

## Article topic: Business Services

October 2009

### Changes to the Companies Act 2006

From 1 October 2009 there are some new amendments to the Companies Act 2006, which new and existing businesses owners need to be aware of.

The changes are a combination of changes in the law and practical changes to how Companies House will operate. So, if you aren't fully up to speed, here are the main points you need to consider.

#### 1. CHANGES AFFECTING EXISTING COMPANIES – NOT OPTIONAL

##### **Changes to an existing company's constitution**

- 1.1 There are two key changes, which taken together, lead to some practical issues all companies should be aware of:
  - 1.1.1 From 1 October, all the provisions of the memorandum (except for the details of the subscribers) are treated as forming part of the articles.
  - 1.1.2 From 1 October, a company's constitution will consist of its articles plus any resolutions or agreements affecting the company's constitution (unless the resolution has been incorporated into the articles by amendments).
- 1.2 It appears what this means in practice is:
  - 1.2.1 If a company is providing a copy of its constitution to anyone post 1 October, it must provide its articles, its memorandum (because the provisions of the memorandum are treated as forming part of the articles) and any resolutions making further changes to the articles.
  - 1.2.2 Existing companies do not have to prepare a revised version of their articles incorporating the provisions from the memorandum until any amendment is made to the articles after 1 October. At that point, the company must file both a copy of the amending resolution and either:
    - (a) an amended version of the articles incorporating the provisions of the memorandum; or
    - (b) the updated version of the articles with the memorandum annexed at the back.

A change of name will not be treated as an amendment to the articles, triggering the requirement to do one of the above.



1.3 If any further guidance is issued on this it will be forwarded separately.

## Changes to objects

1.4 Section 31(2) of the Act states:

*"Where a company amends its articles so as to add, remove or alter a statement of the company's objects –*

- (a) it must give notice to the registrar*
- (b) on receipt of the notice, the registrar shall register it, and*
- (c) the amendment is not effective until entry of that notice on the register"*

1.5 This is a change from the previous position where a change takes effect on the date of the resolution. From 1 October, the change will only take effect when notice of the change is entered on the Register.

1.6 There are some important practical implications:

- 1.6.1 There is a new Form CC04, which must be filed with the copy of the special resolution
- 1.6.2 If a company does not file notice of change of objects, the change is not effective - potentially critical in say a merger situation where one charity is changing its objects.
- 1.6.3 A week or so after filing, companies would be wise to double check that the notice has been entered on the Register.

## Variation of class rights

1.7 Any company with more than one class of members may be affected by Section 631 of the Act which introduces a minimum default procedure for any change to the rights of a class of members. Under Section 631, in the absence of anything in the articles, in addition to a special resolution of all the members agreeing the variation, the members of that class must separately consent to the variation either by:

- 1.7.1 consent in writing from at least three quarters of the members of the class; or
- 1.7.2 a special resolution passed at a separate general meeting of the members of that class sanctioning the variation

1.8 Insertion of any provision for class rights into the articles is treated as a variation of class rights.

## New Companies House forms

1.9 There have been significant changes to Companies House forms with over 250 new forms:

- 1.9.1 All existing forms will have a new name and format.



- 1.9.2 Many additional forms are being introduced, which impose requirements for companies to file accompanying forms with certain documents where previously it was sufficient just to file the documents on their own. Examples include changes to a company's objects and changes to a company's name.
- 1.10 From 1 October:
- 1.10.1 For forms recording a particular event (e.g. appointment of a director), you should use the form current at the time of the event e.g. if a director was appointed on 28 Sept, you should notify this on a Form 288a even if the form is sent in after 1 October.
- 1.10.2 For forms not linked to a particular event (e.g. change of registered office, change of accounting reference date) you should use the form current at the date of submission.
- 1.11 Fee bearing documents will be rejected if the fee has not been paid.

### **Late filing penalties**

- 1.12 There continues to be automatic late filing penalties for failure to file accounts on time. In addition, the Registrar has been given power to fine companies which fail to file a resolution relating to a change to the articles. The time limit for filing remains 15 days. Before imposing a fine, the Registrar must send a notice to a company it thinks is in default, requiring it to meet its filing obligations; for example, if a company filed a special resolution of changes to the articles, but failed to file a copy of the amended articles, this would alert the Registrar to the fact the company was in default. Companies will be given a 28 day period to comply and if they still fail to file, there is a new automatic civil penalty of £200.

## 2. OPTIONAL CHANGES AFFECTING EXISTING COMPANIES

### **Change of name**

- 2.1 There are a wider range of ways for a company to change its name (Sections 77 to 81 of the Act). In addition to the current procedure of members' special resolution, the articles can provide for alternative methods; for example, by directors' resolution. Existing companies may want to amend their articles to take advantage of this.
- 2.2 It is also possible to pass a resolution to change the company's name conditional on the occurrence of an event. In this case the notice given to the Registrar must specify that the change is conditional and either state if the event has occurred, or give separate notification when the event has occurred.

### **Share companies**

- 2.3 There are new rules applying to share companies registered after 1 October (see 2.3.3 below). Existing share companies can take advantage of some of these relaxations and there are specific transitional provisions setting out how in each case this can be done.

### **Directors' service addresses**

- 2.4 Both directors of existing companies and directors of new companies can designate a 'service address'.



