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# Legal Update – Corporate Law Changes In The UK

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Once in a while lawmakers like to make a fresh start, consolidate, set out new rules of engagement. While there are regular amendments and adjustments to law, it is not often that a whole area of law gets a complete re-write. In the UK these changes occur in corporate law once in a generation. The Companies Act 2006 was put on the statute book on 7 November 2006, and it constitutes a total re-write of UK corporate law. The last major re-write of UK corporate law, the Companies Act 1985 is being replaced (just as it replaced the Companies Act 1948, which in turn replaced the Companies Act 1929.) The changes are not fully in force yet and are expected to come into effect over the next 18 months or so. This article explores the more major changes so that General Counsel and senior in-house lawyers may be better informed as they are implemented. Some of these changes are moves closer to the U.S. approach.

### Inspection Of The Register Of Members

As part of a longstanding principle about transparency for UK companies, it has been possible for anyone to inspect the register of members of any UK company. However, there has been a good deal of controversy recently about anti-vivisectionists sending literature, sometimes inaccurate, and even issuing threats, to shareholders of large pharmaceutical com-

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panies, such as GlaxoSmithKline. Accordingly, the Companies Act 2006 provides that any person wishing to inspect a company's register of members must provide their name and address and state the purpose for which the information will be used. The company may apply to a Court for relief if it believes that the information will be used for an improper purpose. Disclosure of notifiable holdings (e.g., a 3% holding under certain UK securities laws) is unaffected.

In the U.S., rights under state corporate statutes, such as the Delaware General Corporation Law, to view corporate shareholder lists are reserved to shareholders only and generally must be provided only upon written demand stating a proper purpose therefor, i.e., a purpose reasonably related to such person's interest as a shareholder. The Delaware General Corporation Law does not refine this standard further. No rights are granted to the public generally. However, if the corporation is public, federal securities laws and exchange rules require some modicum of public disclosure.

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**Rights To Information**

In the UK the use of nominee companies to hold interests in shares has become far more widespread in recent years. The previous legislation did not contemplate this and only gave statutory information rights to the legal (record) owner of the shares, being the nominee companies. Accordingly, the beneficial owners were sometimes missing out on important information. Changes in the Companies Act 2006 provide for greater information flow to the beneficial holders of shares. The holder of beneficial interests in traded companies (i.e., companies traded on a regulated market, such as the London Stock Exchange) will have the right to receive information in relation to their interests directly from the issuer. For non-traded issuers, where the company's constitution so allows, nominated beneficiaries will also be given access to key information. In the U.S., beneficial shareholders in corporations, both private and public, are generally entitled to the same information as record holders.

**Directors**

As in the U.S., the general duties of directors have, until now, generally been a matter of common law in the United Kingdom. The law in the UK is being expressed in specific statutory requirements. Under the Companies Act 2006, directors' duties will be codified in one place, including duties to promote the success of the company for the benefit of its members. The Companies Act 2006 sets out matters that directors have to consider, including newly articulated principles such as "the need to foster the company's business relationships with suppliers, customers and others" and having regard to "the impact of the company's operation on the community and the environment." In the U.S., these are stakeholder statutes and are in effect in a number of states, although not in Delaware. We are advising our UK clients that in interpreting and applying the duties as set out in the legislation, previous common law rules and equitable principles must still be taken into account. The GC100, the UK's panel of leading General Counsel, has recently issued best practices as to how to address these changes, which come into force in October 2007.

There have been a number of recent changes in corporate law allowing UK companies to protect their directors from litigation using indemnities. These changes have been particularly important in many cases for non-executive directors, perhaps taking on a part time role, and are in the context of a more litigious culture in the UK. In the U.S., of course, this has long been the case.

The Companies Act 2006 also sets out how directors of UK companies can be brought to account. For the first time, English legislation states how shareholders can bring a claim for negligence, breach of duty, default or breach of trust, by a director. This is important because bringing a delinquent director to account has been greatly hindered in the past by the rule that the directors' duties are owed to the company as a whole and therefore usually only the company (i.e., the board) was able to take action following breach of a director's duty. Previously, shareholders could institute suit only in exceptional circumstances. There has been a good deal of recent controversy in the UK as to whether the codification of this existing possibility is going to open the floodgates to a huge number of actions. Our view is, however, robust on this point. The Court's consent will need to be obtained before bringing a claim and this should limit the number of actions brought by shareholders. The Companies Act 2006 requires the Court to refuse permission to bring a claim if it determines that a person acting to promote the success of the company would not bring the action, if there is bad faith and if the matter or thing has been ratified by a majority of the shareholders. In the U.S., derivative actions have long been the culture.

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**Financial Assistance**

For generations, a big part of the UK corporate law landscape has been the prohibition on financial assistance. This is a rule whereby if a person or a corporation is acquiring shares in a company it is not lawful for the company or its UK subsidiaries to give financial assistance directly or indirectly for the purpose of that acquisition. For example, it has been unlawful in the UK for a target company effectively to support its own acquisition by allowing its assets to be pledged to the acquirer's bank, without appropriate structuring. However, there has long been a procedure whereby financial assistance for private, unlisted targets is permitted, provided that certain shareholder resolutions and auditors certificates are provided. This "whitewash procedure" has meant that financial assistance for the acquisition of private companies was in fact possible, provided that one went to the expense and difficulty of going through the whitewash procedure. The Companies Act 2006 abolishes financial assistance so far as it applies to private companies – a significant change in the UK. In both the U.S. and UK, leverage has long been an essential element in the M&A marketplace. The changes in UK law will remove the need for a procedure which often had to be followed to allow leverage to go ahead.