



Companies Act 2006 - Do we comply?

December 2009

Private companies were promised a new era of simpler company administration under the Companies Act 2006 (the "**Act**"). Has the Government delivered on this promise? There are a number of deregulatory measures, many of which apply automatically to existing companies (i.e. those incorporated prior to 1 October 2009 when the Act finally came into force in full). However some of the changes operate on an "opt-in" basis which will require some action on the part of existing companies. Also there are some completely new requirements, even for private companies, to be taken into account going forward.

This briefing summarises the steps which existing private companies should take to ensure they comply with the Act, dealing firstly with company administration generally, and secondly the changes they should consider making to their articles of association.

Companies administration checklist

Articles of Association

Table A-based articles are still valid, but companies should consider updating their articles to reflect the Act and the new model articles. See separate checklist below.

Directors' statutory duties

- Ensure the directors are fully briefed on the scope of their new statutory duties under the Act and review board procedures in line with the statutory duties.
- Check D&O insurance and review any directors' indemnity provisions in the articles or any standalone indemnity agreements.
- Pass an ordinary shareholders' resolution to allow the board to approve directors' conflicts of interest, if the company was incorporated prior to 1 October 2008.
- Review the authorisation procedures for directors' conflicts of interest and ensure existing conflicts have been properly declared and approved under the Act.

Directors' home addresses

- Ensure the company has created a separate register of directors' home addresses and that the original register of directors contains details of a service address for each director (which may be the home address unless a decision has been taken to use a service address).
- If individual directors have decided to file a service address, or the company has taken a policy decision to file service addresses for its directors, ensure that Companies House has been notified.
- Ensure the service contracts for directors who are using a service address contain details of the service address rather than the home address.

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Directors - other issues

- Ensure all companies in the group have at least one director who is a natural person.
- Ensure the shareholders have approved any directors' service contract with a term exceeding two years.

Company secretarial issues

- As private companies no longer have to have a company secretary, if there is no company secretary, ensure someone has assumed responsibility for statutory filings and maintaining company records.
- Ensure the company secretary or other relevant personnel are aware of the new Companies House forms and filing requirements.
- Review the company's signing procedures and decide whether to permit a single director to execute deeds (with a witness).
- Ensure the company's statutory details appear on company stationery, company emails and websites.
- Review all register and record requirements under the Act as minor changes have been introduced.

Financial reporting

- Ensure compliance with the new filing deadline for annual reports and accounts (9 months after the year end for financial years commencing on or after 6 April 2008).
- Review the arrangements for the appointment/re-appointment of auditors and fixing auditors' remuneration in the light of the new requirements under the Act.

Shareholder resolutions

- In general, ensure the company's procedures on shareholder meetings and resolutions follow the Act, in particular the new regime for written resolutions.
- Review existing authorities for share allotments and update in accordance with the Act.
- For companies with one class of shares, consider passing an ordinary resolution of shareholders to enable directors freely to allot shares or conversely placing a restriction in the articles on the directors' ability to allot shares (see separate checklist below).
- Ensure the relevant personnel are aware of the circumstances in which the company must file a statement of capital at Companies House, including on any allotment or alteration of share capital and with the annual return.

Updating the company's articles

Table A

- Table A-based articles are still valid despite the introduction of new model articles under the Act, and the Act does not force private companies to update their articles, but many companies are doing so to bring their articles into line with the Act and the model articles and to take advantage of some of the new freedoms given to private companies in the Act.

Share capital

- The concept of authorised share capital is abolished under the Act and a company's existing authorised share capital will operate as a restriction on the amount of share capital that may be allotted, so companies should consider removing the authorised share capital provision (if any) assuming no restriction on allotments is needed.
- Directors of companies with a single class of shares are entitled under the Act to allot shares without shareholder approval provided the shareholders have passed a one-off ordinary resolution allowing the directors to do so. Conversely, companies with a single class of shares may prefer to place a limit on the directors' ability to allot shares by inserting a provision in the articles requiring shareholder approval for allotments.
- Consider removing from the articles any specific authorities for share buy-backs, reductions of capital, the consolidation and sub-division of shares and the issue of redeemable shares, as these are no longer relevant under the Act.

Memorandum provisions

- The memorandum of association under the Act is a much simplified document and no

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longer contains an objects clause which restricts the scope of the company's activities. For an existing company, the objects clause in its memorandum will automatically have been imported into the articles. If the company is to have unrestricted objects going forward, the imported objects clause should be removed, along with other provisions imported from the memorandum (e.g. the company name and share capital clauses).

Shareholder meetings and resolutions

- The terms "extraordinary general meeting" and "extraordinary resolution" are not used in the Act and should be replaced with "general meeting" and "special resolution" respectively.
- Update or delete written resolution provisions to reflect the new written resolution procedure under the Act.
- Consider whether the company should continue to hold AGMs (private companies are no longer obliged to do so) and if not, delete the relevant provisions from the articles.
- Delete the provisions allowing the chairman a casting vote at general meetings.
- Update the proxy/corporate representative provisions in line with the Act and the Shareholders' Rights Regulations which came into force in August 2009.

Electronic communications

- Update the electronic communications provisions (if any) to reflect changes made in the Act, or consider including electronic communications provisions if none were included previously, since the regime is now easier to implement.

Directors

- Consider including an express sanction for certain conflicts of interest of directors and/or parameters for the board in considering whether to approve directors' conflicts.
- Consider a parent company approval regime for conflicts affecting directors of wholly-owned subsidiaries.
- Update the provisions relating to directors' declarations of interest or delete them and rely on the relevant provisions in the Act itself.
- Update the provisions on directors' indemnities in line with the Act.
- Remove any maximum age limit for directors.

Company secretary

- Most larger private companies have retained their company secretary despite no longer being obliged to do so under the Act. If there is no secretary, remove the relevant references from the articles.

Company name

- Consider taking advantage of the deregulation of company name changes by specifying that the company name can be changed by an ordinary resolution (rather than a special resolution) or, for a wholly-owned subsidiary, a written direction from the parent company.

Company seal

- If the company has a specific authority in its articles for the use of the company seal overseas, the authority is no longer needed and can be removed.

Definitions/Companies Act 1985 references

- Replace references to the Companies Act 1985 and related definitions.

If you would like more information on any of the topics discussed in this briefing, please speak to your usual contact at the firm.

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