

Falconbury Successful Company Secretarial Administration

Module 1 **The Role**

Roger Mason

Roger Mason FCCA, FCIS, ACIB is a highly experienced company director and company secretary. His early career was with Midland Bank and the Ford Motor Company before becoming finance director of ITC Entertainment Ltd. He was, for 14 years, company secretary and finance director of a leading British greetings card company. He lectures on finance and business matters and has written a number of well-respected books.

Course helpline:

Tel: +44(0)20 7729 6677

Email: distancelearning@falconbury.co.uk



Falconbury Ltd
10-12 Rivington Street
London EC2A 3DU

Telephone: +44 (0)20 7729 6677

Fax: +44 (0)20 7729 6110

Email: distancelearning@falconbury.co.uk

Web: www.falconbury.co.uk/distancelearning

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seeks only to act as a guide through the maze. Readers should
take legal advice where appropriate, however, this course
should provide the basic knowledge that will at least enable
those seeking further knowledge to ask informed questions.

THE ROLE

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1. THE POSITION OF COMPANY SECRETARY

Introduction

Until 6th April 2008 it was a legal requirement that every company had a company secretary. This is still the case for all public companies but the position is now voluntary for all private companies. Subject to the articles the directors decide whether or not to have a company secretary, and they can change their minds from time to time.

The position of company secretary is deeply ingrained into the British system and into the systems of many other countries too. The company secretary's rights, duties and responsibilities are partly fixed by statute, partly by company articles, partly by accepted good practice and partly by the wishes of the directors. Although the statutory responsibilities cannot be varied, the remainder can and do vary enormously. This is The Company Secretary's Desktop Guide and it is appropriate to commence with a study of different aspects of this fascinating position.

Who may hold the position of company secretary?

Over 99% of all companies are private companies and almost any person may hold the position of company secretary in them. Of course the directors are always well advised to make a suitable choice and may face criticism if they do not do so.

It is different for public companies. Section 273 of CA2006 states that the directors must take all reasonable steps to secure that the secretary (or each joint secretary) is a person who appears to them to have the requisite knowledge and experience and who qualifies on one of the following grounds:

- a) that he has held the office of secretary of a public company for at least three of the five years immediately preceding the appointment
- b) is a barrister, advocate or solicitor called or admitted in any part of the United Kingdom
- c) is a member of one of the following bodies:
 - The Institute of Chartered Accountants in England and Wales
 - The Institute of Chartered Accountants of Scotland
 - The Institute of Chartered Accountants in Ireland
 - The Association of Chartered Certified Accountants
 - The Institute of Chartered Secretaries and Administrators
 - The Chartered Institute of Management Accountants
 - The Chartered Institute of Public Finance and Accountancy
- d) is a person who, by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging those functions.

A body corporate may be company secretary of a private company. A partnership may also be appointed to the position of company secretary of a private company. In England and Wales this has the effect of making all partners joint secretaries, but in Scotland the partnership is appointed in its own right. It is possible for joint secretaries to be appointed. If this is done, the two (or more) secretaries will have equal rights and responsibilities. Details of all of them must be entered in the register and reported to Companies House.

Appointment and removal of the company secretary

In the case of a newly formed company, the person named as secretary in the statement accompanying the memorandum and articles for registration (form 10) becomes, upon registration, the first secretary.

Subject to the articles subsequent appointments, removals, etc are made by a decision of the directors. It is a requirement that these decisions be minuted. The precise procedure may be specified by a company's articles. Table A to the Companies Act 1985 applies unless it is inconsistent with a company's articles. Reg. 99 of Table A states:

'Subject to the provisions of the Act, the secretary shall be appointed by the directors for such term, at such remuneration and upon such conditions as they may think fit, and any secretary so appointed may be removed by them.'

The Registrar of Companies must be notified of an appointment within 14 days and this must be done on form 288a. This form requires the new secretary's signature consenting to the appointment. Resignation or removal of the company secretary must be advised to the Registrar of Companies on form 288b. A change in the secretary's particulars must be advised on form 288c. The forms must be signed by a serving director or company secretary. A newly appointed company secretary can sign form 288A on behalf of the company to notify the Registrar of his own appointment.

The company secretary as an officer of the company

Officers of a company have specially recognised duties and responsibilities, and may incur personal liability and penalties in certain circumstances. This particularly relates to compliance with the provisions of the Companies Act and responsibilities to creditors, liquidators and administrators. Directors and the company secretary are always officers of the company, and others may be in some circumstances. Section 1261 of CA2006 defines officer as follows:

'in relation to a body corporate, includes a director, a manager, a secretary or, where the affairs of the body are managed by its members, a member.'

The company secretary has responsibilities additional to those given by the Companies Act and the details will vary from company to company. It will depend on employment policies, different industries, etc.

