

## The Companies Act 2006

On 1<sup>st</sup> October 2009, the final provisions of the Companies Act 2006 came into force, replacing the remaining clauses under the Companies Act 1985. The 2006 Companies Act ('the Act') has brought wholesale changes to company law for all companies registered in the United Kingdom, and all company directors will have to quickly acquaint themselves with the new law to ensure that their companies remain compliant.

The Act was the largest ever to pass through Parliament, with over 1,300 clauses, and reams of supporting legislation. This guidance note cannot hope to cover all of the new provisions, but outlines some of the major changes that companies should be aware of.

### **Companies House forms**

From 1<sup>st</sup> October 2009 all Companies House forms have changed, and except where the form is dated before this date, the old Companies House forms will no longer be accepted. The new forms can be accessed online at the Companies House website – [www.companieshouse.gov.uk/act](http://www.companieshouse.gov.uk/act). The Annual Return form has been changed so that for companies limited by shares they must now give details of the issued share capital they hold, along with the rights held by each class of share.

### **Authorised share capital**

Prior to 1<sup>st</sup> October 2009, all companies limited by shares had a limit to the number of shares that could be issued, known as the Authorised Share Capital (ASC). Shares could not be allotted by the directors to exceed the ASC. Although this could be increased, it required the consent of the shareholders to make the change.

Any companies created after 1<sup>st</sup> October will have no cap on the number of shares, unless they specify otherwise. For existing companies the ASC continues to exist as it did prior to the 1<sup>st</sup> October, but this can be removed (or altered) by an ordinary resolution of the members. Companies may wish to consider removing the cap to give flexibility to the directors to allot shares without the need for the approval of the members (which can be a lengthy process).

### **Memorandum and Articles of Association**

The format of company constitutional documents changed on 1<sup>st</sup> October 2009. For new companies the memorandum of association consists now of a single paragraph with a statement that the subscribers intend to create a company and the initial shareholdings. All other parts of the company constitution will be part of the articles of association, including the company objects (default objects of the company will be unlimited unless otherwise restricted).

For existing companies the objects (currently found in the memorandum) are to be treated as though they are now part of the articles, and accordingly any change to the objects of a company (including a change to make

them unlimited) should be dealt with as a change to the articles. You may wish to consider whether your company might benefit from unlimited objects (if a company does something contrary to its objects then the directors of the company can become personally liable to the company for any losses).

For many existing companies the articles of association will be based on a standard set of articles produced by Companies House, known as 'Table A'. As part of the new Act, the standard articles have been substantially amended to make them much more accessible and comprehensible (not to mention shorter!), and are now termed the 'model articles'. For any companies looking to review their existing documents, they may wish to consider using the model articles as a template.

## **Directors' Duties**

One of the major areas of change under the Act is the consolidation of directors' duties. In addition to the many common law rules, there is now statutory guidance on the obligations incumbent upon directors.

One of the new statutory duties that may be particularly relevant following 1<sup>st</sup> October 2009 is that all directors are obliged to act in accordance with the company constitution. This means that all directors must make themselves aware of the provisions for their company, to ensure that they are acting within their company rules. Directors may wish to consider updating the company articles to the more user-friendly model articles if the existing provisions are unclear or outdated.

Other duties include:-

### 1. Independent Judgment

To exercise independent judgment as a director. There are some concerns as to how this might apply to nominee directors who are appointed by another party (say a shareholder in the company), and who then act on the instructions of that appointer. Arguably this could require a director to go against their appointer's instructions or face potential liability to the company if they were found not to be acting independently to the detriment of the company. The Act provides for the articles to be amended to state otherwise. It is therefore advised that companies amend their articles if they believe that this scenario is relevant.

### 2. Benefits/Corporate Hospitality

Directors are obliged not to accept benefits from third parties where the benefit is conferred due to being a director of the company. It is, at present, unclear how far this provision extends, and whether this spells the end of corporate hospitality as we know it. There is an exception that it will not apply where it does not give rise to a conflict. It is recommended that you speak to a solicitor to ascertain whether you can benefit from the exemption.

3. A duty to promote the success of the company.
4. A duty to exercise reasonable care skill and diligence.
5. A duty to avoid conflicts of interest.
6. A duty to declare an interest in a proposed transaction. These duties are in addition to the duties incumbent on directors at common law and as otherwise found in the Act (such as the duty to file documents at Companies House).

## **Service addresses**

One new change welcomed by company lawyers is the provision for service addresses to be used for directors, in place of their residential addresses. Although it is still necessary for Companies House to be informed of directors' ordinary residential addresses, this will no longer appear on the public record. Previously it had been necessary to seek a special exemption to remove the address from the public register, with a fee of £500, whereas this is now open to all directors.

It must be noted that this does not expunge the historical records, and so it is of limited value where a director's details are already on public documents, but directors may wish to utilise this provision where they take up a new directorship or where they have recently moved address.

## **Miscellaneous amendments**

In addition to the matters above, numerous other changes have been brought into force, including (by no means exhaustively) the following matters:

- The penalties for late filed accounts have increased; they are now £150 if up to one month late; £375 if 1-3 months late, £750 if 3-6 months late and £1,500 if 6 months plus late.
- In addition, these penalties are doubled where the accounts are filed late twice in succession and the first accounting period begins after 6 April 2008.
- A new rule has been introduced to expressly allow provisions to be entrenched in the articles, so that they may only be amended with the consent of all the members;
- Private companies no longer need to have a company secretary (although it must be noted that the jobs previously performed by the secretary still need to be carried out, especially filing obligations);
- Companies can now validly execute documents by having a director sign in the presence of a witness (larger companies may wish to consider removing this method of execution in their articles if they do not want individual directors to have this power);

- Companies must have at least one natural director, and all must be over 16 years of age (for companies existing prior to October 2006, they still have until 1<sup>st</sup> October 2010 to appoint a natural director);
- Service contracts for directors in excess of 2 years now need to be approved by the members of the company (previously this was 5 years);
- The rules on company loans to directors (or connected people) have been revised. This is a complex area and it is recommended that advice is taken prior to a company making a loan to a director. The default position remains that such a loan requires the consent of the members of the company, although there are exceptions to this;
- Written resolutions are now permitted for private companies, allowing decisions to be taken by members without calling a general meeting (certain matters still require a physical meeting, such as forcing a director out of his position);
- Members are given powers in relation to calling meetings and circulating resolutions: 5% of members can require a written resolution to be circulated, and 10% of members can require the company to call a physical general meeting (5% of members can call a meeting if over 1 year since the last meeting);
- Accounts for limited companies must now be filed within 9 months of the end of the financial year (not 10 months as previously);
- The restriction on financial assistance for purchase of a company's shares (the whitewash provisions) have been removed for limited companies; and
- For companies struck off after 1<sup>st</sup> October 2009, it is possible to apply to the Registrar of Companies House to reinstate the company in certain circumstances (previously only the court could reinstate).

We recommend that companies seek legal advice to ensure that they are Companies Act 2006 compliant. The Bishop & Sewell Business Solutions team is happy to deal with any queries that you may have in relation to any of the above matters.

We can also show you the benefits of the new Act and how it can make life easier for you – please contact:

Edward Robinson    Tel: 020 7079 4199  
Alyson Young        Tel: 020 7079 2409