- 2.4.1 For directors of existing companies, the Register will show this as their current address, but all home addresses recorded on forms already filed will continue to appear on the Register. There will be a procedure whereby 'at risk' directors can apply for their residential address to be expunged from documents already on the Register. This is limited to documents filed since January 2003 and there will be a fee per document,
  - 2.4.2 For directors of new companies, the Register will show this as their current address. Directors will have to provide their home address to Companies House, but this will not be disclosed to the public - although it may be disclosed to credit reference agencies and other Government agencies.
- 2.5 Companies will still need to record residential addresses in the company records – in practice, this will mean having two registers, or a split register.

### **Single Alternative Inspection Location (“SAIL”)**

- 2.6 The Companies Act imposes requirements to keep a number of different sets of company records available for inspection at the registered office. As an alternative, a company can designate a Single Alternative Inspection Location, known as “SAIL” Two forms must be filed: Form AD02 to notify a SAIL and Form AD03 to notify that company records will be now be kept at the SAIL.

### **Electronic filing**

- 2.7 There are no immediate changes to what can be filed electronically. So, for example, changes to articles will still have to be filed in hard copy - although ultimately, Companies House plans to allow for everything to be filed electronically over time.
- 2.8 Companies House is, however, strongly encouraging all companies to use electronic filing as much as possible. The advantages include:
- 2.8.1 documents filed electronically get on the Register quicker and in some cases, the fee is reduced;
  - 2.8.2 online filing avoids the need to get signatures for forms; and
  - 2.8.3 filing online avoids the risk of using an outdated version of a form.

Companies can register for online filing if they have not already done so. A security code will be sent by email immediately and an authentication code will be sent by post to the registered office address.

- 2.9 Companies using electronic filing can sign up to a new Companies House Protected Online Filing Service (“PROOF”) which acts as protection against rogue paper filing; for example, a football fan filing a Form 288a to say he/she has been appointed a director of Chelsea Football Club. Once a company has subscribed to PROOF, Companies House will only accept certain information electronically.

### **Incorrectly filed documents**

- 2.10 The Registrar now also has the power to remove wrongly filed documents, such as confidential board minutes filed along with a certificate of passing a resolution. It is not clear yet whether there will be a fee for this.



## 3. CHANGES TO FORMATION OF NEW COMPANIES

### Memorandum post 1<sup>st</sup> October 2009

3.1 The memorandum of a company now looks very different. Essentially it simply states the details of the subscribers and their desire to form a company. The memorandum must be in the prescribed form for that type of company, i.e. company limited by shares, company limited by guarantee, or public limited company. Below is the prescribed form for a company limited by shares.

3.2 Form of Memorandum for company limited by shares  
"COMPANY HAVING A SHARE CAPITAL

Memorandum of association of [*insert name of company*]

Each subscriber to this memorandum of association wishes to form a company under the Companies Act 2006 and agrees to become a member of the company and take at least one share.

*Name of each subscriber*

*Authentication by each subscriber*

Dated"

### Articles post 1<sup>st</sup> October 2009

3.3 The Articles now contain a combination of the key provisions previously set out in the Memorandum and Articles. There are some changes:

3.3.1 Objects – all companies are formed with unrestricted objects unless the articles contain a restriction. Therefore most companies will not have an objects clause, although charitable companies will.

3.3.2 Change of name – the articles can now include provisions for the company to change its names in other ways, in addition to the usual special resolution. See 3.1 above.

3.3.3 Share companies

(a) The articles do not need to state an amount of authorised/nominal share capital, as these concepts have been abolished (see

(b)

(c) For companies limited by shares, the concept of the articles stating authorised share capital is abolished and instead a separate statement of capital and initial shareholdings will be submitted to Companies House on formation below.

(d) For companies with only one class of shares, S550 of the Act gives the directors' power, unless restricted in the articles, to allot shares or grant rights to subscribe for, or convert any security into shares. For trading subsidiaries of charitable companies this is something that the articles should prohibit.

(e) For all new companies, unless the articles state otherwise, the company will have power to sub-divide or consolidate shares, issue redeemable shares, permit a repurchase of shares, or redeem or purchase shares out of its capital. This is a reversal of the position under the 1985 Companies Act.



- 3.4 Tables A – C have been replaced with three different sets of new model articles – one for a private company limited by shares, one for a public limited company and one for a company limited by guarantee. The link below will take you to the three sets of model articles.

[http://www.opsi.gov.uk/si/si2008/uksi\\_20083229\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20083229_en_1)

The model articles will apply unless excluded. This is similar to the current position for companies limited by shares and Table A, but constitutes a change for companies limited by guarantee where currently Table C applies only if specifically adopted. This means new companies can choose one of the following three options:

- 3.4.1 Model articles apply – this is the case if no articles are filed.
- 3.4.2 Model articles with amended provisions – this is the case if a company files specially drafted articles but does not exclude the model articles.
- 3.4.3 Bespoke articles – this is the case if a company files specially drafted articles which state the model articles are excluded.
- 3.5 Charitable companies will need to include in their articles the objects, restrictions on use of assets, permitted trustee and member benefits and a dissolution clause. The Charity Commission has published on its website model articles for a charitable company formed after 1 October 2009.

### Companies House Forms

- 3.6 The current Forms 10, 12 and 30(5)(a) will be replaced by new Form IN01. This contains a section for all the subscribers to sign a statement of compliance. Charitable companies will no longer have to file a separate form in order to be exempt from the requirement to use the word 'limited' in their name.
- 3.7 For companies limited by shares, the concept of the articles stating authorised share capital is abolished and instead a separate statement of capital and initial shareholdings will be submitted to Companies House on formation.

**For more information on changes to the Companies Act 2006, please speak to our Business Services team.**

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