The statutory duties of the company secretary

Overall compliance responsibility lies with the directors and they may, if they wish, do the work themselves. However, it is normal for it to be the responsibility of the company secretary and this is usually the wish of the directors.

The company secretary is generally responsible for keeping the statutory records, sending forms, accounts and other documents to the Registrar of Companies, generally complying with the Companies Acts and generally ensuring good (or at least lawful) corporate governance. Beyond this, practice varies enormously from company to company, according to the wishes of the directors and the skills of the secretary. In some companies the secretary almost (but not quite) acts as a director.

There is no requirement that the company secretary must personally do the necessary work associated with the statutory duties. Many contracts, legal documents, etc, require the signature of two directors or one director and the secretary. A company secretary who is also a director may not sign such a document in each capacity; a further director's signature is required. In many companies the secretary does personally do the work associated with the statutory duties, but in all cases he should ensure that the work is satisfactorily done.

The following is an outline summary of the secretary's main duties. Each is considered in detail elsewhere in this course:

- Ensure that the statutory books and registers are kept up to date, in good order and available for inspection.
- Ensure that all necessary forms and other documents for the Registrar of Companies are accurate and submitted on time.
- Ensure safe custody and correct use of the company seal.
- Ensure that the annual return is accurate and submitted on time.
- Attend and take minutes of meetings of members and of the Board. Ensure that such meetings are validly called according to statute and the articles. If necessary, advise the chairman and other directors on correct procedure at such meetings.
- Generally, ensure that the company complies with the provisions of the Companies Act, other legislation and its own memorandum and articles.
- In the case of a quoted company, ensure compliance with Listing Authority regulations.
- Ensure that changes in membership are handled correctly and that proper share certificates are issued. Responsibility for this is sometimes passed to a registrar.
- Ensure that dividends are paid correctly and that proper tax vouchers are issued.
- Ensure that statutory accounts are sent to the members in good time and that a signed copy is sent to the Registrar of Companies in good time.

Other duties of the company secretary

Practices vary enormously and in some cases the secretary is responsible for nothing beyond the statutory duties. This is particularly likely to be the case if the secretary is an outsider. In some companies the secretary may be a vital member of the management team with responsibility for one or more of accounts, treasury, property, IT, personnel, training, general administration and other things. The secretary is frequently responsible for matters calling for regulation, compliance and sound administration. Health and safety is one example.

The company secretary may be a director as well as secretary.

2. DIRECTORS

Introduction

A sound working relationship between the company secretary and the directors is important, and particularly important is the relationship between the company secretary and the chairman. In many companies considerable mutual respect has been earned, to the benefit of the company and of all concerned. The fostering of a good relationship is a key part of the company secretary's role and should not be neglected.

This study of the role of directors consists of the laws and rules governing appointment, removal, rights, conduct, powers and duties, but it also touches on the directors' role and contribution. Compliance duties placed on directors have become, probably with good reason, more onerous, but running the company is their prime purpose. A good company secretary can reduce the burden on directors.

What makes a person a director?

In most companies the position is clear and unambiguous: a director is a person properly and formally appointed in accordance with the provisions of the Act and the articles. However, a person may be held to be a director even though these formalities have not been observed. If this is the case he will be a 'de facto director.' Section 1261 of CA2006 defines a director as follows:

“director”, in relation to a body corporate, includes any person occupying in relation to it the position of a director (by whatever name called) and any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act.’

A person who acts as a director without being properly appointed (and who is not a shadow director) is a de facto director. This can be very important. Directors have responsibilities and may incur penalties, and in some circumstances may be personally liable for the debts of the company. This extends to de facto directors. De facto directors do not have the right to act as directors and the 'real' directors may at any time stop them doing so.

Some companies give senior employees a title that includes the word 'director,' but do so without actually appointing them to the Board. This may be to impress customers or to increase the status of the people concerned. An example is the title Director of Sales which is not normally a Board appointment. By contrast, Sales Director normally is a Board appointment.

The word 'director' in a person's title does not automatically make that person a director in the legal sense. Care should always be taken as it may sometimes have unintended consequences. An outsider may be led into believing that the person concerned is a director in the legal sense and may justifiably believe that he has authority to commit the company. It depends on individual circumstances. The absence of the word 'director' in a person's title does not necessarily mean that he is not a director. Some directors may use words such as 'governor' instead. What matters is the job that they do and the responsibility that they have.

It is possible for a company to be a director of another company and to act through the medium of its own directors. Approximately 2% of directors are companies. Such a director is known as a corporate director.

Shadow directors

The definition of a shadow director is within Section 1261 of CA2006 quoted in full earlier in this section. It is *'any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act'*. A shadow director is the opposite of a de facto director who openly acts as a director. A shadow director, as the name suggests, does not operate openly.

