

BERR

Department for Business
Enterprise & Regulatory Reform

COMPANIES ACT 2006

Private company information

NOVEMBER 2007

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Private Company Information

The following information is likely to be of most interest to those with some knowledge of company law. It is intended to point out those changes to the previous law which are likely to be of most significance to the generality of private companies. It should be read in conjunction with the Companies Act 2006 (available at www.tsoshop.co.uk) and should not be regarded as a substitute for reading that Act or seeking legal advice. Full explanatory notes on the provisions of the Act are also available at www.tsoshop.co.uk together with tables of derivations and destinations for the Act's provisions.

Memorandum of Association

1. Under the Companies Act 2006, the role of the memorandum of association is greatly reduced for both existing companies and new companies. In future it will contain only very limited information: the names of the subscribers; the fact that they wish to form a company; and that they agree to

become members of the company and, if the company has share capital, take at least one share in the company each. It will be primarily an historical record rather than affecting the ongoing operation of the company. Information that was previously provided in the memorandum on formation will in future be provided to the Registrar in the form of a series of statements made in the application for registration or in the articles. The formation provisions have been drafted with a view to supporting electronic incorporation, and it is envisaged that the required information could be provided to the Registrar in the form of a series of data entries or alternatively in hard copy.

2. For existing companies (i.e. those existing before the coming into force of the Act), this means that any provisions contained in their memorandum which go beyond that limited information will, from October 2009, be regarded as provisions of their articles of association.

Objects

3. The memorandum used to provide the company's objects. For new companies this will not be necessary, as the default position under the new Act is that a company's objects are unrestricted [s. 31(1)]. Existing companies may wish to take advantage of

this change by resolving to remove a statement of objects from their articles that were previously in the memorandum. Companies should note that they would be required to give notice of such a change to the Registrar [**s. 31(2)**].

Shares

4. The previous style of memorandum also set out the company's authorised share capital or, if it was a guarantee company, the terms of the guarantee. From October 2009 new companies will not be required to specify their authorised share capital. Instead they will need to deposit an initial statement of capital or, as appropriate, a statement of guarantee when incorporating. This will then need to be updated by the company when appropriate, such as when new shares are issued.

5. Shares will still be required to have a nominal value.

6. Although authorised share capital has been abolished for new companies, for existing companies it will continue to operate as a restriction in the articles. It will act as a ceiling on the number of shares that can be allotted. Existing companies will need to amend their articles to abolish reference to authorised share capital if they want to

allow the company to allot beyond that ceiling.

7. Most private companies have only one class of share. In these companies, directors will be able to allot further shares of that class, subject to any rights of pre-emption in either the articles or the Act (and subject to any ceiling set out as in the previous paragraph), without prior authorisation from the members, as is currently required. This new power is subject to provision in the articles: a company may need to amend its articles if it wants the power to apply. Alternatively it may wish to consider whether the articles should prohibit the directors' ability to allot shares without first getting the members' approval, or whether it wants to place some other restriction on the directors' allotment powers.

8. The pre-emption rights conferred by the Act may be disapplied either in the articles or by special resolution [**s. 569(1)**], so some companies may wish to consider amending their articles to permit this.

9. In private companies with more than one class of share, or where private companies wish to allot shares of a new class, the directors will require authorisation for allotting shares by an ordinary resolution of the members. Such authorisation can be general or in relation to a specific allotment,

and can only be for a maximum of five years. This is a change from the present rule, as private companies can currently give authorisation for an indefinite period.

10. The previous statutory rule that companies cannot give financial assistance for the purchase of their own shares has been abolished for private companies. Previously, private companies who wished to give such financial assistance had to comply with a “white-wash” procedure.

11. Private companies may in future reduce their capital by passing a special resolution coupled with a statement by each of the directors that the company is solvent. Previously a reduction of capital required the approval of the court. The new procedure is subject to any provision in the articles restricting or prohibiting reduction of capital. These procedures are similar to those which apply to other ways of achieving reductions of capital, such as the redemption or purchase by the company of its own shares out of capital.

