

**Farewell to Financial Assistance . . . Almost
James Hutchinson, September 2008**

Companies involved in acquisitions or looking to restructure should celebrate the imminent demise of the prohibition on financial assistance including the whitewash procedure. The Companies Act 1985 prohibits companies from giving financial assistance for the purchase of shares in themselves but this will be repealed by the Companies Act 2006 in relation to private companies, with effect from 1 October 2008.

Financial assistance would frequently arise when a target company gives security (for example a charge or a guarantee) to support loans made to a buyer for the purpose of acquiring the target. A breach of the financial assistance prohibition has serious consequences – the transaction itself is void and unenforceable, any directors involved may be liable for disqualification and those directors could also be liable to a fine or up to two years' imprisonment or both.

Private companies were permitted to give financial assistance by using the whitewash procedure, but this was a lengthy and expensive process requiring:

- the company to have the capacity and sufficient net assets available to give the assistance;
- the directors to sign a statutory declaration of solvency;
- the financial assistance to be given within eight weeks of the date of the directors' statutory declaration; and
- the shareholders to pass a special resolution in general meeting authorising the financial assistance.

The repeal of the prohibition on financial assistance by private companies should speed up the acquisition process and reduce unnecessary legal and accounting costs. However, the general prohibition set out in the Companies Act 1985 against financial assistance by public companies will continue to apply until 1 October 2009, when similar provisions in the Companies Act 2006 retaining the prohibition, are expected to come into force.

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