An example of a shadow director may be a majority shareholder who is not a properly appointed director, but who gives repeated instructions to the directors which they accept and follow. He would not be a shadow director if the directors did not follow his instructions.

It is bad practice and dangerous for a company to have a shadow director, bad for the company, bad for the directors and bad for the shadow director himself. A shadow director runs particular risks, including the risk of being personally liable for the debts if there is improper activity resulting in the company becoming insolvent.

Restrictions and qualifications relating to appointment

Company articles may require directors to conform with certain requirements. An example of such a restriction is a requirement that a director hold British nationality. Company secretaries should be particularly aware of three possible restrictions:

Undischarged bankrupt

An undischarged bankrupt may not be a director and neither may a person who is the subject of a bankruptcy restriction order or a bankruptcy restriction undertaking. This is a statutory restriction (Company Directors Disqualification Act 1986) and overrides the articles. However, the court can give permission in exceptional cases.

Age restriction

There is now no statutory maximum age limit. However, a minimum age of 16 has applied since 1st October 2008. It is possible that an age restriction may be imposed by the articles.

Share qualification

Company articles sometimes require a director to hold a minimum of a specified number of shares in the company, although this is less common than was formerly the case.

Appointment of directors

As explained above, a person may be a director without having been properly appointed. If this happens, he will be a de facto director or a shadow director. Company secretaries should be aware that this is most definitely not good practice. There may be dangers for the company, for the officers of the company and for the de facto director or shadow director. This section does not consider these matters and deals exclusively with the correct procedures for appointment. After appointment of the first directors subsequent appointments are in accordance with the provisions of the articles. Table A applies unless it is inconsistent with the articles.

The first directors

The first directors of a company are named in the statement accompanying the memorandum and articles and sent to the Registrar of Companies (form 10). This statement is signed by the named directors and constitutes their consent to act.

Appointment by existing directors

It is common for articles to permit existing directors to fill a casual vacancy, or to appoint additional directors up to any maximum number specified by the articles. This power is given by Reg. 79 of Table A. A casual vacancy may be caused by such things as the death, disqualification or removal of an existing director.

Appointment by members

Directors are appointed according to the provisions of the articles. Apart from the filling of casual vacancies by the directors, it is usual for new directors to be elected by the members. This may be at an Annual General Meeting or at a General Meeting. Election is by an ordinary resolution, but special notice must be given to the company if the proposal is by a member.

Retirement and removal of directors

The first directors

In a public company, subject to the articles, all the first directors retire at the conclusion of the first annual general meeting. They may offer themselves for re-election. This may happen in private companies too, but it is not usual because annual general meetings are not now normally held in private companies. It is now normal in private companies, subject to the articles, for the first directors to serve until they die, resign, are removed or become ineligible.

Rotation

This is governed by the articles but it is common for directors of public companies to retire at annual general meetings. They may offer themselves for re-election. Table A provides for one third of directors to retire at each annual general meeting. Subject to the articles this may also happen in private companies, but most private companies now do not hold annual general meetings. In most cases a provision in the articles of a private company requiring directors to retire by rotation (as in Table A) must be disregarded. This means that directors serve until they die, resign, are removed, become ineligible or are disqualified. In private companies directors only retire by rotation if it is a specific requirement of the articles.

Removal by the other directors

Company articles sometimes contain a provision that a director may be removed by a vote of the directors. This does not apply unless it is permitted by the articles and it should be noted that Table A does not provide for it.

Removal by the members

Company members may, by ordinary resolution in a general meeting, vote to remove any director. This right overrides any provision in the articles and any agreement with the director. A director facing dismissal in this way has certain rights which are detailed later in this section.

Death

This is conclusive and does not need an explanation.

Bankruptcy

An undischarged bankrupt cannot be a director of any company, though in unusual circumstances the court may make an exception. A person ceases to be a director when declared bankrupt, and does not automatically resume the position when the bankruptcy is discharged.

Disqualification by court order

This may happen for a number of reasons. An example is if a director has been a director of a company that continued to trade whilst insolvent. Disqualification is at a judge's discretion and is to protect the public. It is a separate matter from any punishment.

Company secretary's responsibilities on appointment or removal of a director

The responsibility of the company secretary is to take action in three ways:

- The appointment, or resignation or removal, should be properly minuted.
- Details of the change should be entered in the Register of Directors.
- The Registrar of Companies should be notified within 14 days of the change. In the case of an appointment this should be done on form 288a which should be signed by the new director to signify his consent to the appointment. In the case of a resignation or removal, notification should be by form 288b. The Registrar of Companies should also be informed (on form 288c) in the case of a change in notifiable details (change of address for example) of a continuing director.

There are numerous other points that may be considered according to individual circumstances. They include a press release, an announcement to staff, and alteration to bank mandates.

