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The Association of Investment Companies

# Changes to Guernsey company law

## AIC Seminar

Tuesday 16 September 2008

# The Companies (Guernsey) Law, 2008 (as amended)

## Overview and Practical Implications for Directors

16 September 2008



Ben Morgan, Partner

# Commencement

- Effective 1 July 2008
- Comparison with 2006 UK Act

## No Change

- Insider dealing
- Market abuse (s41A of the POI Law)
- Misleading statements (s38A of the POI Law)
- UK management and control issues
- Anti-money laundering laws

# General Application

## Changes

- Certificates to Commence Business now abolished
- Every company other than a listed, open ended or closed ended investment company, or a supervised company must have a resident agent
- “unlimited objects” unless the memorandum specifically restricts
- amendments to the Memorandum

# Articles of Incorporation

## Changes

- May now have entrenched provisions which must be contained in the Articles on incorporation or inserted by unanimous resolution
- Entrenched provisions may only be amended by unanimous resolution or by court or other authority
- Other changes to articles

## Action Points

- Review Articles to ensure compliance with 2008 Law. Any amendments are made by special resolution
- For existing companies, the 2008 Law does not apply to provisions rendered invalid and unenforceable by it until 1 January 2010
- Other changes to benefit from flexibility of new 2008 provisions

# Issue of Shares

## Changes

- Conversion to stock
- No need to have a preference to redeem
- Multi-class companies – authority in the memorandum or articles or by ordinary resolution
- The authority must specify the limit on the number of shares that can be issued and it may only last for a period of 5 years although it may be renewed or revoked

## Action Points

- Until 1 January 2010 - existing companies - 1994 Law governs the power of directors to issue shares
- Resolution to confer authority or change articles and renewal of authority - a standing item at each AGM

# Certificates of Compliance

## Changes

- Certificates of Compliance for change of name, conversion, amalgamation, migration, annual validation and voluntary striking off
- Signed by any one director
- Fine - £10,000

## Action Points

- Verification procedure for Certificates of Compliance
- Documentation trail – minutes suffice – central record of compliance certificates

# Board Meetings and Accounts

## Changes

- All proceedings at board meetings be “recorded”
- Only minute signed by chairman of the meeting or of the very next meeting - evidence of proceedings
- Director’s Report - reasonable steps to make themselves aware of any relevant audit information and to establish that the company’s auditor is aware of the information
- Report and accounts within 12 months after the end of the relevant financial year

## Action points

- Audit committee or board ensures form of directors’ report - compliant with the Law
- All relevant audit information has been provided

## Resolutions and Meetings

- Proxy may vote on show of hands or poll
- Notice of meeting to contain statement of proxy's rights
- Notices on website or by email
- Amend articles and form of election

# Takeovers, Schemes of Arrangements and Requisitions

- ‘squeeze out’ 10% minority
- UK style schemes of arrangement or reconstruction
- Requisitioning meetings
- Inspection of share register
- Takeover defence plans

## Conclusion and AOB

- Robust compliance procedures and monitoring
- Company secretarial support – key
- New insolvency law in the pipeline



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# The New Solvency Test

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- Why?
- When?
- What is it?
- Issues
- Risks
- Conclusion



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# Why?

- Unified test
- Capital Maintenance Doctrine
- Better solution



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# When?

- Conversions, transfers of ICs
- Amalgamation
- Migrations (in and out)
- Restoration to Register
- Administration Orders

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# When? (part 2)

- Distributions NB includes financial assistance, buy backs, redemptions
- Dividends
- OEICs



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# What is it?

S.527 ... a company satisfies the solvency test if:

- The company is able to pay its debts as they become due.
- The value of the company's assets is greater than the value of its liabilities; and
- [supervised companies].

NB s.303, 304, 309, 321 – definitions of “debts” and “liabilities” – (fixed pref returns)



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# Issues



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Difficult legal questions on:

- Cash flows
- Valuation of both assets and liabilities
- Use of a/c records and financial statements to determine solvency
- Reliance on valuations or opinions
- Change of financial position



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# Issues (part 2)

## Liquidity Test

- Future cash flow forecasts are dependent on assumptions
- Use of accounting ratios



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# Issues (part 3)

## Valuation of assets and liabilities

- S.527(2) ... in determining whether the value of a company's assets is greater than the value of its liabilities
- The directors:
  - Must have regard to:
    - o The most recent accounts of the company; and
    - o All other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and liabilities; and
  - May rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances



# Issues (part 4)

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## Balance Sheet Test

- Contingent assets
- Contingent liabilities



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# Issues (part 5)

Directors need step beyond the financial statements only where:

- solvency is suspect;
- doubt over figures in the financial statements; or
- assets or liabilities not included in the financial statements which should be taken into account.



