

# Companies Act 2006

## A Closer look at the decision making process

Towards the end of 2007 the government announced that the final implementation date for the Companies Act 2006 (the Act) would be delayed until October 2009. A previous announcement had indicated that all of the new Act's provisions were expected to be in force by October 2008. The reason for the delay stems from the need to ensure that the necessary changes to the systems and processes at Companies House are in place in time.

In this briefing we remind you of the current status of the implementation of this important legislation. We then take a closer look at the changes made to the corporate decision making process.

### The beginning

The company law reform process began as far back as 1998, with an independent review. White Papers followed in 2002 and 2005 and a Bill was eventually published in November 2005. The Act itself finally received Royal Assent on 8 November 2006.

### Objectives

The government's overall objectives in respect of the new legislation were to simplify and modernise company law so that it better meets today's business needs and provides flexibility for the future. While the reform process aimed to 'think small first', the resulting legislation has an impact on directors, auditors, shareholders and company secretaries of private, public and quoted companies.

The Act itself has been written in simplified language, with a particular focus on small business.

### Implementation

The Act itself is over 700 long pages and contains some 1,300 sections. It will take around three years to implement in full! In addition to the Act there will be a considerable amount of secondary legislation issued, including commencement orders. This additional legislation will provide us with further detail and will include the specific dates that the individual sections of the Act will come into force from.

Early in 2007 the government published an overview of the expected commencement timetable for the new Act. Three key common commencement dates were announced:

- 1 October 2007
- 6 April 2008
- 1 October 2008

These represented the main dates that particular sections of the new Act would be introduced from. While many of you will be familiar with the law from the Companies Act 1985 and the practices and procedures that this brought about, the new 2006 Act will eventually replace almost all of the 1985 Act. Not everything in the 2006 Act is new though; broadly speaking around one third is a consolidation of the existing law, one third is re-written old legislation and one third is new.

A further government announcement late in 2007 confirmed that the final implementation date would in fact be October 2009.

It is worth mentioning that the implementation dates for the individual sections of the new Act do not always mean that change will take place immediately. Changes may take place for accounting periods beginning on or after those dates. For example, the forthcoming changes in respect of company reports and accounts will generally take place for accounting periods beginning on or after 6 April 2008. It is expected therefore that in most cases April 2009 year ends and onwards will be the first to be affected.

## Progress to date

At the time of going to print five commencement orders had been issued, bringing individual sections of the new Act into force.

Some of the key changes already introduced include:

- electronic communications

Some of the first provisions of the new Act to come into force allowed companies to make greater use of electronic communications. Electronic communications with shareholders by email, or via a website with notification, are now possible where an individual shareholder consents. Individual shareholders who prefer not to use this option have the right to request continued communication as hard copy.

- a new statutory statement of directors' duties
- amendments to the rules for directors, including the removal of the general prohibition on companies providing loans to directors
- much of the new law covering company meetings and resolutions.

We take a closer look at this further in this document.

### What's next?

The next important implementation date is 6 April 2008 when the new legislation in respect of reports, accounts, audits and auditors will be introduced. The government has also announced that the repeal of the restrictions under the Companies Act 1985 on financial assistance for the acquisition of shares in private companies, including the 'whitewash' procedure, will be implemented from October 2008.

### A closer look at the decision making process

One of the government's intentions with the new Act was to make it easier to set up and run a company. A number of changes to help make this possible were introduced with effect from October 2007 and it is fair to say that there has been a relaxation of the rules in this area.

### The following changes relate to private companies.

#### Private companies no longer need to hold an annual general meeting (AGM).

For many years company law required every company, including private companies, to hold an AGM with not more than 15 months between meetings. This was amended in 1989 to allow private companies to make an election 'by elective resolution' to dispense with the AGM. Many private companies, although not all, took advantage of this.

As of 1 October 2007 there is no longer a legal requirement for a private company to hold an AGM. However if there is an existing express provision in a company's Articles of Association (Articles) that requires an AGM this provision will need to be removed before the company can dispense with the AGM.

A company may of course still choose to hold shareholders' meetings and meetings can be called by directors or by shareholders representing 10% (5% if it is more than 12 months since the shareholders last requisitioned a meeting) of the voting shares.