Rights of directors

These include the following:

Access to all information

All directors, including non-executive directors, have full collective responsibility for the running of the company. It follows that all directors have full rights to information. This includes access to the statutory records and to the financial records, but it applies to other information too. Some companies are so big that there may be practical difficulties in achieving this. Nevertheless, all directors have full and equal rights.

Alternate directors

If permitted by the articles, a director may appoint an alternate director to act in his place during his absence. It is sometimes done by directors who spend significant periods abroad or who are otherwise away. The precise procedures depend on the articles. Table A allows a director the right to appoint another director as his alternate, or any person provided that the directors vote to accept the appointment. Details of an alternate director must be supplied to the Registrar of Companies on form 288a.

Remuneration

There is no automatic right for a director to be remunerated for his services as a director. However, such a right may be given by the articles, which may also stipulate whether the amount of such remuneration is to be fixed by the directors or by the members in general meeting. Remuneration for services as a director is a different matter from remuneration as an employee. It is usual for the remuneration of each director to be fixed by the directors as a whole. Executive directors receive salaries, whereas non-executive directors receive fees.

Compensation for loss of office

An executive director has the minimum employment rights available to all employees and may make a claim for wrongful dismissal. He will have such additional rights as may be contained in a service contract (if any) or the articles. A non-executive director will only have the rights contained in a service contract (if any) or the articles.

Indemnity and insurance

Directors owe certain duties to their company. These are civil duties and not a criminal matter. An action may be brought against one or more directors by the company. Directors also have certain duties to third parties. It is not permitted for companies to indemnify directors in respect of an action brought by the company itself. An attempt to do so by contract or the articles will fail.

The Companies (Audit, Investigations and Community Enterprise) Act 2004 permits (but does not require) companies to indemnify directors in respect of actions brought by third parties. This covers both legal costs and the financial consequences of an adverse judgment. However, this does not include criminal penalties, penalties imposed by regulatory bodies such as the Financial Services Authority and the legal costs of an unsuccessful criminal defence or application for relief.

Relief may be granted by the court under section 1157 of CA2006. This is at the discretion of the court and relief may be granted if the court decides that a director has acted honestly, reasonably and ought fairly to be excused. All three requirements must be met. In practice relief is hard to obtain and it is only of very limited value to directors. Relief cannot be granted if a director has been negligent because, by definition, he has not acted reasonably.

Companies may pay directors' costs of defence proceedings as they are incurred, even if the action is brought by the company itself or is a derivative action. The director is still liable to pay damages and to repay his defence costs to the company if his defence is unsuccessful.

Notwithstanding the above, companies may (but do not have to) purchase officers' liability insurance and this can cover an action brought by the company itself.

It was formerly forbidden for a company to indemnify (by its articles or by contract) officers who were not directors. This was in the same way that it was forbidden to indemnify its directors. This prohibition has now been removed and it is now permitted for a company to indemnify its officers who are not directors. Company secretaries are among those who benefit but it is not permitted for a company to indemnify its auditors.

On receipt by the company of a members' resolution to remove a director

The director has the right to receive a copy of the resolution, to have a statement circulated to members and to have a statement read to the meeting or to address the meeting himself. Certain restrictions relating to libel, etc, may in some circumstances modify these rights.

Responsibilities of directors

Directors are required to act within their powers, as laid down by the Companies Acts and by the memorandum and articles of the company. Certain matters are the prerogative of the members in general meeting and company articles may vary these requirements. However, the Act stipulates that certain matters are always the prerogative of members. Directors exceed their authority at their peril.

Directors are required to act in the best interests of the company as a whole. They must not give undue preference to the interests of one section of the members over the interests of other sections. This may cause practical difficulties because directors are sometimes appointed to look after the interests of a major shareholder, employees or some other such section. Nevertheless, they must act in the best interests of the company as a whole.

Directors owe duties firstly to their own company rather than to other group companies. Normally there is no conflict and working in the interests of another group company is in the interests of their own company. However, this is not always the case and if there is a conflict, their first duty is to their own company.

Directors appoint the company secretary and usually delegate a great deal of authority to him. This particularly relates to their statutory obligations and they should therefore take care to appoint a suitably competent person.

Directors have primary responsibility for the management of the company and for seeing that statutory obligations are fulfilled. The number of statutory obligations are vast and cover for example health and

safety, data protection, compliance, etc. They are responsible for good corporate governance, or at the very least lawful corporate governance. An increasing criticism is that the requirements of directors are becoming so numerous and onerous, that they interfere with the general running of the company for the benefit of the members. In most cases, maximising profits is a primary aim and this is the responsibility of the directors.

