

Corporate Briefing

Companies Act 2006: Public Company Articles of Association



The Companies Act 2006 received Royal Assent in November 2006. This note looks at what the new Act means for the Articles of Association of a listed public company. The phased implementation of some parts of the 2006 Act, in 2007 and 2008, has meant many companies have made changes to their Articles in the past couple of years. With the final implementation of the 2006 Act in October 2009 it is now possible to ensure that a company's Articles reflect all of the new statutory provisions.

New Model Articles

New Model Articles for public companies will come into force on 1 October 2009. The intention is that these will apply by default to public companies incorporated on or after this date unless companies adopt entirely different articles when they are first registered or choose to disapply some of the provisions of the Model Articles. We expect few listed companies will adopt the Model Articles of public companies but will continue to adopt tailor-made articles. However, it may be appropriate for articles to reflect the language and style of the new Model Articles.

2009 changes which will affect existing articles

Format of memorandum and articles

From 1 October 2009 new companies will have a greatly simplified memorandum of association. For existing companies the effect of this is that their objects clause will remain but will be treated as part of a company's articles. Companies wishing to have unrestricted powers will need to pass a special resolution to delete the objects clause from their articles.

There are also other provisions of an existing company's memorandum which cannot be deleted (eg. that the liability of members is limited, the location of

the registered office) and will therefore be deemed to be included in the company's articles after 1 October 2009. Any future version of the articles should be amended to include these clauses.

Share capital

- Authorised share capital and authorisation for allotment – under the 2006 Act, companies will no longer be required to restrict the total number and nominal value of their shares which the directors are authorised to allot. Any existing limit on the authorised share capital of a company will operate as a restriction as to the number and nominal value of shares which the company can allot. Existing section 80 authorities will continue to have legal effect until their expiry or revocation. Existing companies wishing to take advantage of the new freedom afforded by the 2006 Act will have to amend their articles to remove or modify any limit on their authorised share capital;
- Alterations to share capital – the 2006 Act removes the requirement for prior authorisation in a company's articles in respect of certain alterations to its share capital e.g. consolidation and reduction of share capital or purchase of own shares. Any provisions which restrict a

We have prepared briefings on other aspects of the 2006 Act, including directors' duties and liabilities, the impact on public companies' AGMs and more general summaries of the key changes for private companies, private equity firms, companies listed on AIM and Official List companies, all of which are available at <http://www.traverssmith.com>

company's ability to alter its share capital will continue to restrict such actions and therefore a company will need to remove them if they wish to make such alterations without the need for prior authorisation. Alterations will, of course, still be subject to the Listing Rules or AIM Rules and other legal requirements such as court approval, where necessary; and

- Power to issue redeemable shares – as long as the articles contain the necessary authority the 2006 Act allows directors to determine the terms and manner of redemption of redeemable shares, rather than having to set out those matters in the articles.

Other changes

The remaining provisions of the 2006 Act to be implemented in October 2009 which could necessitate changes to a company's Articles include:

- the removal of the current requirement for authority to have an official seal for use abroad;
- the requirement for share transfers to be registered as soon as possible;

- the ability of companies to change their name by means provided in their articles of association as well as by special resolution; and
- the ability of the company to make provision for their employees on the cessation or transfer of the company or any subsidiary.

Other Regulatory Changes

Unfortunately, the final implementation of the Companies Act 2006 was not the end of the road so far as changes to a public company's articles of association are concerned. The EU Shareholder Rights Directive came into force via The Companies (Shareholders' Rights) Regulations 2009 on 3 August.

The intention behind the Directive is to improve shareholder participation in meetings, so many of the changes will affect the notice of a general meeting rather than directly affecting a company's articles of association. There may however be some changes which it may be appropriate to reflect, on the basis that public company articles are usually as comprehensive as possible. These include:

- the deletion in a company's articles of any language which was inserted to reflect s.323(4) of the 2006 Act - which was interpreted as meaning that corporate representatives could not vote in different ways even if they were appointed in respect of different blocks of shares;
- the percentage of members who are able to requisition a general meeting is reduced from 10% to 5%;
- on a poll vote the votes may include votes cast in advance and any provision in a company's articles requiring any document casing a vote in advance to be received earlier than the time specified in the Regulations will be void;
- any provision in a company's articles giving the chairman of a general meeting a casting vote will be void.

The Companies Act 2006 allowed companies to reduce the minimum notice period for general meetings other than AGMs to 14 clear days. Implementation of the EU Shareholder Rights Directive means that listed companies will only be able to take advantage of this timetable where:

- (i) a separate resolution allowing this has been passed at the previous AGM; and

- (ii) the company offers shareholders the facility to vote by electronic means.

