by the Bill is set out below.

Prospectus rules (1931 Act companies)

The prospectus rules in Section 35 (1) and the Fourth Schedule of the Companies Act 1931 will be repealed. It will no longer be necessary for the contents of a prospectus issued by a 1931 Act company to comply with the Fourth Schedule. The new provisions will require a prospectus issued by a 1931 Act company to contain all material information that the intended recipients would reasonably expect to receive and of which the directors are aware or ought to have been aware having made reasonable enquiries. This requirement is the same as applies to 2006 Act companies. It will remain necessary to register a prospectus under Section 38 of the 1931 Act.

The requirement to deliver a statement in lieu of prospectus will be abolished.

The FSC will be given power to direct that a 1931 Act company amend its prospectus if the FSC considers a statement included in the prospectus is untrue or misleading or considers that the prospectus is in contravention of the statutory prospectus requirements.

Registration of Charges (1931 Act companies)

Two changes will be made in relation to 1931 Act companies. Firstly, it will be sufficient to register a certified copy of the charge rather than the original (at present registration of a certified copy is only permitted in the case of a charge created outside the Isle of Man comprising property situated outside the Isle of Man).

Secondly, registration of a charge will only be required if the company is beneficially interested in the property charged and controls or is able to charge the legal interest in the property. This will mean, for example, that a charge over trust property created by company which is a trustee need not be registered. An equivalent change is made in relation to charges registrable by F registered companies.

Takeovers and Mergers

The FSC will be given power to make regulations in relation to takeovers and mergers of 1931 Act and 2006 Act companies. Separately, the statutory role of the Takeover Panel contained in

the UK Companies Act 2006 was extended to the Isle of Man with effect from March 1 2009 by Order in Council.

Accounts of 1931 Act companies

The time limit, if it applies, to lay statutory accounts before a company in general meeting will be reduced to six months from the end of the financial year in the case of a public company and nine months in the case of a private company (whether or not having interests outside the Isle of Man). The FSC will have power, for special reason, to extend such periods.

The obligation that a 1931 Act company's accounts comply with the requirements of Schedule 1 of the Companies Act 1982 will be disapplied to the extent necessary for the accounts to comply with the requirement to give a true and fair view. Particulars of such a departure from Schedule 1 and the reasons for it and its effect must be given in a note to the accounts.

In determining how amounts are presented in the accounts of a 1931 Act company, the directors will be required to have regard to the substance of any transaction or arrangement in accordance with IFRS, UK GAAP or US GAAP. The FSC will be given power to make regulations requiring compliance with standards or practices recommended by particular bodies.

Auditors of 1931 Act companies

The persons qualified to audit 1931 Act companies will be extended in certain respects.

The position will remain the same in relation to the recognised accountancy bodies of which an individual (a "qualified individual") must be a member in order to be qualified to be appointed as auditor of a 1931 Act company (ICAEW, ACCA etc.).

A partnership will be qualified to be appointed as an auditor if at least half the partners are qualified individuals, they own at least 50 per cent of the voting rights in the partnership, and each of the partners who carry out the audit is a qualified individual.

A body corporate will be qualified to be appointed as auditor provided each of the persons who carry out the audit is a qualified individual, and the body corporate is controlled by qualified individuals. A wide definition is given to "control" such that qualified individuals represent at least 50 per cent of the members, voting rights or directors of the body corporate. This change will allow, for example, an English firm of accountants constituted as an LLP to be appointed as auditor of an Isle of Man company.

Similar provision will be made in relation to the qualification of a limited liability company to be appointed as auditor.

A new power will be introduced allowing a person to apply to the FSC for authorisation to be appointed as auditor of a specific company. In addition, the FSC will be given power to amend the definition of "recognised accountancy body" by adding, deleting or substituting any body and also to extend the classes of persons qualified for appointment as auditor.

The FSC will also be given power to make regulations subjecting auditors of 1931 Act and 2006 Act companies to prescribed systems of public oversight, quality assurance and investigations and penalties.

The FSC will also be given power by regulations to make provision in connection with the accounting records and accounts of 1931 Act and 2006 Act companies and their audit. This power is intended to allow the FSC to react quickly to changing conditions and avoid the need to amend primary legislation.

Financial Assistance by 1931 Act companies

The statutory prohibition on a private 1931 Act company giving financial assistance for the purposes of the acquisition of its own shares will no longer apply. The statutory prohibition will only apply to 1931 Act public companies, and subsidiaries of public companies. However, the rules relating to capital maintenance will continue to apply to 1931 Act private companies, and accordingly transactions involving the giving of financial assistance by private companies will still need to avoid any unlawful reduction of capital. While there will no longer be a statutory “whitewash” procedure in relation to private companies, it may be that directors of companies will wish to have the comfort of a similar procedure, and counterparties (in particular banks) may require a similar procedure to control any risk of the financial assistance transaction being vulnerable in a subsequent insolvency.

Treasury Shares

The FSC will be given power by regulations to introduce treasury shares, both in relation to 1931 Act companies and 2006 Act companies. We understand that the FSC intends to commence consideration of this proposal in the near future.

Limited Liability Companies

In the Limited Liability Companies Act 1996 the default position is that an LLC must be wound up on the occurrence of certain events, such as the death or resignation of a member, and the remaining members are deemed to be joint provisional liquidators for this purpose. The remaining members can within sixty days of such event disapply the winding up by agreeing to continue the LLC and file a notice to that effect, failing which the triggering of the winding up is irreversible. In future the default position will be that an LLC will continue on the occurrence of such events unless the operating agreement otherwise provides.

2006 Act Companies

It will be permissible to keep a 2006 Act company’s accounting records at a place other than the office of the registered agent, in which case copies must be sent to the registered agent at intervals not exceeding 12 months and those copies must be retained at the office of the registered agent.

The originals of any financial statements prepared must be kept at the office of the registered agent.

A new right to require financial statements to be prepared will be introduced. If a 2006 Act company has not prepared financial statements for a continuous period of 18 months or more, any member or director of the company will be entitled to demand that financial statements be prepared within six months.

At present the Companies Act 2006 is silent as to the contents of any financial statements which are prepared. That will be changed such that, if financial statements are prepared, they must show a true and fair view, and the directors must have regard to the substance of transactions in accordance with IFRS, UK GAAP or US GAAP. The FSC will be given power to make regulations requiring compliance with standards or practices recommended by particular bodies in any financial statements prepared.

At present the Companies Act 2006 does not require the appointment of an auditor. That will be changed and a 2006 Act company will be required to appoint an auditor if the company's securities are listed or admitted to trade on a securities market or exchange. Further, in any case where a 2006 Act company appoints an auditor (whether obliged to do so or not) the auditor will be required to be qualified for appointment to a 1931 Act company (see above). Existing 2006 Act companies should consider whether their auditor (if any) will be so qualified.

The power of a member to inspect the accounting records of a 2006 Act company will be modified so that a member will only be entitled to inspect such records if (i) the articles expressly so provide (ii) financial statements have been demanded by a member and the company has failed to prepare them or (iii) the directors allow such inspection.

The above points are not exhaustive and the information is compiled for guidance and general overview only. It is not intended to be legal advice and is no substitute for specific legal advice.

For more specific details please contact Irini Newby, head of the corporate and commercial department at Simcocks Advocates – telephone 01624 690300, fax 01624 690333 or email inewby@simcocks.com