CA2006 codified directors' general duties. The subject is too big to be examined in detail but there are seven of them as follows:

- Duty to act within powers
- Duty to promote the success of the company
- Duty to exercise independent judgment
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid conflicts of interest
- Duty not to accept benefits from third parties
- Duty to declare interest in proposed transaction or arrangement

The first four of these took effect on 1st October 2007. The others took effect on 1st October 2008.

Rights and duties concerning members' meetings

The directors of a public company must call annual general meetings within prescribed time limits, and the directors of all companies may call general meetings at such times and for such purposes as they see fit. There are certain circumstances in which they must call a general meeting.

All directors must be sent notices relating to forthcoming meetings of members. All directors may attend and speak at meetings of members, even if they are not members. However, they may not vote unless they are members.

Subject to the articles, the chairman of the board will act as chairman of a members' meeting if he is present and willing to act. If this is not the case, the role will be filled by any director who is present and willing to act. Table A provides for this and also provides for the chairman to have a casting vote.

The directors of a private company must submit a written resolution to a vote of the members if properly required to do so by the members.

Substantial property transactions

This does not just mean freehold or leasehold property. It means any asset other than cash and the restrictions apply to a director or a 'connected person'. A company may not make an arrangement with a director to transfer a non-cash asset to or from him except where one of the following applies:

- The members vote to give permission.
- The true value of the asset is less than £5,000.

- The true value of the asset is less than £100,000 or ten per cent of the company's net assets, whichever is the lower.

There are a few other exceptions in special circumstances. The rules apply even if the company is paying or receiving fair value for the asset.

Example 1

A company sells some old office furniture to a director for £300. Its real value is £500.

This is permitted.

Example 2

A company with net assets of £120,000 sells a car to a director for £12,500. This figure is an independent valuation.

This is not permitted unless the members vote to allow it.

Miscellaneous matters

Number of directors

A public company must have at least two directors. If the articles permit (which Table A does not), a private company may have just one director and that one director may be the sole member.

Company stationery

It is not a requirement that company stationery show the names or nationalities of directors. However, if directors' names or nationalities are shown, the list must be complete, accurate and up to date. In passing, it should be noted that company notepaper, orders, e-mails, faxes and websites must show the exact registered name of the company, the registered number and place of registration, and the address of the registered office.

Loans to directors

Members may vote to permit loans or quasi-loans of any amount to a director or a person connected to a director. The directors may agree a loan or quasi-loan up to £10,000, or up to £50,000 to meet expenditure on company business. They may agree up to £15,000 for small credit transactions. There are no limits if the company's business is to lend money.

Inspection of directors' service contracts

A copy of a director's service contract must be kept at the registered office or at the place where the Register of Members is kept. There are certain exceptions and qualifications to this rule. A director's service contract must be available for inspection by members within normal business hours and without charge.

3. THE STATUTORY REGISTERS AND THE COMPANY SEAL

Introduction

The keeping of the statutory registers is a core part of the company secretary's job, and in most cases it is the company secretary who does it. It is important because members, directors, the Government, HMRC and the world at large are entitled to accurate, up-to-date information. The number and content of the registers is specified by law.

Various firms of law stationers produce excellent packs that contain all the registers, correctly headed, together with minute books, blank share certificates, etc. These are recommended for many companies, but may not be adequate for larger companies having many entries to record. Company secretarial software may be more appropriate in these cases, and this is almost universally used in large companies.

The information in the registers is used in compiling the annual return and for various other forms filed with the Registrar of Companies at Companies House. Members and many others have a legitimate use for it; lenders and credit reference agencies being examples.

Company secretaries should take the registers very seriously, because mistakes and out of date information can reflect badly on the company and on themselves. Of course, the flow of information is not entirely within their control: directors and others may not always share their enthusiasm. The company secretary can only enter what he knows, and in some cases he can only enter information that has been notified by the correct person in the correct way. He must not act on reputed information obtained from another source. The company secretary should use his persuasive skills to encourage others to provide all the information promptly. In many cases it may be necessary for him to give directors a list of their obligations and what is required.

This section concludes with a study of the company seal and, now that its use is optional, procedures for operating without it. This is almost always in the control of the company secretary and is conveniently studied with the statutory registers.

Location, inspection and copies of registers

The rules relating to the various registers are as follows:

Register of members

All companies must keep this register and it must be kept at the registered office, unless the Registrar of Companies has been informed on form 353 that it is kept at the place where it is made up and the address given. A company registered in England and Wales must keep its register in England and Wales. A company registered in Scotland must keep its register in Scotland.

The register may be inspected by both members and non-members. Inspection must be allowed (except when closed as permitted) for a minimum of two hours on each business day. Copies or extracts may be required by both members and non-members, and these must be provided within ten days.

Register of directors and secretary

All companies must keep this register and it must be kept at the registered office and it may be inspected by both members and non-members. Inspection must be allowed for a minimum of two hours on each business day. There is no obligation on the company to provide copies or extracts. A person inspecting the register may make copies himself.