If a company has not amended their articles to allow them to hold general meetings on 14 days' notice it may now be appropriate to refer to a 14 day notice period if the relevant statutory provisions are complied with.

Earlier provisions of the 2006 Act which will affect existing articles

January 2007 changes

Electronic communications

Under the 1985 Act regime, companies were able to provide certain information via their websites to shareholders who specifically agreed to website publication. Since 20 January 2007, the 2006 Act has enabled companies to deem that agreement to have been given. If a shareholder does not respond to a request for agreement to receive information via the company's website within twenty-eight days from the date of the request then he will be deemed to have agreed to this form of communication. In order to take advantage of these provisions, shareholders will either need to approve a resolution to permit such communications or the company's articles must authorise website communications.

Given the expected cost savings, many public companies have already amended their articles to permit communications via their website. If a company's articles already contain provisions allowing electronic communications, they should be reviewed carefully to ensure that they will be sufficient. If they are in any way specific to the regime in the 1985 Act then the articles should be updated.

Investigations into interests in shares

Section 212 of the 1985 Act, which allowed public companies to investigate who held an interest in their shares, has been repealed and replaced by new provisions in the 2006 Act. Although the regimes are substantially the same, appropriate changes to cross-references in a company's articles will be required.

April 2007 change

Maximum age of directors

The provisions of the 1985 Act which prevented a person from being appointed a director of a company if he had reached the age of 70 (subject to certain exceptions) and imposed a duty

on a director to disclose his age, if over 70, have been repealed and will not be replaced. Articles which retain any such restrictions are likely to be challenged under age discrimination laws and should therefore be amended.

October 2007 changes

Notices of general meetings

All general meetings of public companies (other than the annual general meeting) may be called on 14 days' notice (but see "Other Regulatory Changes" above). The articles may require a longer period, and the Combined Code on Corporate Governance recommends a minimum notice period of 20 working days for AGMs. The provisions on members consenting to hold a meeting at short notice remain (i.e. a majority in number can do so if holding not less than 95% in nominal value of the shares giving a right to attend and vote at the meeting).

Proxies to speak and vote on a show of hands

Regardless of the provisions in a company's articles, the 2006 Act allows proxies present at a meeting, to speak and vote on a show of hands.

Exercise of members' rights

The 2006 Act provides a statutory framework for indirect investors who hold their shares through intermediaries to exercise certain membership rights. Even if the articles are not specifically amended, members of companies whose shares are admitted to trading on a regulated market are able to nominate another person to receive all information to which they are entitled. It would be advisable, however, for the articles to be amended to provide for a nomination process as the 2006 Act does not do this.

Extraordinary resolutions and extraordinary general meetings

These terms are no longer used in the 2006 Act. The transitional provisions suggest that references to extraordinary resolutions in a company's articles will continue to have effect and to be construed in accordance with the relevant section of the 1985 Act. However, many companies have updated their articles.

Qualifying pension scheme indemnity provision

The 2006 Act preserves the 1985 Act provisions which, since April 2005, have allowed companies to indemnify directors for the cost of proceedings brought by third parties, except those incurred in mounting an unsuccessful defence against criminal proceedings and fines imposed in criminal or regulatory proceedings. The 2006 Act includes a new provision enabling directors of pension trustee companies to obtain an indemnity from the company against liabilities incurred in connection with the company's activities as trustee of the pension scheme. Any indemnity provisions in a company's articles should therefore be reviewed to ensure they are up to date and

Public companies should amend their articles at the 2008 AGM to enable directors to authorise conflicts of interest in accordance with the 2006 Act.

extended, if felt appropriate, to take advantage of the new pension scheme trustee provisions. The provisions enabling a company to help fund a director's defence in proceedings against him are also extended to cover regulatory proceedings (such as an FSA investigation).

October 2008 change

Directors' conflicts of interest

From October 2008, non-interested members of the board can sanction any conflict of interest situation involving a director, provided that the articles expressly permit this. Public companies should therefore have amended their articles to include such a provision. The GC 100 has published a useful paper on directors' conflicts of interest, which gives guidance on the new provisions and the amendments to be made to a company's articles in this regard.

When should companies amend their articles?

Some companies are adopting an entirely new set of articles, reflecting the changes mentioned above. These new articles will be effective from 1 October 2009. Although it is possible to include both old and new articles in the same document, making it clear that certain articles only come into effect on 1 October, we believe that this is likely to cause confusion. If a new set of articles is not adopted then companies must remember, when asked to provide a member with a copy of the company's articles after 1 October 2009, to also send the member a copy of the old-style memorandum clearly showing which provisions are now included in the articles.

If you would like more information on any of the topics discussed in this note, or what you should do to prepare for the changes, please contact your usual contact at the firm

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