

COMPANIES ACT 2006

1 October 2009 - the end of the beginning?

ADVICE NOTE

This is the final implementation date for the provisions of the Companies Act 2006 (the "2006 Act"), the longest piece of UK legislation to date. It has been implemented over a period of almost 2 years and we now wait to see what practical effects this mammoth enactment will have on the day-to-day operation of private owner-managed companies. This is a summary of the major changes with "Points to note".

INCORPORATION

To make it easier to set up and run a company a number of changes have been made to the incorporation process from 1 October 2009. It will be possible to form any type of company with a single shareholder (a public company was required to have at least 2 shareholders). The process of forming a company by filing certain documents at Companies House remains the same but the documents will change. The new incorporation process will require an application to register a company (Form IN01) accompanied by a memorandum of association, the articles of association (see below) and the correct fee. The memorandum is a new shorter document consisting simply of a statement by each subscriber that they wish to form a company, become a member and take at least one share each. The memorandum will have to be in a prescribed form and cannot subsequently be amended.

ARTICLES OF ASSOCIATION

Model articles

As the new shortened memorandum will become a document of purely historical significance, new forms of model articles of association for the 3 most commonly used types of company – private company limited by shares, private company limited by guarantee and public company – have been introduced. From 1 October 2009 they replace Table A as the default set of articles for limited companies incorporated on or after this date. Companies will be free to include in their articles provisions of the model articles, with or without modification, whether or not they are the relevant model articles for the type of company that they are. The model articles will not, and Table A will, continue to apply to existing companies.

Old provisions of memorandum inserted into articles

Any provisions of an existing memorandum which go beyond the new short-form memorandum will automatically be inserted in the company's articles on 1 October 2009. This includes not only the company's objects but also its name, location of registered office, limited liability status and authorised share capital.

Point to note: Existing companies should consider whether to amend their articles to (i) remove any provisions which are automatically inserted from the memorandum (such as a restrictive objects clause and/or restrictions on authorised share capital) and (ii) take advantage of the new provisions of the 2006 Act.

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Entrenchment

The 2006 Act introduces the new concept of entrenching rights in the articles. These are provisions that can only be altered or removed if certain conditions are met, or procedures complied with, that are more restrictive than those applicable in the case of a special resolution (a majority of 75% or more). Companies will only be able to adopt entrenchment provisions on incorporation or if all shareholders agree. There will be special filing requirements whenever provisions are entrenched or where entrenched provisions are altered or removed.

Point to note: Existing companies should consider whether any of the provisions in their articles should be entrenched.

DIRECTORS' ADDRESSES

The information that companies must file relating to its directors will change so that for each director, a service address and the country of usual residence will be required in addition to the usual residential address. This will apply from 1 October 2009 for new appointments; for existing directors, a service address and the country of usual residence will be required in Annual Returns made up to dates after 30 September 2009. The service address will be on the public record and will be public information but the residential address will be "protected information" and only available to prescribed regulatory authorities such as the police and HMRC and credit reference agencies. A director may choose any address as the service address, which may be the registered office of the company or another address of the company (but not a PO Box or a DX number).

Directors and company secretaries will also be able to apply for a residential address that has been placed on the public record since 1 January 2003 to be removed. Directors and secretaries whose addresses are currently the subject of confidentiality orders will be treated as if they had made a successful application. Company secretaries will only need to notify a service address to the company and Companies House, not their "usual residential address" as is currently required

Point to note: Companies need to split their existing register of directors and secretaries into 2 separate registers for the company's directors and secretary. The register of directors will need to contain a service address for each director and a further register will need to be created containing the residential address of each director. Companies will need to ensure that all staff with access to the register of directors' residential addresses are aware that its use is strictly limited.

COMPANY NAME

A company's articles will be able to specify a procedure for change of name, for example, by board resolution or conditional shareholders' resolution. This is in addition to the existing special resolution route. Companies must notify Companies House by completing a notice available for each method and this notice must be accompanied by the requisite fee. The change of name is only effective when Companies House has processed all the documentation required. Names cannot be reserved and Companies House strongly recommend that all documents are sent together.

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The prohibition on registering a company name that is the "same as" another company name on the index of company names will be made stricter. Companies House will disregard a number of matters if they appear at the end of the name and they are preceded by a full stop including "GB", "services" and "com" so as to try to circumvent this prohibition. Companies House may register a name that is the same as another in the index of company names if the company belongs or is to belong to the same group as the company already on the register and a written consent from the latter is sent to Companies House.

The 2006 Act has introduced new provisions to frustrate attempts to register company names simply for the purpose of abusing someone else's goodwill in a particular industry sector. The Company Names Tribunal can order a change of name following a successful complaint against such opportunistic registration. Opportunistic company name registrations share similar characteristics to opportunistic Internet domain name registrations (or "cyber squatting"). An example of an opportunistic company name registration is when someone registers one or more variations of the name of a well-known company in order to get the latter company to buy the registration(s). Another example might be where someone knows that a merger is about to take place between two companies and so registers one or more variations of the name that the newly formed commercial entity is likely to require. The registration(s) would be opportunistic in that the registration holder's purpose in obtaining the registration was to cash in on the other entity's fame.

OTHER CHANGES

The 2006 Act introduces a number of other changes from 1 October 2009. If you require further information, please contact Simon Porter on 01306 502243 or by email: s.porter@downslaw.co.uk.

Companies House – www.companieshouse.gov.uk – have a useful section on their website as does the Department for Business, Innovation and Skills – www.berr.gov.uk.