Register of charges

All companies must keep this register and it must be kept at the registered office. It may be inspected by both members and non-members, and inspection must be allowed for a minimum of two hours on each business day. Copies or extracts may be required by both members and non-members and these must be provided within ten days.

Register of interests disclosed

This register must only be kept by companies quoted on the London Stock Exchange, or admitted to trading on the AIM or PLUS markets. It must be kept at the registered office or at a place specified by regulations.

Register of debenture holders

The register may be kept at the registered office, or elsewhere if the Registrar of Companies has been informed on form 190. A company registered in England and Wales must keep its register in England and Wales. A company registered in Scotland must keep its register in Scotland. The register may be inspected by any person. Inspection must be allowed (except when closed as permitted) for a minimum of two hours on each business day. Copies or extracts may be required by any person. There is no specified time limit in which these must be provided.

It is not compulsory that a register of debenture holders be kept by any company.

Fees permitted for inspection and copies

Members may inspect any of the registers free of charge. Modest fees may, in some cases, be charged to non-members. In the case of the register of members and the register of interests disclosed it is £3.50 per hour or part thereof.

The following charges may be made for supplying copies of the register of members or the register of interests disclosed.

- Up to 5 entries £5.00
- Up to next 95 entries £30.00
- Up to next 900 entries £30.00
- Up to next 99,000 entries £30.00
- The rest of the entries on the register £30.00

The reasonable cost of sending out the copies may also be charged.

Special provisions relating to an inspection of the register of members and the supply of copies

These provisions take effect from the date that the first annual return made up to a date after 1st October 2007 is registered at Companies House.

A person or organisation requesting information is required to provide:

- his name and address;
- in the case of an organisation, the name and address of an individual;
- the purpose for which the information is to be used;
- whether the information will be disclosed to any other person or organisation and, if so, their name and address and the purpose for which they will use it.

A company must within five working days of receipt of a requirement comply with the requirement, or refer it to the court for a decision. The court will then decide if the request is for a proper purpose and direct whether or not the company must comply with it. The court may order that the company's costs be paid by the person or organisation that made the request to the company. CA2006 does not give guidance to the court about what is and is not a proper purpose.

There are several offences that can be committed in these matters, by a person making a request not supplying proper information and by a company not complying with its obligations.

Register of Members

This is a key register and is compulsory for every company. It must contain:

- *The names and addresses of all members*

These details are as supplied by the members and it is important that the register be written up exactly in this way. The order of the names, if it is a joint holding, may for example affect voting rights and the rights to receive dividends.

- *The date on which each member was first registered as a member.*
- *The date on which each former member ceased to be a member.*
- *Details of each holding*

This should specify the class of share, the individual numbers of the shares if applicable, the amount paid up on each share if applicable, and the number of shares held.

The register must contain the above details for each member for a period of 10 years from when he ceased to be a member.

In the now very unusual event of shares having been converted into stock, the amount of stock held by each member must be shown in the register.

If the company becomes a sole-member company, the register must contain a statement to this effect and the date that it occurred. If such a company acquires a second member, the register must contain a statement that it is no longer a sole-member company and the date that the change occurred.

If there are more than 50 members and the names are not kept in alphabetical order, a separate index must be kept.

No notice of any trust should be marked on the register of a company registered in England and Wales. The position is different for companies registered in Scotland, and for these companies notices served on the company must be recorded in the register.

Register of Directors and Secretary

The register must contain the following information in respect of directors, including alternate directors, de facto directors and shadow directors, though in respect of the last two the requirement is very likely to be ignored in practice.

1. Present full surname and forenames
2. Any former surname and forenames

It is not necessary to show former names if they have not been used for at least 20 years, or were only used before attainment of the age of 18. Nor is it necessary to show the maiden surname or former married surname of a married woman, or the former name of a peer (if different from his title).

3. Nationality
4. Residential address

The address given should be the real residential address. It should not be a company office unless the person concerned really does reside at company premises. In very limited circumstances a director or company secretary may apply for a Confidentiality Order and details of these are given later in this section.

5. Business occupation

The terms director or company director are often used but this is not correct. It should be the qualification, skill or occupation. For example, the finance director may be described as an accountant. If a person is a director of several companies and has no particular qualification or other occupation, he may be described as 'director of companies'.

6. Other directorships

This must list the exact names of companies of which the director is currently a director, or of which he has been a director within the last 5 years. It is rather like penalty points on a driving licence; they drop off after a period. Directorships of other companies within the same group need not be included. Also, dormant companies need not be included. Only companies registered in Great Britain need be included.

7. Date of birth

This is always required.

8. Date of appointment

This is unambiguous and is embarrassing in the case of shadow directors, who of course have not been formally appointed.

