

**DISCLOSURE OF LOANS TO
DIRECTORS IN COMPANY
ACCOUNTS**

Consultation

5 AUGUST 2009

URN 09/1139

INTRODUCTION

1. This consultation concerns section 413 of the Companies Act 2006 (the 2006 Act) which deals with disclosures in the notes to company accounts of advances, credits and guarantees for the benefit of directors. Section 413 (the text of which is set out in the Appendix 1 to this document) replaced section 232 of the Companies Act 1985 for financial years beginning on or after 6 April 2008.
2. The consultation addresses two related issues:
 - the particular position in respect of the directors of banking companies and the holding companies of credit institutions under section 413(8);
 - the general position relating to directors of other companies.
3. The consultation was issued by Corporate Law and Governance Directorate, BIS on 5 August 2009 and is relevant to company law experts, accounting experts, and preparers and users of accounts.

HOW TO RESPOND

4. Respond by: 23 October 2009.
5. Enquiries and responses to:

Rufus Rottenberg,
Corporate Law and Governance
Department for Business, Innovation and Skills
Bay 560, 1 Victoria Street, London SW1H 0ET.
Tel: 020 7215 0163.
Email: companiesact2006@bis.gsi.gov.uk
6. This consultation is being publicised to Company Law stakeholders and published on the Companies Act 2006 section of the BIS website.
7. When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

CONFIDENTIALITY & DATA PROTECTION

8. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

9. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

ADDITIONAL COPIES

10. You may make copies of this document without seeking permission.
Further printed copies of the consultation document can be obtained from:

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11. An electronic version can be found through on the BIS website
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<http://www.berr.gov.uk/consultations/index.html>

12. Other versions of the document in Braille, other languages or audio-cassette are available on request.

HELP WITH QUERIES

13. Questions about the policy issues raised in the document can be addressed to:

Name: Rufus Rottenberg
Team: Corporate Law and Governance
Department for Business, Innovation and Skills
Postal address: Bay 560, 1 Victoria Street, London SW1H 0ET
Tel: 020 7215 0163
Email: companiesact2006@bis.gsi.gov.uk

14. If you have comments or complaints about the way this consultation has been conducted, these should be sent to:

Tunde Idowu, Consultation Co-ordinator
Department of Business, Innovation and Skills
Better Regulation Team
1 Victoria Street
London SW1H 0ET
E-mail: Babatunde.Idowu@BIS.gsi.gov.uk
Tel: 020 7215 0412
Fax: 020 7215 0235

15. A copy of the Code of Practice on Consultation is in Appendix 2

BACKGROUND

Disclosure of loans to directors of banking companies

16. The Government consulted on an amendment to section 413(8) towards the end of 2008 in its consultation on the draft Companies Act 2006 (Accounts, Reports and Audit) Regulations 2009. No responses to that consultation commented on the proposed change to that subsection, which was to replace the words “(3)(a) and (4)(b)” with the words “(5)(a) and (c)”, but the Government decided to consider the issue of the note disclosures about directors’ loans more widely. As a result, the Regulations (which have now come into force¹) do not contain any amendment of section 413.
17. The intention of the 2006 Act was to continue to exercise the option available to Member States in article 40(7) of the Bank Accounts Directive² to require banks to disclose only aggregate figures for such advances, credits and guarantees. That was the position under the Companies Act 1985. However it has been pointed out to the Department that the effect of section 413(8) of the 2006 Act as enacted would seem to be to require the information for each director, and not an aggregate figure. As with all companies, there is no requirement for the director to be named. The Government has received representations from banking stakeholders that the law as currently drafted is unclear and may result in banks making many pages of additional disclosure of such matters as individual credit card transactions for each director.
18. Under section 343 of the Companies Act 1985, banking companies and the holding companies of credit institutions were required to maintain a register of loans, quasi-loans and other dealings in favour of directors if those transactions were not disclosed in the company’s accounts, and make a statement of the transactions available to the members of the company. Section 343 of the 1985 Act was repealed with effect from 6 April 2007.