Model Articles

12. Model articles (which were set out in “Table A” under the old arrangements) will continue to be prescribed. The Secretary of State will now prescribe different sets of

model articles for the most common types of company: private companies limited by shares; private companies limited by guarantee; and public companies.

13. Model articles are “default” in the sense that they apply where the company either has not provided for its own articles, or where its articles do not cover a particular subject. As before, companies can exclude some or all of the model articles.

14. The new model articles for private companies will eliminate much of the complex regulation which used to be contained in Table A but which is not relevant to small companies.

15. Existing companies will still be subject to the model articles that were in force at the time the company was registered, unless a company has subsequently chosen to make different arrangements. However, existing companies can adopt the new model articles instead if they wish, by members passing an appropriate special resolution. New companies registering from 1 October 2009 will have the new model articles as a default, unless they choose to register different articles.

Entrenchment of articles

16. Provisions of the articles can now be entrenched. Articles can say that certain of their provisions can only be amended or altered if specific conditions are met or procedures followed. Existing companies may wish to take advantage of this new provision by amending their articles.

Directors: minimum requirements

17. Under the Act, all companies must have at least one natural person as a director, so a company cannot be the sole director of another company. If a company's only director is a company, it will need to appoint a natural person.

18. A new minimum age of 16 is set for directors. In future if the company appoints a younger person as a director his appointment will be void.

Directors: other changes

19. Companies are no longer required to maintain a register of dealings in their shares by directors and their spouses, civil partners, or children. Directors in future will not be required to provide details of their other directorships.

Directors' general duties

20. Directors' general duties to their companies are, for the first time, comprehensively set out in the Act. The general duties of directors have been developed until now in case law. In order to make the rules more accessible, the Act confirms the existing case law by stating that the primary duty of directors is to act in a way which they consider most likely to promote the success of the company for the benefit of its shareholders as a whole and that, in doing so, they will need to have regard where appropriate to long term factors, the interests of other stakeholders and the community, and the company's reputation. While the Act generally codifies the case-law position, there are two major changes.

21. Firstly, the Act says that a director proposing to enter into a transaction with the

company need only disclose his interest to the board, rather than seek the approval of shareholders. Companies are able to make provision on these lines in their articles, and this is what the majority of companies have done.

22. Secondly, in future non-conflicted directors of private companies can authorise what would otherwise be a director's conflict of interest (other than transactions with the company itself), rather than refer it to shareholders for approval as previously, so long as nothing in the articles invalidates this. However, if a conflict is already permitted by articles then this will continue to be the case. **[s. 180(4)(b)]**.

23. Loans, quasi-loans and credit transactions to or in favour of directors **[ss. 197 – 214]** are no longer prohibited but are now subject to member approval if there is adequate disclosure and the criminal offence has been repealed.

24. Ratification of breaches **[s. 239]**: negligence, default, breach of duty and breach of trust by directors continue to be ratifiable by the members. In future, for an effective ratification a company will need to disregard the votes of the director in default and any person connected with him. This does not affect the unanimous consent rule, so if all the members are defaulting directors

and/or connected persons and they all vote to ratify the default, then that vote is effective. However, directors and shareholders still cannot ratify certain breaches, eg one that impacts on creditors.

Directors' addresses

25. Every company continues to be required to keep a register of directors. However, in order to protect directors as appropriate, the Act now provides that the register should contain service addresses for the directors rather than requiring details of their residential address. The service address can, for example, be a residential address or stated simply as "the company's registered office".

26. The company must also keep a separate register of the directors' residential addresses.

27. Both the service and the residential address (or the fact that the service address is the residential address) will need to be supplied to the Registrar of Companies. However, the residential address (or the fact that the service address is the residential address) will generally remain confidential to the company, the Registrar and certain specified public bodies and credit reference agencies. It will therefore be withheld from

the public register. However, there may be certain circumstances where the residential address has to be disclosed, such as if communications from the Registrar remain unanswered or communications are not coming to the director's attention.