9. Date of vacation of office

In respect of the secretary it is only necessary to include the present full surname and forenames, any other surname and forenames, and his residential address.

Register of Interests Disclosed

Until 20th January 2007 it was a requirement that the acquisition of shares in a public company resulting in an interest of 3 per cent or more to be notified to the company. The same applied to further acquisitions and sales and also when the holding dropped below 3 per cent. Public companies were required to maintain a register to record this information.

CA2006 instead requires a register to be maintained to record information received in response to notices issued by the company requiring notification of certain information. This is as per the requirements of the FSA Transparency Rules.

The new rules retain the disclosure thresholds used in the CA1985 requirements – 3 per cent (or 10 per cent for certain non-material interests such as those of investment managers or unit trusts) with disclosure of 1 per cent increments. However, additionally ‘non-material’ interests must also be disclosed at the 5 per cent level, but not at intervening points up to 10 per cent.

The above is a very simplified summary and there is much more detail. The requirements for the register only apply to companies quoted on the London Stock Exchange or admitted to trading on the AIM or PLUS markets.

Register of Charges

Every company must maintain a Register of Charges, even if, as is often the case, it contains no entries. Details of each charge entered in the register must contain:

- The amount of the charge. The amount may be limitless as in ‘all moneys owed from time to time.’
- A description of the property charged.
- The names of the parties entitled to the charge.

Every company must keep copies of the instruments creating the charges.

Register of Debenture Holders

The keeping of a Register of Debenture holders is not a requirement under the Act, nor are the precise contents stipulated if one is kept. If only one debenture is issued, full details may be entered in the Register of Charges and no separate register is necessary. If, however, several debentures are issued, a separate register is desirable.

Confidentiality Orders

A director, company secretary or representative of an overseas company may apply to the Secretary of State for a Confidentiality Order. Such an application must be on form 723B and be based on a real and justified fear of violence to or intimidation of himself or of a person living at his residential address. Confidentiality Orders are not granted lightly and one will be issued only following receipt of a persuasive case and after investigation.

If a Confidentiality Order has been issued, the director, company secretary or representative of an overseas company may supply a service address to the company. This address must be entered in the register and be made available to the public in this way. It must also be supplied to Companies House and thus made available to the public. The real residential address must be supplied to the company and to Companies House but will not be made available to the public or to members of the company. It will, though, be available to the police and to certain regulatory authorities.

The company seal and execution of documents

It is no longer a requirement that a company has a company seal. However, a company may continue to have and use a company seal, and many companies do so. If a company seal is used, its design must incorporate the name of the company.

The company seal (when retained) is used on deeds, and also on documents that are not deeds, such as share certificates. The use of the seal is governed by the articles, but it is normal that its use be attested by two directors or by one director and the secretary. However, subject to the articles, this may be delegated. It may be done, for example, when a share certificate is sealed by a registrar.

It is important that accurate and detailed records are kept of the use of the company seal, and this is normally done by the company secretary. If there are not many sealings it is normal for a Board minute to list and approve the sealings since the last Board Meeting. If there are a lot of sealings, it is usual for a separate Seal Register to be kept. Board minutes will then approve blocks of entries in this register. The company seal is important and the company secretary should take care with its use and safe custody.

Companies may operate either without having a company seal, or by having a seal and electing not to use it. A document signed by two directors, by one director and the secretary, or by one director having his signature attested, in a form that clearly states that it is executed by the company, will have the same effect as if it had been sealed. A document intended to be a deed, and whose wording makes that fact clear, will upon delivery have the effect of a deed. An example of such wording is:

Executed by _____

Ltd as a deed and signed by:

_____ *Director*

_____ *Company Secretary*

Records of documents executed without a company seal, but which would have been sealed had a seal been in use, should be kept by the company secretary in the same way as the records of sealings. Similarly, Board approval to such documents should be given in the same way as Board approval is given to sealings.

Such documents must be signed by two directors, by one director and the company secretary or by one director in the presence of a witness who attests the signature. The task cannot be delegated.

Forthcoming changes

1. From 1st October 2009 married women who are directors or company secretaries will be required to disclose their maiden surname and any previous married surnames. However, all directors and secretaries will only be required to disclose former names used in a business capacity. These matters relate to the register of directors and secretary and also disclosure to Companies House.
2. From 1st October 2009 company secretaries will be required to supply just a service address, which may or may not be their real residential address. A service address may be the company's registered office. Company secretaries may not apply for a non-disclosure certificate (unless they are also a director) and can achieve privacy without one.

All directors may choose to supply their real residential addresses for the register and for Companies House. However, they may choose to apply for a non-disclosure certificate. They will not have to give a reason. A non-disclosure certificate will be routinely issued and it will be for the director personally. It may be used in all companies in which he holds office.

