



JONES DAY COMMENTARY

COMPANIES ACT 2006

The Companies Act 2006 (the "2006 Act") effects the most sweeping and significant alteration of UK companies legislation for over 20 years. Significant portions of the 2006 Act were implemented on 1 October 2007, 6 April 2008 and 1 October 2008, with the remainder coming into force on 1 October 2009.

MAIN CHANGES

The main provisions of the 2006 Act becoming effective on 1 October 2009 relate to the formation and constitutional documents of companies, share capital and the redemption and purchase by a company of its own shares. These and certain other changes are discussed in more detail below.

PROVISIONS TO BE IMPLEMENTED ON 1 OCTOBER 2009

Formation of a company (sections 7-16 of the 2006 Act).

A single individual will be able to form any type of company, not just a private company.

There will be a change to some of the filing requirements when forming a new company. Principally, a statement of capital and initial shareholdings in the prescribed form will be required to be delivered to Companies House on an application for the registration of a company having a share capital. The statement of capital will include:

- the total number of issued shares in the company to be taken on formation
- the aggregate nominal value of those shares
- details of the rights attaching to each class of shares
- the amount paid up and/or to be paid up on each share.

A statement of compliance with the provisions of the 2006 Act will still have to be provided along with the other incorporation documents to Companies House, but this will no longer be required to be a statutory declaration.

Constitution of a company (sections 17-28 of the 2006 Act).

The memorandum of association will cease to form part of a company's constitution and will simply be a snapshot of the subscriber(s) on incorporation. It will be in a prescribed form and the only information that it will contain will be the name of the company, a statement that the subscriber(s) wish to form the company and, if the company is to have a share capital, a statement that the subscriber(s) will take at least one share. All provisions in the memoranda of existing companies, other than provisions required by the new style of memorandum, will be deemed to be provisions of the company's articles of association.

A company's constitution will, by definition, include the company's articles and any of the constitutional-type resolutions and agreements now specified in the 2006 Act.

Companies will be able to "entrench" provisions of their articles, either on formation or subsequently by unanimous agreement of the members. Once a provision is "entrenched" it can only be amended by unanimous agreement of the members or a court order. The company will be required to notify Companies House on the addition or removal of entrenched provisions. Although the provisions of the 2006 Act relating to "entrenchment" were intended to be implemented on 1 October 2009, their coming into force has recently been delayed.

A company's objects will be unlimited unless its articles specifically restrict them—i.e. the objects clause (which currently provides the scope of a company's objectives and authorities) will be abolished. For an existing company which wants to take advantage of the new regime, it will be necessary to pass a special resolution deleting the objects clause from its articles (after it has been deemed to have been incorporated on 1 October 2009).

The current "Table A" articles will be replaced with a simplified standard set of company articles known as "Model Articles of Association". These will be the default articles of a private company limited by shares incorporated after 1 October 2009 unless the company adopts different provisions. There are also prescribed documents which will be the default articles of public companies and private companies limited by guarantee unless those companies adopt different provisions. An existing company's articles which are based on "Table A" articles will not be affected.

The provisions of a company's constitution will be stated to be binding on the company and its members to the same extent as if they were covenants to observe those provisions signed and sealed by each member and by the company itself. This enhances the current position by putting onto a statutory footing the common law principle that the provisions of a company's articles constitute a contract between the company and individual members.

Share capital (Part 17 of the 2006 Act).

The requirement for an authorised share capital is to be abolished for all companies. Shares will simply be capable of being issued, subject to any restrictions on the number of shares contained in a company's constitution. For companies incorporated before 1 October 2009 whose constitutional documents include a statement of the authorised share capital, that statement will be treated as a maximum amount of shares that may be issued. Companies may wish to amend their constitution to remove this restriction at an appropriate time.

A company will be able to denominate different classes of shares in different currencies and to redenominate a class of shares in a different currency.

Companies will have to file a statement of capital at Companies House within one month after a change in their issued share capital.

A company will no longer be able to convert shares into stock, but it may reconvert stock to shares in accordance with the 2006 Act.

The directors of a private company with only one class of shares will be free to allot shares (or to grant rights to subscribe for shares or to convert any security into shares) without prior authorisation from the members, subject to any restriction or prohibition on this power in the company's articles—i.e. the old "Section 80" authority to allot shares will no longer be required unless shares of a new class are issued (in which case shareholder approval will be required). Allotments by a private company with several classes of shares will still require authorisation by the Company although, as before, this may be given under the articles or by a special resolution.

The statutory rights of pre-emption provided by section 89 of the Companies Act 1985 are carried over into the 2006 Act without material alteration.

Purchase by a company of its own shares (sections 690-708 of the 2006 Act).

The requirement for authorisation in a company's articles for a purchase of its own shares is to be removed, but articles may still prohibit or restrict such purchases—i.e. the current position is reversed.

Also, in contrast to the current position, companies will be permitted to contract for an off-market purchase of their shares before obtaining authority to do so by special resolution as long as the contract is conditional on that authority being obtained.

Redemption or purchase by a company out of capital (sections 709-723 of the 2006 Act).

A private company need not have prior authorisation in its articles before it is able to make a payment out of capital in respect of the redemption or repurchase of its own shares, though the articles may expressly restrict or prohibit such payments—i.e. the current position is reversed.

The directors need only make a simple statement of solvency, rather than a statutory declaration as before, but they must now take into account the contingent and prospective liabilities of the company when forming their opinion on the company's solvency.

Members will be able to delegate to the directors the ability to determine the terms of any redeemable shares on issue; those terms will no longer need to be set out in the company's articles. Instead, where this authority is used, the redemption terms must be set out in a statement of capital to be filed at Companies House within one month after allotment of the shares.

Importantly from a practical perspective, companies will be entitled to agree to a deferred payment on redemption of shares, in contrast to the current position whereby payment is required to be made at the time of redemption.

Disclosure of directors' details (sections 162-167 of the 2006 Act).

Under a new disclosure regime, a director will be required to file two addresses with Companies House—one address for service (which may be the company's registered office) and one which is his usual residential address. Only the service address will be made public at Companies House. The residential address will be kept on a private register. If a director's residential address is currently on the public register, he may apply to have it removed only if it was registered after 1 January 2003 and he can demonstrate that there is a serious risk of violence or intimidation towards himself or someone that lives with him in connection with the activities of the company of which he is a director.

Companies must also keep two registers of directors, one of which will contain their service addresses and be available for inspection, and one which contains their residential addresses which must be kept private.

Change of company name (sections 77-81 of the 2006 Act).

Under the current law, a company may change its name only by way of a special resolution of its members. From 1 October 2009, in addition, a company will be able to change its name by whatever means are prescribed in its articles, for example by way of a board resolution.

Dissolution and restoration to the Register (sections 1000 to 1034 of the 2006 Act).

In addition to the ability of private companies to do so, public companies will also be entitled to voluntarily apply to be struck off the Register.

Where a company has been struck off the Register by the Registrar under his/her authority to do so because there is reasonable cause to believe it is no longer carrying on business or in operation, a new procedure for "administrative restoration" will be available to restore the company without application to court.

FURTHER INFORMATION

This commentary is intended to provide a summary of the main provisions of the 2006 Act where current law is changing significantly.

A web site on which the Government sets out further information on the key areas of change addressed in this *Commentary* can be found at www.berr.gov.uk/whatwedo/businesslaw/co-act-2006. In particular, please see the document available on that web page entitled “Companies Act 2006 implementation—changes to constitutional documents, including model articles: a summary of what the new approach means”.

LAWYER CONTACT

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