Company Secretary

28. Private companies will, from 6 April 2008, no longer be obliged to have a company secretary, although they may continue to have one if they wish.

29. If they no longer wish to have a secretary they need do nothing, apart from the secretary resigning or his or her appointment being terminated. The Act says that a director or person authorised by the directors can do anything required to be done by or to the secretary [**see s. 274(b)**]. If a private company does continue to have, or appoints, a secretary then s/he will have the same status as previously.

Executing documents

30. Affixing a common seal is relatively rare now. Apart from that, documents such as contracts can, as previously, be executed by companies either by signatures of two

directors, or by signatures of one director and the secretary if there is one. Documents can also be signed by just one director, so long as s/he signs in the presence of a witness.

Company Names: change

31. A company can now set its own procedure in its articles for changing its name **[s. 79]**. Existing companies may wish to amend their articles to allow this.

Company Names: objection

32. Anyone may now object to a company's name if it either interferes with a name in which they have goodwill or is so similar to such a name that it would suggest a link between them and the company which is misleading. If the objection is upheld the company may be directed to change its name. **[see generally s. 69 et seq]**. However a company can only be required to change its name if it cannot show any of the specified legitimate reasons for it to have the name, or if it can be shown to have chosen the name for its value to someone else, with the intention of blocking its use by that person, or in effect, selling it.

Trading Disclosures

33. The current requirement is for the company name to appear legibly in a sign outside all its business premises, including the Registered Office, and in all business communications. This includes (a) all business letters, (b) all notices and other official publications, (c) all websites, (d) all bills of exchange, promissory notes, endorsements, cheques, orders for money or goods purporting to be signed by or on behalf of the company, and (e) all bills of parcels, invoices, receipts, letters of credit). In addition, the company's business letters, order forms and websites have to include the company's place of registration, its registered number, and the address of its registered office. A company's name, number, registered office and other particulars, currently required to be displayed on business letters and other documents, must now also be provided on electronic documents, as well as on any company website or order form **[see The Companies Act 2006 Registrar, Languages and Trading disclosures Regulations 2006]**.

34. There is also a new provision permitting the Secretary of State to require companies to supply, on request, specified information to those they deal with in the course of their business **[s. 82(1)(c) regs]**.

Register of Members

35. The register of members continues to be open to the inspection of members without charge and any other person on payment of the requisite fee. However, requests for inspection must in future outline details about the person seeking the information, whether the information obtained will be disclosed to others, and what the purpose for the request is. If the company does not think it is a proper purpose, it may apply to the court for, and the court may grant, an order that the company need not comply with the request.

Communications

36. The new Act makes it much easier for companies to communicate electronically, either by email or another electronic form or through a website. The general principle is that companies should be able to communicate in hard copy or electronically. These provisions came into force in January 2007.

37. *Hard copy* Documents or information sent to a company or by a company can continue to be done in hard copy form, by sending the document by post or by hand to the relevant address.

38. *Electronic form* Documents or information can only be sent to or by a company electronically, if the company or recipient respectively has agreed generally that all documents/information will be sent electronically, or has agreed specifically in relation to a particular document/information. It should be noted that various provisions of the Act deem a company to have agreed to receiving documents/information electronically: for example, if a company gives an electronic address in any document containing or accompanying a written resolution, then it is regarded as having agreed that documents or information relating to it can be sent to the company electronically at that address unless it says otherwise [s. 298].

39. The Act also allows companies to agree that information or documents are validly sent to it or by it in any way which the company agrees with the sender or recipient respectively, unless those provisions of the Act apply which only allow information to be supplied by companies in particular ways.

40. Companies should therefore consider whether they wish to have agreements, especially general agreements with members, that communications can be received in certain ways, especially electronically.

