

# The Companies Act 2006

## October 2009 implementation

September 2009



The final implementation of the Companies Act 2006 (CA2006) takes place on 1 October 2009. This briefing looks at some of the main changes being introduced on that date and how those changes will apply to existing companies. It is one in a series of briefings which we have produced looking at the key implications of the CA2006.

### Formation

It will be possible to form any type of company with a single shareholder. Public companies previously needed at least two members. There will be an entirely new set of forms to file at Companies House when creating a new company on or after 1 October 2009, including a new style memorandum of association.

### Memorandum of association

The memorandum will be downgraded from a key constitutional document to an historical document giving a snapshot of basic subscriber information on incorporation. It will be in a short standard format.

Central to this change is a relaxation in the legislation relating to the objects (or purposes) of a company. The basic assumption under the CA2006 is that a company has unrestricted objects. As a result there will be no need to use the memorandum to list what a company is permitted to do as is currently the practice. If a company wants to restrict its objects it will do this by way of limitation provisions in its articles of association.

The second key feature which currently makes the memorandum an important document - the statement of authorised share capital – is also removed by the CA2006 which abolishes the concept of authorised share capital. This is discussed below.

#### Existing companies

On 1 October 2009, provisions which were previously in a company's memorandum (and which do not form part of the new 'snapshot' memorandum) will automatically be treated as provisions of the company's articles of association. Most significantly these include the objects clause and the statement of authorised share capital. A company will continue to be restricted by its objects unless it takes action to remove them. The options to do this include a special resolution to simply remove the objects (and other unwanted provisions which transfer from the memorandum to the articles) and/or the adoption of a new set of articles. These steps can be taken before 1 October 2009 to take effect immediately on that date.

### Articles of association

Most private company articles of association currently use Table A as a foundation and build on this with some bespoke tailoring to fit the company's size, shape and needs. For new companies (incorporated on or after 1 October 2009) Table A will be replaced by the new model articles. There are separate model articles for private limited companies, public limited companies and companies limited by guarantee. The model articles for private companies are intended to produce a more streamlined constitution mirroring the deregulatory objectives of the CA2006.

In practice we expect that most new private companies will adopt articles based on the model articles with bespoke amendments. New public companies will typically continue to adopt long form custom-built articles.

### Existing companies

A company's current articles of association will continue to apply until they are amended or new articles are adopted. Where Table A has been used as the basis for a company's articles it will remain in place unless the company chooses otherwise – there is no automatic switch from Table A to the new model articles for an existing company.

Many of the deregulatory changes in the CA2006 aimed at private companies require action on the part of an existing company before the benefit can be felt, either by passing a resolution or amending its articles. Where articles contain provisions which are inconsistent with the CA2006 they will be overridden.

With the CA2006 fully in force this October, companies may choose to review their articles to deal with any inconsistencies, take advantage of any applicable relaxations and generally update them to bring them into line with legislation and updated practices. Many public companies have used this year's AGM to update their articles in anticipation of the final implementation date.

## Share Capital

The current system of authorised share capital will come to an end, removing the need to ensure there is shareholder-approved 'headroom' before the board can issue shares under its allotment authority. Restrictions can be built into the articles if the company structure requires shareholder-level control over the number of shares available for issue – although allotment authorities can also be used to exercise control over the board (see below).

New companies will have no upper limit on the number of shares which they can issue unless the company specifically chooses to set one.

### Existing companies

The statement of authorised share capital is currently found in the memorandum of association. As described earlier, this statement is one of the provisions which will switch over into the articles of association immediately and automatically on 1 October 2009. It will continue to act as a ceiling on the number of shares available for issue until removed or altered by a members' resolution or the adoption of new articles of association. These steps can be taken before 1 October 2009 to take effect immediately on that date.

## Allotment of shares

The directors of a private company which has only one class of shares will have a free rein to allot shares unless the articles of association restrict them. For any other company the directors will continue to need allotment authority from the members (by way of an ordinary resolution or in the articles of association).

The rights given under the pre-emption regime (and the ability to disapply the regime) will remain largely unchanged. (Pre-emption sets a presumption that new shares will be offered to existing shareholders in proportion to existing holdings.) For public companies it may be useful to note that the period during which a statutory pre-emptive offer (e.g., a rights issue) must remain open is reduced to 14 days from 21 days.