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# Risks

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## Recovery of distributions:

- From members
- From directors (if its not able to be recovered from members)



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# Conclusion

- Enhances flexibility
- Price to pay for flexibility
- Financial Statements – starting point
- Directors assessment always needed



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# AIC SEMINAR ON GUERNSEY COMPANY LAW DIRECTORS UNDER THE NEW REGIME

A PRESENTATION BY:

IAN M KIRK

16 SEPTEMBER 2008

## SOURCE MATERIAL

- The Companies (Guernsey) Law, 2008
- The Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2008
- The Companies (Transitional Provisions) Regulations, 2008

## A DIRECTOR FOR THE PURPOSES OF THE LAW

- “.... a person occupying the position by whatever name called”
- Includes Alternate Directors
- Shadow Directors  
“a person in accordance with whose directions or instructions the directors are accustomed to act”
- With effect from 1<sup>st</sup> July 2009 Shadow Directors are subject to the disclosure of interest provisions

## THE BOARD

- Meaning of Board
  - Directors representing a quorum acting together
  - If Sole Director, that director
- Company must have one Director
- Directors of ICC, Directors of each ICC

## MANAGEMENT

- “Subject to the Company’s Memorandum and Articles, its business and affairs must be managed by, or under the direction or supervision of the Board”
- This is a statutory duty
- The Board has all the powers necessary for managing, directing and supervising the Company

## APPOINTMENT OF DIRECTORS

- **Eligibility**
  - Precludes Minors and Disqualified Persons
  - Disqualification in other jurisdictions
- **Declaration of Eligibility**
  - Consent to act
  - Declaration of Eligibility
  - Pre 1<sup>st</sup> July directors to comply by 1<sup>st</sup> January 2009
- **Subsequent Appointments**
  - Subject to Memorandum and Articles, by Ordinary Resolution
  - One person per resolution
- **Board Changes**
  - Notice within 14 days to Registrar
  - Statement of Particulars
  - Consent and Declaration

## DIRECTORS – SERVICE ADDRESSES

- Can be used
- Company must have Director's usual residential address
- Registrar must be notified of it
- Disclosure by Company to third parties
- Court applications
- Registrar must disclose to authorities, subject to safeguards

## DUTIES AND LIABILITIES

- No codification of duties
- Evolving common law duties
- If no secretary, directors assume those duties
- Exemption/Indemnification
  - Any provision exempting or indemnifying a director from or against liability for negligence, default, breach of duty or breach of trust void
  - Purchase of D&O cover permitted
  - Third party indemnity permitted but not for:
    - Criminal fines
    - Regulatory penalties
    - Defending criminal proceedings (convicted) or
    - Defending civil proceedings (loser)
  - Pre 1<sup>st</sup> July, exemptions/indemnification unaffected by new law until 1<sup>st</sup> January 2010, then only to the extent necessary to comply with the new law

## RELIEF

- Application for relief by the Court  
“if acted honestly and reasonably and .... ought fairly be excused”
- Applies to officers and auditors

## DISCLOSURE OF INTERESTS

- A Director is interested in a transaction if he/she:
  - is a party to, or may derive a material benefit from it;
  - has a material financial interest in another party to it;
  - is a director, officer, employee or member of another party (other than associated companies) who may derive a material financial benefit;
  - is the parent, child or spouse of another party who may derive a material financial benefit from it; or
  - is otherwise directly or indirectly materially interested in the transaction
- A Director must, ***immediately*** after becoming aware that he/she is interested in a transaction, disclose to the Board:
  - if the monetary value of the interest is quantifiable, the nature and monetary value of that interest; or
  - if not, the nature and extent of that interest

## DISCLOSURE OF INTERESTS (CONT'D)

- A general disclosure that a Director has an interest in a party and is regarded as interested in any future transaction with that party is sufficient
- Do not need to disclose (?)
  - If the transaction or proposed transaction is between the director and the company in the ordinary course (?) and on usual (?) terms and conditions
- Exemption from Disclosure
  - remuneration/benefits;
  - D&O cover; or
  - qualifying third party indemnity

## DISCLOSURE OF INTERESTS (CONT'D)

- Effect – Non-disclosure is a criminal offence by the Director concerned
- Transaction is potentially voidable
- A transaction is voidable by the Company within 3 months of its disclosure to the Board *unless*:
  - the Director disclosed his/her interest prior to it;
  - it was exempt from disclosure;
  - it has been ratified; or
  - the Company received 'fair value'
- **Third Parties**

The avoidance does not affect third parties who acquired

  - in good faith;
  - for valuable consideration; and
  - without knowledge of the failure to disclose

## CONCLUSION

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