A director with a non-disclosure certificate must supply his real residential address to the company and to Companies House, but it will be kept confidential. A service address must also be supplied to the company and to Companies House, and this will be available to the public. The service address may be any address with which the director is associated. Unlike the present rules for confidentiality orders the service address may be a company office, including the registered office.

Features of the new arrangements will include the following:

- Directors must put a service address on the public record (which may or may not be their real residential address).
- Directors must put on the public record the country or state (or part of the United Kingdom) in which they are ordinarily resident.
- The registrar will be required to disclose the real residential addresses to specified authorities and in response to a court order.
- The registrar will be required to disclose real residential addresses to licensed credit reference agencies.
- Directors particularly at risk will be able to apply for extra protection. The number of successful applicants is likely to be small, probably approximately corresponding to the number currently able to have a confidentiality order. Credit reference agencies will not have access to the real addresses of these directors, and Companies House will remove their addresses from the public record back to 1st January 2003.

Confidentiality orders in existence on 1st October 2009 will continue until the end of their five year term.

4. FREQUENTLY ASKED QUESTIONS

Company Secretary: The position and the role

Is it compulsory for a company to have a company secretary?

It is compulsory for all public companies, but since 6th April 2008 the position has been voluntary in all private companies. This includes very large private companies and private companies that are subsidiaries of public companies. The articles may require that a company does or does not have a company secretary, but otherwise the directors decide and they can change their minds from time to time.

Is it possible to have a truly one-person company?

It is not possible in the case of a public company, but it is possible in the case of a private company. One person may be the sole member and (if the articles allow it) the same person may be the sole director, with no company secretary and (if it is a small company) no audit.

Is that a good idea?

Her Majesty's Government thinks that it is. Many people disagree. You are entitled to your own opinion.

Who chooses the company secretary?

The first secretary is chosen by the subscribers to the memorandum and is named on form 10, which is submitted to the Registrar of Companies with the application to form the company. Form 10 contains the notifiable details of the secretary and must be signed by him to show that he has consented to act. The first secretary automatically assumes the office as soon as the company is incorporated. Subsequent appointments are made by the directors in accordance with the articles. Reg. 99 of Table A states:

'Subject to the provisions of the Act, the secretary shall be appointed by the directors for such term, at such remuneration and upon such conditions as they may think fit; and any secretary so appointed may be removed by them.'

Who can be the secretary of a public company?

CA2006 Section 273 states:

'It is the duty of the directors of a public company to take all reasonable steps to secure that the secretary (or each joint secretary) of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company.'

This duty only relates to public companies and could lead to criticism of directors if an unsuitable appointment is made. In addition, the secretary must be:

- a) a barrister, advocate or solicitor called or admitted in any part of the United Kingdom or
- b) a member of one of the following bodies:
 - i) The Institute of Chartered Accountants in England and Wales.
 - ii) The Institute of Chartered Accountants of Scotland.

- iii) The Association of Chartered Certified Accountants.
- iv) The Institute of Chartered Accountants in Ireland.
- v) The Institute of Chartered Secretaries and Administrators.
- vi) The Chartered Institute of Management Accountants.
- vii) The Chartered Institute of Public Finance and Accountancy.

There are exceptions to these requirements and these are explained in the answer to the next question.

Are there any exceptions to the requirement for the secretary of a public company to be a member of one of the bodies specified in the answer to the last question?

A person may also hold the position if for at least 3 of the 5 years prior to the appointment he held the office of secretary of a public company.

In addition, the Act states that the directors may appoint:

‘a person who by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging those functions.’

This last point might seem to suggest that in practice the directors can appoint almost anyone, but there is the overriding requirement to take reasonable steps spelled out in the answer to the last question. In practice the directors of public companies almost invariably do make suitable appointments.

Who can be the secretary of a private company?

The choice of company secretary is made by the directors. The articles may impose restrictions but otherwise they have a free choice. The following points are relevant:

- The company secretary may be a director.
- The company secretary may be an employee.
- The company secretary may be an outside professional, such as an accountant, solicitor or chartered secretary in practice.
- The company secretary can be another company.
- The company secretary can be a partnership. In England and Wales this has the legal effect of making all the partners joint secretaries. In Scotland it does not have this effect and the partnership stands in its own right.
- There are no age restrictions.

How has the office of company secretary developed over the years?

In Victorian times a company secretary had little ability to act independently of the directors and the position conferred relatively low status. A number of cases confirmed this and on one occasion a judge made the unfortunate observation that the company secretary was a ‘mere clerk’. It was generally the case that the company secretary could not bind the company except on the authority of the directors.

This unsatisfactory position (from the point of view of company secretaries) gradually changed, partly due to accepted practice and partly due to developing legal decisions. In particular, the 1971 case *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* established that the secretary is the chief