### Existing companies

Existing allotment and pre-emption authorities will remain valid until their expiry date. For public companies this will mean business as usual with authorities being renewed at the next AGM (albeit with updated wording to reflect the new statutory references, concepts and definitions used in the CA2006). For a private company existing authorities will also need to be renewed in due course. The new rule for private companies with only one class of share will not apply automatically and an ordinary resolution will be required in order to give the directors this wide freedom to allot shares.

## Some other relaxations/changes relating to share capital

It will no longer be necessary to have a positive statement of authority in the articles before a company can (unless its articles expressly prohibit or restrict it):

- consolidate or sub-divide share capital
- issue redeemable shares (private companies only)
- carry out a reduction of share capital
- purchase own shares (including a purchase out of capital by private companies).

In a procedural change, a statement of capital will need to be filed at Companies House setting out an up-to-date position on the issued share capital of a company each time it takes an action affecting its shares.

The terms and manner of redemption of redeemable shares may be decided by the directors at the time of allotment provided that the articles of association (or an ordinary resolution) give them this authority. In a further relaxation it will be possible for the payment on redemption to be deferred (e.g., left outstanding as a loan repayable at a later date) if the holder of the redeemed shares and the company agree.

For public companies with shares listed or traded on the Official List or AIM who purchase their own shares to hold in treasury, the 10 per cent ceiling on shares which can be held in treasury will be removed.

For private companies, the statutory declaration required to be sworn by directors in connection with a purchase of own shares out of capital will be replaced by a directors' statement. The directors must consider all liabilities, including contingent and prospective liabilities when making this statement. This is potentially a wider category of liabilities than previously.

A simplified and less costly procedure for redenomination of share capital into another currency will be introduced (using a shareholder resolution rather than the current route which typically involves court approval).

## Home addresses kept confidential

Directors will need to give details of both a usual residential address and a service address (which may be the company's registered office). The company and Companies House will keep two separate registers of addresses but only the service address will be available to the general public. Companies House will only disclose an address from the residential register to certain specified public authorities or credit rating agencies. Company secretaries will only need to provide a service address.

### Existing companies

Any home address currently filed will be deemed to be the service address going forward unless a director provides a new address for this purpose. Even where a director gives a service address any references to his or her home address which are on Companies House historical records will not be removed (due to the practicalities and expense involved) and will still be accessible to the public. This limits the benefit of the new confidentiality regime unless and until a director moves home. Where however a director can show a serious risk of violence or intimidation as a result of the company's activities it may be possible to have a home address completely removed from the public records.

## Change of company name

Currently the only way a company can change its name is by special resolution of the shareholders. The CA2006 allows for an alternative (and simpler) method to be set out in the articles (e.g., by resolution of the board or a lower level of shareholder approval).

## Companies House forms

There has been a revamp of Companies House forms and all forms will be in a new format from 1 October 2009.

## Further information

Please speak to your usual contact at Burges Salmon or contact **Nick Graves** (0117 939 2200) ([nick.graves@burges-salmon.com](mailto:nick.graves@burges-salmon.com)) (Partner) or **Alyson Whale** (0117 939 2294) ([alyson.whale@burges-salmon.com](mailto:alyson.whale@burges-salmon.com)) (Senior Associate, Professional Support Lawyer).

## Existing companies – key | October 2009 changes at a glance

	<b>Consider</b>	
Memorandum downgraded/unrestricted objects	→	Special resolution and/or amend articles to remove existing objects (and other unwanted memorandum provisions which transfer to articles)
Authorised share capital abolished	→	Ordinary resolution or amend articles to remove or vary the ceiling on share capital (or include in above special resolution if removing other provisions of memorandum)
Directors freedom to allot shares (private companies with one class of shares)	→	Ordinary resolution to authorise
Directors to determine terms and manner of redemption of shares	→	Ordinary resolution or amend articles to authorise directors
Home addresses to be kept confidential (to a degree)	→	Company – keep separate registers of home and service addresses Directors – file a service address
Change of company name by method allowed in articles	→	Amend articles to allow alternative method (e.g., board resolution)

## Existing companies – some earlier CA2006 changes relevant to articles of association or procedures for resolutions and meetings

- Private company deregulation (e.g., removal of AGM and company secretary requirements)
- New written resolution regime (private companies only)
- Relaxations in general meeting notice periods (specific rules apply to Official List companies)
- New rules on proxies and corporate representatives
- New electronic communications regime
- Contents of notice of meeting expanded (Official List)
- Website publication of advance information, poll results, accounts and reports and more (Official List)
- Rights of members to include business at AGM and request independent report on poll (Official List)
- Information rights for indirect investors (Official List)
- New statutory directors' conflicts of interest regime

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