Consequences of no longer needing to hold an AGM include:

- where the company has an audit, the auditor is automatically re-appointed for the following year
- private companies will no longer need to lay their accounts before the AGM; however, the accounts must still be circulated to the shareholders.

**Most private company decisions may now be made by written resolution – formal meetings are in the majority of situations no longer necessary.**

Company law sets out procedures for conducting certain aspects of company business through

formal meetings, where resolutions are passed. A resolution is an agreement or a decision taken by the directors or shareholders and when passed, the company is bound by them. Under the previous legislation there were a number of rules to comply with in respect of notice periods for meetings and with regard to the types of resolution to be passed.

Under the new Act private companies are able to pass written resolutions without unanimous shareholder approval. The resolution may also be circulated to the shareholders electronically rather than in hard copy under changes brought about earlier by the new Act.

Written resolutions may be proposed either by the directors or shareholders representing 5% of votes or whatever particular conditions are specifically stated in the company's Articles. A company's Articles may be amended to substitute a lower percentage in this situation.

The reasoning behind these changes is that the vast majority of decisions in private companies are made by the directors, who are often also the company's shareholders. Now there is generally no need to call a separate meeting of the shareholders.

There are two types of written resolution in the new Act:

- ordinary resolutions which require a simple majority of the eligible votes to approve them
- special resolutions which require 75% of eligible votes.

Existing companies should be aware that their Articles may specifically require a higher majority for each of these and that the new Act will not automatically override this.

In order to further streamline the meeting process, shareholder meetings for private companies may now be called on a 14 day notice period, unless other arrangements are specified in the company's Articles. 90% of shareholders rather than the previous 95% can also agree to hold a meeting at short notice.

However a formal company meeting continues to be required if the company wishes to remove a director or the auditor.

### Looking forward

#### **A private company may choose whether to appoint a company secretary or not.**

The legal requirement for a private company to appoint a company secretary will be abolished from 6 April 2008. Public companies will continue to be required to appoint a company secretary.

A private company will however have the option to choose to appoint a company secretary if it wishes, as many of the functions that the company secretary traditionally carried out will remain. The details of any company secretary appointed will continue to be required to be registered at Companies House.

If after 6 April 2008 your private company no longer wishes to have a company secretary, you should ensure that the role is resigned or that the appointment is terminated.

#### **The following changes relate to both private and public companies.**

##### **Forming a company will become easier from October 2009.**

If you delve back into your company's statutory records you will come across two documents in particular, a Memorandum of Association (Memorandum) and Articles of Association. These preliminary documents, which set out how the company can operate, will change significantly in the future.

New companies registering under the Companies Act 2006 from 1 October 2009 will be able, if they wish, to take advantage of new, more relevant model Articles of Association.

Existing companies may also choose to take advantage of these new model Articles in whole or

in part, provided that the appropriate special resolution is passed. Otherwise an existing company will retain the model Articles that were in place at the time it was formed or the ones that it has specifically registered.

The Memorandum will become an historic document, which with various accompanying documents will simply record the facts at the time of incorporation, for example the names of the subscribers to the company. The Memorandum will not affect the ongoing operation of the company. For existing companies the provisions contained in the Memorandum that are beyond the new standard information will automatically be regarded as Articles. Existing companies are not therefore required to alter their Articles in this respect.

Also from this date the Articles rather than the Memorandum will set out the principles that cover the way in which the company conducts its business. Going forward there will also be no requirement for companies to state their objects, therefore they will not be restricted in what they do. Of course the option remains to restrict what the company may do.

Existing companies may take advantage of this change by passing a resolution to remove a statement of objectives that is currently part of their Memorandum.

### Other changes

There will be a new minimum age of 16 for directors. Any existing underage directors will cease to be directors when this age criteria comes into force.

All companies will be required to have at least one natural person as a director, therefore another company cannot be the sole director of a company. An existing company in this position will therefore have to appoint a natural person as a director. The government's intention is to allow companies that did not have at least one director who was a natural person at the time that the act received Royal Assent until October 2010 to comply with this requirement.

#### Action

You may now wish to review your company's Articles of Association to identify any action that you wish to take in response to the deregulation under the new Act. Please contact us if you would like to discuss the options available in more detail.

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