trowers & hamlins

Legal update

Latest themes and considerations for board members

Webinar summary

Trowers & Hamlins recently held a webinar for company directors on Thursday 20 May and in this summary document we outline the key areas of discussion, the Q&A and useful resources.

Temporary Covid-19 relaxations of filings, meetings and insolvency provisions

The Government introduced a range of temporary measures to help companies weather the pandemic, including:

Accounts filing deadlines: the automatic extension to deadlines for filing accounts with Companies House ended on 5 April. Private companies now have the usual 9 months after the end of their financial year to file their annual accounts but can apply for an extension citing Covid-19.

Virtual meetings: the Government allowed company meetings to be held virtually until 30 March. Private companies should now use the written resolution procedure to pass resolutions or, if this is not practical, check that there is nothing in their articles to prevent virtual meetings.

Insolvency: the restrictions on using statutory demands and winding up petitions, the small supplier exemption from the restrictions on terminating supply contracts and the temporary suspension of liability for wrongful trading have been extended until 30 June. However the temporary provisions applying to moratoriums are extended to 30 September.

New reporting requirements for companies

The Companies (Miscellaneous Reporting) Regulations 2018 (the 2018 Regulations)

The 2018 Regulations require all large UK companies to make a corporate governance statement in the directors' report. A large company is one that satisfies one or both of the following conditions:

- > 2000 employees; or
- (1) turnover > £200m, and (2) balance sheet total > £2bn.

The Wates Principles for large private companies were introduced to help companies make that statement by applying and explaining the approach a company takes to corporate governance.

The 2018 Regulations also bring in three other new reporting requirements:

- an employee engagement statement requiring the company to explain how the directors have engaged with and had regard to the interests of their employees - applies to all companies with 250+ employees;
- a section 172 statement, setting out how the directors have discharged their section 172 duty to have regard to the broader corporate social responsibility type matters set out in section 172(1)(a) – (f) - applies to companies meeting any two of the following criteria: turnover >£36m, balance sheet total >£18m and >250 employees; and
- a stakeholder interests statement summarising how the directors have had regard to the need to foster relationships with the company's suppliers, customers and others, and the effect of that regard on the company's key decisions - applies to companies meeting any two of the following criteria: turnover >£36m, balance sheet total >£18m and >250 employees.

Modern Slavery Registry

An online Government Registry of organisations' modern slavery statements was introduced in March to strengthen the reporting requirements under the Modern Slavery Act 2015 and provide easier access to the statements with a wider view to promoting transparency. UK companies with an annual turnover of £36m+ are required to publish a modern slavery statement. Publishing on the Registry is currently voluntary, although the Government has announced that it intends to make this mandatory. For further detail see Modern Slavery Statement Registry: what do you need to do?

What's on the horizon?

Corporate transparency reforms

The Government has consulted on a package of reforms to increase corporate transparency and clamp down on fraud and money laundering. These will apply to all companies, limited liability partnerships and limited partnerships. The proposed changes include:

- **Ban on corporate directors:** implementing the 2015 legislation (which has not yet been brought into force), subject to limited exemptions.
- **Companies House reforms:** including new compulsory identity verification for all directors, People with Significant Control and those filing information on behalf of a company; strengthening Companies House's powers to query, amend or remove information and improving processes for removing personal information from the register.
- **Company accounts:** accounts will have to be filed digitally and rules on accounting reference periods would be amended so they can only be shortened once every 5 years.
- **Register of Directors:** the Government is considering removing the requirement for this (and some other registers) so that the register held at Companies House is the single, verified source for this information.

The Government will publish a comprehensive set of proposals and will legislate 'when Parliamentary time allows', so we would expect to see some of the changes in the next few years. For more information see Changes at Companies House: corporate transparency and companies register reform.

Company Directors' Disqualification

Earlier this month, the Government introduced the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill to close a loophole allowing directors to dissolve their businesses to write off state-backed emergency Covid-19 loans and avoid repaying their creditors.

Among other things, the Bill includes new powers extending the scope of the current investigation and enforcement regime to include former directors of dissolved companies. The measures can be applied retrospectively, allowing the Insolvency Service to investigate and disqualify directors who have inappropriately wound up companies that have benefited from emergency state financial support during the pandemic. For further information see Directors beware – dissolving a company will not absolve you of liability.

Corporate governance reforms

The Government has published a White Paper on corporate governance reforms which was drawn up after some much publicised accounting scandals at UK companies. Directors of the UK's largest companies suspensions and the claw back of two years worth of bonuses if their businesses make significant errors with accounts or leave the door open to fraud. The Government is consulting on the changes (including which companies the changes will apply to) until 8 July. For further information see the White Paper: Restoring trust in audit and corporate governance.

Climate related financial disclosures

The Government is proposing that new requirements on climate-related financial disclosures be included as part of the non-financial information statement within the strategic reports of the largest UK companies. The proposed changes would apply to financial years starting on or after 6 April 2022. For further information see the Government Consultation: Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs.