Disclosure of loans to other directors

19. In considering what amendments might be made to section 413(8), the Government is taking the opportunity to seek views on the wider issue of the disclosure of loans etc. to all directors, not only those made to directors of banking companies and of the holding companies of credit institutions. Depending on the outcome of this consultation, amendments may be made to other aspects of section 413.
20. As was explained when the 2006 Act was enacted the disclosure regime under section 413 follows much more closely Article 43(1)(13) of the 4th (78/660/EEC) Company Law Directive and Article 34(13) of the 7th (83/349/EEC) Company Law Directive (see Appendix). The Government now wishes to look again at whether the 2006 Act regime provides

¹ S.I. 2009/413.

² Council Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions.

sufficient information to company members and to other users of the accounts, or whether it should go further than required by the Directives by imposing additional disclosure requirements.

21. Particular issues are that:

- 1) under section 413 there is no requirement to disclose in the notes to the annual accounts, or anywhere else, the names of individual directors who receive loans from their companies; there is also no requirement to disclose loans to, or guarantees for the benefit of, persons connected with those directors;
- 2) regulations made under the 2006 Act (the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (S.I. 2008/410) have imposed a new requirement for large companies (including banking and insurance companies) preparing Companies Act accounts to give particulars of transactions entered into with related parties. This corresponds to the obligation on large companies which prepare accounts using EU adopted international accounting standards, including IAS 24 (related parties);
- 3) the 2006 Act breaks the link, which existed in the Companies Act 1985, between the restrictions on a company's power to make loans etc to directors and persons connected with them and the disclosure requirements. As a result, a company may not have to disclose details of a loan which it needed member authorisation to make (and will in any case not need to disclose the name of the director when reporting loans in the notes to the accounts). The breaking of the link also means that different definitions are used in respect of authorisation and disclosure. Section 197 of the 2006 Act requires loans to directors, and related guarantees or security, to be approved by members. In the case of a public company, or a private company associated with a public company, member approval is required for loans, quasi-loans, credit transactions and related guarantees or security made by the company for a director or a director's connected persons.

There are however exemptions from these requirements for prior member authorisation. In particular, there are exceptions for:

- expenditure on company business (section 204);
- minor and business transactions (section 207);
- loans etc made by a "money-lending company" (defined as one whose ordinary business includes the making of loans) provided these loans are entered into in the ordinary course of business, and the value is not greater, and its terms not more favourable, than it is reasonable to expect the company would have offered to a person of the same financial standing but unconnected with the company (section 209).

PROPOSALS FOR CONSULTATION

Possible options for amending section 413 are as follows-

22. Option 1: amend only section 413(8), and thus return to the disclosure by way of note to the accounts similar to that which existed under the Companies Act 1985 whereby banks were required to disclose the total amount of loans, the total amount of guarantees and total amount of credits to their directors, even if made on normal commercial terms. This could be achieved by replacing the words “(3)(a) and (4)(b)” with the words “(5)(a) and (c)”. There would be no breakdown of this figure for individual directors, nor would they be named. This could be achieved separately from and in advance of any additional reform (see Options 2 and 3 below) in order to provide a short-term solution to the current unclear state of the law.
23. Option 2: repeal section 413(8). This would require banks to publish in their accounts the same level of detail of advances, credits and guarantees as specified for non-banking companies in section 413.
24. Option 3: Require more disclosure by all companies, perhaps more closely aligned to the requirement of sections 197-214 of the 2006 Act, which set out the requirements for the approval by members of loans, quasi-loans and credit transactions with directors. This might involve for example, aligning the terms used, extending the disclosure to persons connected with directors, and to loans made to the directors of any group company. Other examples of additional disclosures that might be required are, for each director, the balances of advances, credits and guarantees at the beginning and end of the financial year and the maximum balance of each during the year.
25. Companies would need a longer time scale than under Option 1 if Option 2 or 3 were adopted in order to make necessary adaptations to their record-keeping systems in order to capture any additional information that might be required.

QUESTIONS

- 1) Do you agree that the Government should amend section 413(8), as set out in Option 1, in time for the year ended 31 December 2009 annual accounts? The Government could then consider more fundamental reform of section 413 on a longer time scale.
- 2) What are the costs and benefits of each of the options?
- 3) Which option do you prefer and why?

