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Companies Act 2006 - 1 October 2009 Provisions

Background

This note highlights the principal changes introduced by the Companies Act 2006 (the "2006 Act") that came into force on 1 October 2009 and the practical consequences for companies. These new changes finally bring the 2006 Act into force in its entirety.

Main Provisions

1. Company Formation

Any type of company (not just a private company) can now have a single shareholder, although a public company is still required to have at least two directors.

2. A Company's Constitution

The provisions contained in the memorandum of a company incorporated before 1 October 2009 will be deemed to be incorporated into the articles of the company, unless the company passes a resolution otherwise. For new companies, there is a new prescribed form of memorandum, which is simply a statement by each of the subscribers that they wish to become members of the company.

New 'model articles' have also been introduced, which will apply by default if a company is incorporated either without articles or with articles that do not exclude the model articles.

3. A Company's Members

The requirement under the 2006 Act for members' addresses to be supplied as part of a company's annual return now apply only to companies whose shares are traded on an EU-regulated market and then only in respect of those members who hold 5 per cent or more of any class of shares. This aims to prevent shareholder information being obtained and used for improper purposes.

4. Directors and Company Secretaries

A director or company secretary is now obliged to record only a service address for disclosure on the public records. Companies House will still require directors and company secretaries to provide their residential address but these will be kept on a separate secure register. Directors also no longer need to provide details of other directorships held.

5. A Company's Records

A company may now keep its registers and records at a location other than its registered office address provided that alternative location is in the same part of the UK as the registered office. This location must be disclosed in the annual return. There are also provisions in the 2006 Act dealing with the fact that companies are required to make company records available for inspection within certain time frames, allow persons

inspecting the register of members to make copies and inform the inspecting persons whether the register of members and index is up to date.

Under the 2006 Act, it is no longer possible to close the register of members for any time period, so the register must remain open for inspection at all times.

The register of directors and the register of secretaries are now also treated as two separate registers.

6. A Company's Share Capital

(a) Reduction of Share Capital

If a creditor wishes to object to a reduction of capital, the burden of proof has now moved from the company to the creditor, who must show that there is a real likelihood that the proposed reduction will risk the discharge of the creditor's claim.

(b) Share Buybacks

Directors must now make a directors' statement when a company buys back its shares, which replaces the need for directors to make a statutory declaration about the company's financial position. There are a wider category of liabilities that a director must take account of when making the directors' statement, however, which makes the test more stringent.

(c) Authorised Share Capital

The concept of authorised share capital has now been removed. A company wishing to restrict the number of shares that it can issue needs to ensure that its articles contain a suitable restriction. Any existing company

wishing to remove an authorised share capital restriction from its articles can do so by an ordinary instead of a special resolution.

A limited company with a share capital must still have a fixed nominal value for its shares. Shares may not be issued with no par value and any allotment of shares that does not have a fixed nominal value will be void. New provisions in the 2006 Act codify the common law rule that shares of a company may be denominated in any currency, with the only proviso being that a public company must still satisfy its initial minimum share capital requirement. Different classes of shares may be denominated in different currencies.

(d) Allotment of Shares

A private company with only one class of share will now only need authority to allot shares if its articles of association specifically require it. Companies with more than one class of share will still require prior authorisation for the allotment of shares either by ordinary resolution or under the company's articles.

The definition of 'relevant securities' that was used in the Companies Act 1985 (the "1985 Act") has not been included in the 2006 Act. The definition included both the right to subscribe for/ convert into shares and also shares themselves. The 2006 Act now sets out that directors must have authority both to grant a right to subscribe for/ convert

into shares and to allot shares, but clarifies that, where the directors have authority to grant a right to subscribe for/ convert into shares, they do not need a separate authority to allot shares that result from the exercise of such right of subscription or conversion. Resolutions granting directors such authorities will need to be updated to reflect the new wording in the 2006 Act.

(e) Pre-emption Rights

The minimum period for which a pre-emptive offer must be kept open has been reduced from 21 to 14 days.

(f) Alterations to Share Capital

There is now no requirement for prior authorisation in a company's articles to allow a reduction of share capital, sub-division and consolidation of share capital, redemption of shares, share buybacks and reconversion of stock into shares. A company is permitted to pass a resolution effecting any of these alterations to share capital unless there is a specific restriction or prohibition in the articles of the company. Previously, silence in a company's articles amounted to a restriction on alterations.

A further change is that a statement of capital must be filed with the Registrar on every alteration of capital together with the relevant company forms.

(g) Share Premium Account

The purposes for which a company's share premium

account can be used have been reduced.

7. Dissolution and Restoration to the Register

The 2006 Act extends the availability of the voluntary strike off procedure to public, as well as private, companies. There have also been changes to the procedure for applying to the court to have a company restored to the register, and a wider range of people may now make such an application.

8. Overseas Companies

The Secretary of State has new powers to make regulations to impose registration, reporting and disclosure requirements in connection with the registration of UK companies not formed under the 1985 Act (that is, companies incorporated outside the UK). Overseas companies operating in the UK will now be subject to regulations including a requirement to register specified particulars with, and deliver specified documents to, the

Registrar and for such companies to prepare accounts and directors' reports as well as obtaining an auditor's report.

9. The Registrar of Companies

Numerous changes have been made to the documents that must be filed with the Registrar. A person who knowingly or recklessly causes to be delivered to the Registrar a document that is false or misleading is liable on indictment to two years' imprisonment or a fine or, on summary conviction, to 12 months' imprisonment or a fine.

Actions for Companies

There are several steps that companies should take in light of the new changes, including:

- reviewing their articles to remove or amend provisions that will be incorporated from the memorandum, to consider removing restrictions on authorised share capital and to update them generally;

- ensuring that resolutions to give directors authority to allot shares track the new wording in the 2006 Act; and
- updating their statutory books to reflect the separation of both the register of directors and secretaries and also the register of directors' service and residential addresses.

Other Provisions

This note is only a brief summary of the main changes that the 2006 Act introduced on 1 October 2009. If you would like to discuss in more detail any of the matters covered by this note, or would like advice on any of the other changes that the 2006 Act has introduced, please contact James Green or Jennifer Lovesy at this Firm.

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