Current issues for employers

Agility

Before the pandemic started, businesses were already starting to implement agile working. However, the lockdown has accelerated its implementation for many companies almost overnight. At least 90% of employers we recently consulted are considering moving to some form of agile working permanently. Key considerations for businesses going forward with this in future include:

- reviewing how agile working fits in with the needs of the business and how to manage its impact on other key areas such as recruitment and retention, data protection, culture and engagement, work/life balance, training and supervision;

- reviewing policies and employment contracts to catch up with the changes, once you have decided on a longer term strategy for agile working; and

- considering how agile working affects everyone working for the business: for example, if it would create a two-tier workforce (for those who can work from home and those who have to be on site) and what you can do to mitigate the effects of this.

Equality and diversity

Diversity within the workforce is in sharp focus across many industries and increasingly with regulators. This should be a top issue for boards. For example, in a speech by FCA executive director Sheldon Mills last month, he talked about why black inclusion is an important regulatory issue for the financial services industry and an area where the FCA will be requiring improvement.

Last summer, the Commission on Race and Ethnic Disparities was set up to report into racial and ethnic disparities in the UK. A number of its recommendations are relevant to the employment field, including that the Equality and Human Rights Commission receives additional government funding to use their compliance, enforcement and litigation powers to challenge policies or practices that either cause significant and unjust racial disadvantage, or arise from racial discrimination.

Q&A session

1. **For companies which are compulsorily reporting (or choosing to voluntarily report) under The Companies (Miscellaneous Reporting) Regulations 2018, should the reports be combined with the company's annual statements or do they need to report separately?**

The reports will normally be part of either the directors' report or the strategic report. The Regulations set out specific requirements for where these reports should go. For example:

a) the employee engagement statement and stakeholder interests statement should be part of the directors' report; and

b) the section 172 statement should be part of the strategic report.

The Wates Principles and the Government's *FAQs* state that you can cross refer to other places which contain the required information – you do not have to repeat something you have said elsewhere in order to comply with the Regulations. Cross-referencing is encouraged. The object is not to make annual reports longer but to ensure that the required information is provided to investors and other stakeholders.

2. **There are many items on boards' agendas at the moment – should boards be meeting more regularly in the current circumstances? How often would you expect a board of a private company to meet?**

We would expect boards to be meeting more regularly under the current circumstances, particularly given the rapidly changing environment at the moment. For example, although we came out of national lockdown on 17 May, the position on what will happen in future is still not clear.

In terms of a typical private company, it is standard for the board to meet around 6-8 times a year, but of course this depends on the particular company and what it is doing. Irrespective of formal board meetings, boards need to ensure they are in regular communication about the health of business and direction in which it is going.

3. **On the Government's proposal to change the rules so that a company can only shorten its accounting reference period once every five years, in a situation where a company which was subject to an acquisition twice in that five year period, could it shorten its accounting period twice to align with each new parent company?**

There isn't anything detailed in the consultation on this point. All that the consultation states is that where a company cites aligning its accounting reference period with a parent (or subsidiary), Companies House will in future request the name and company number of the parent/subsidiary. As the purpose of the reform is to reduce the potential for abuse and aligning accounting reference periods with a parent is a justifiable reason rather than an abusive one, we would think this should be acceptable. Clearly companies will work with their auditors on this. We will need to wait and see what the Government's detailed implementation plans say about this.

4. **On the Government's proposal to implement the ban on corporate directors, when do you think parliamentary time will allow for this? Should companies start to amend their articles and replace corporate directors with individuals now?**

It would be sensible for companies to start planning to replace corporate directors with natural persons, particularly given this change has been coming since 2015. It is currently unclear when parliamentary time will allow, particularly as the Government has many other pressing priorities at the moment. However, reforming corporate transparency is an important issue for the Government and we would expect at least some of the proposed reforms over the next couple of years.

5. **Will the new verification of identity requirements at Companies House apply to existing directors and companies?**

Yes, the new verification requirements will apply to existing directors and companies, as well as new ones. There will be a transitional period during which existing directors will have to verify their identity and if they do not, they will be subject to 'sanctions'. We don't yet know when or how long the transition period will be or what 'sanctions' will be imposed (the consultation refers to 'compliance action and possible prosecution'). The intention behind the change is to ensure that there is just one 'identity' or account on Companies House for each director. This ensures directors and their activities are more easily trackable by Companies House which can help tackle fraud.

6. **Over the last year or so, people and businesses have had to adapt to new ways of working remotely. Are there risks for companies whose policies and employment contracts have not yet been updated to reference these new ways of working and do they need to update them now?**

Boards should first focus on plans and strategies for how agile working will be implemented across the business going forward. Boards need to consider agility in relation to various aspects of the business, including recruitment and retention (as many employees want more agility in their working lives), business needs, what customers want and how agility can be actually be achieved operationally. Contracts and policies will have to play catch up but it is most important to work out what your business needs in the long term before jumping in to make contractual changes which are time-consuming and difficult to reverse.

7. **Diversity and Inclusion is a significant area. Is your business prepared?**

Diversity within the work force is in sharp focus across many industries and increasingly with regulators. There is focus in particular on the make up of the Board and senior management team so we suggest this is a top priority and something that can drive productivity, inclusion and success.

To download the webinar or view on demand please visit Trowers Vimeo

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