If the Government chose to look at further amendments to section 413 (Option 3)

- 4) Should the directors in receipt of loans etc. be named in the disclosure?
- 5) If they should be named, should this be only if the transaction exceeds a certain limit?
- 6) Should additional disclosure be required only for certain types of company, such as banks, large companies or traded companies?
- 7) Should a director's connected persons be caught by these provisions? Section 200 (Loans or quasi-loans to persons connected with directors: requirement of members' approval), and section 201 (Credit transactions: requirement of members' approval) apply to connected persons if the company is a public company or a company associated with a public company.
- 8) Is it necessary to add further disclosures under section 413 particularly in the light of the additional requirements of the Companies Act, accounting standards and the Listing Rules concerning disclosure of related party transactions?
- 9) Do you have alternative proposals?

WHAT HAPPENS NEXT?

26. The consultation period will end on 23 October. We will publish a response to the consultation, and, depending on the decisions reached in the light of the consultation will publish draft Regulations effecting any fundamental change to section 423 (i.e. going beyond Option 1) for comment. The coming into force date of any resulting Regulations would depend on the extent of the changes from current requirements and the need for the Government to allow companies a reasonable length of time to put new systems into place to gather additional information.

APPENDIX 1

CURRENT TEXT OF SECTION S413 COMPANIES ACT 2006

s413 Information about directors' benefits: advances, credit and guarantees

(1) In the case of a company that does not prepare group accounts, details of—

- (a) advances and credits granted by the company to its directors, and
- (b) guarantees of any kind entered into by the company on behalf of its directors,

must be shown in the notes to its individual accounts.

(2) In the case of a parent company that prepares group accounts, details of—

- (a) advances and credits granted to the directors of the parent company, by that company or by any of its subsidiary undertakings, and
- (b) guarantees of any kind entered into on behalf of the directors of the parent company, by that company or by any of its subsidiary undertakings,

must be shown in the notes to the group accounts.

(3) The details required of an advance or credit are—

- (a) its amount,
- (b) an indication of the interest rate,
- (c) its main conditions, and
- (d) any amounts repaid.

(4) The details required of a guarantee are—

- (a) its main terms,
- (b) the amount of the maximum liability that may be incurred by the company (or its subsidiary), and
- (c) any amount paid and any liability incurred by the company (or its subsidiary) for the purpose of fulfilling the guarantee (including any loss incurred by reason of enforcement of the guarantee).

(5) There must also be stated in the notes to the accounts the totals—

- (a) of amounts stated under subsection (3)(a),
- (b) of amounts stated under subsection (3)(d),
- (c) of amounts stated under subsection (4)(b), and
- (d) of amounts stated under subsection (4)(c).

(6) References in this section to the directors of a company are to the persons who were a director at any time in the financial year to which the accounts relate.

(7) The requirements of this section apply in relation to every advance, credit or guarantee subsisting at any time in the financial year to which the accounts relate—

(a) whenever it was entered into,

(b) whether or not the person concerned was a director of the company in question at the time it was entered into, and

(c) in the case of an advance, credit or guarantee involving a subsidiary undertaking of that company, whether or not that undertaking was such a subsidiary undertaking at the time it was entered into.

(8) Banking companies and the holding companies of credit institutions need only state the details required by subsections (3)(a) and (4)(b).

4TH DIRECTIVE

Article 43

1. In addition to the information required under other provisions of this Directive, the notes on the accounts must set out information in respect of the following matters at least:...

(13) the amount of advances and credits granted to the members of the administrative, managerial and supervisory bodies, with indications of the interest rates, main conditions and any amounts repaid, as well as commitments entered into on their behalf by way of guarantees of any kind, with an indication of the total for each category;

7TH DIRECTIVE

Article 34

In addition to the information required under other provisions of this Directive, [on consolidated accounts] the notes on the accounts must set out information in respect of the following matters at least:...

(13) The amount of advances and credits granted to the members of the administrative, managerial and supervisory bodies of the parent undertaking by that undertaking or by one of its subsidiary undertakings, with indications of the interest rates, main conditions and any amounts repaid, as well as commitments entered into on their behalf by way of guarantee of any kind with an indication of the total for each category. A Member State may require that advances and credits granted by undertakings linked as described in Article 32 or 33 shall also be included with the information specified in the first sentence.

APPENDIX 2

The Consultation Code of Practice Criteria

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