41. The Act now allows a company to provide information to members on a website. This can only be done where the recipient has agreed to it being done that way. However, if the members generally agree that websites might be used for communication, or if there is such provision in the articles, then individual members will generally be regarded as having agreed if they are asked for agreement and do not respond within 28 days. Companies may wish to consider proposing an appropriate resolution or change to the articles.

42. Every time new information is made available on the website, the company will need to inform the relevant members of this, either in hard copy or electronically. Companies wishing to make best use of the website provisions will probably wish to secure members' agreement to email communication.

43. Shareholders will always be entitled to request hard copies of documents or information [s. 1145].

Resolutions and Meetings

44. The Act abolishes the current obligation for private companies to hold annual general meetings. Companies will still be able to hold shareholder meetings if they wish to;

and meetings can be instituted by the directors at any time, or by members representing 10% of voting shares (5% if it is more than 12 months since the members met). Companies may still need to hold a meeting in certain circumstances, since they will not be able to dismiss a director or an auditor before his term of office by written resolution [**see s. 288(2)(a)**].

45. The vast majority of decision-making in private companies is obviously carried out by the directors. However, the members or shareholders of the company also have a role in taking various decisions – such as the appointment of the directors; amending the articles etc. Often in small companies, of course, the shareholders and directors will be the same people. The Act therefore makes it easier to use written resolutions for decisions by shareholders, and is drafted on the basis that most decision making by members in private companies will be by written resolution, rather than by calling meetings of shareholders.

46. In future, written resolutions can be proposed either by the directors or by members representing either 5% of members eligible to vote or whatever lower percentage the company's articles provide. Articles can be amended to substitute a lower percentage.

47. Previously, written resolutions required unanimity. Now, the Act refers to two types of resolution: ordinary, which to be passed requires a simple majority of those eligible to vote; and special, which requires 75% of those eligible to vote to be in favour. Written resolutions will no longer have to be notified to the auditors since, following other recent reforms, most small companies are no longer required to have auditors.

48. The Act does not override provisions in the articles which require a higher majority than the Act specifies for a particular action. So, if the Act requires only an ordinary resolution as it does in the majority of cases, but the articles require a special resolution or unanimity, then the provision in the articles will need to be complied with.

49. As from 1 October 2007, any provision in a company's articles which provides that a member voting by proxy will have fewer votes than if he votes in person will be invalid.

50. Where the company does decide to have meetings, the arrangements have not changed significantly. Since the AGM requirement has been abolished, private company meetings are now all on 14 day notice unless the articles say otherwise. Now 90%, rather than 95%, of members can agree to hold a meeting on short notice

(although the articles can specify a higher percentage up to but not exceeding 95%).

Proxies

51. Shareholders can now appoint more than one proxy at a meeting, up to a maximum of one proxy per share. This right will override any conflicting provision in a company's articles.

Accounts, Reports and Audit

52. The time for private companies to file their accounts with the Registrar of Companies has been reduced from 10 months to 9 months from the year end. The medium-sized group exemption from preparing consolidated accounts has now been removed: in future only small groups will be so exempt.

53. In recognition of the abolition of the requirement for private companies to hold an AGM, they will now no longer be required to send out their annual accounts prior to a general meeting. Instead, the annual accounts, or summary financial statements if appropriate, must be sent to members by the time they are due to be filed with the Registrar of companies.

Accounting provisions will be separately set out for small private companies under regulations to be made in April 2008 (save for a few provisions common to all companies that will remain in the Act).

54. Many small private companies are exempt from audit. Small private companies who do not take advantage of the audit exemption and so have audits will be affected by certain changes in the Act. As there will no longer be a requirement for annual general meetings, an auditor will be deemed to be reappointed for the following year unless the company takes steps to end his appointment, or to appoint a different auditor. It will also now be possible for the company, by ordinary resolution, to choose to agree a limitation of the auditor's liability for a financial year.

Annual return

55. There is no change to current arrangements on the face of the Act, but the regulations will provide for exemptions from the requirements for details of shareholders and their shareholding so that, in the case of private companies, shareholders' addresses are no longer required.

