

Companies Act 2006 Sections in force since 1 October 2009

On 1 October 2009 the last few sections of the Act were brought into force and The Companies Act 2006 ("the 2006 Act") is now fully implemented.

In this Insight we highlight the main changes affecting private companies and LLPs and how we can help you take advantage of them.

COMMENCED ON 1st October 2009

The Company's Constitution

New style Memorandum and Articles for companies formed on or after 1 October 2009.

One of the most important changes brought in by the new Act in this last implementation stage is that companies formed on or after 1 October 2009 will have new-style constitution documents. The Memorandum of Association is now simplified and contains only the subscribers' details and a statement of their intention to form a company. New Model Articles are significantly shorter than Table A regulations under the previous Companies Acts.

What is the position for companies formed before 1 October 2009?

For companies which were in existence before 1 October 2009, all clauses set out in their Memorandum of Association, but not part of the new-style Memorandum (i.e. everything apart from the subscription details), are now deemed to be part of the Articles

of Association. Therefore, the objects clause and limited liability clause are now deemed to be part of the Articles.

The implication of this is that such clauses can now be amended by special resolution which requires 75% majority and not a unanimous consent of the members normally required to amend the Memorandum of Association.

The first time a company's Articles are amended in any way, however minor, on or after 1 October 2009, the new Articles will have to expressly include the clauses from the old-style Memorandum which are now deemed to be part of the Articles. Some of those clauses may be altered, in particular the objects clause and a clause stating the amount of authorised share capital - see below.

Private companies can delete the objects clause entirely, which will have the effect that the company continues with unrestricted objects. However, charitable companies must ensure that their objects clause is preserved in any new Articles to ensure compliance with the statutory definition of "a charity".

Privacy rights for directors' and LLP members' residential addresses

Directors and LLP members can use a service address on all Companies House forms.

Residential address will be treated as protected information and will not be visible on public record.

Since 1 October 2009 company directors are able to use a service address instead of their residential address on public record for each directorship they hold. They have to disclose to the Registrar of Companies both their usual residential address and a service address, but these will be kept separate. The service address will be shown on public record for each directorship. The residential address will be recorded on the company's registers and on the company's record at Companies House, but this will be held as protected information and will not be made public unless the service address given is no longer active.

A director can choose any address as the service address including the registered office of the company/ies of which he is a director. However, the address must be one where documents can be delivered and an acknowledgement of receipt can be provided if required. The address cannot be a PO Box or a DX number.

A director can keep his residential address as the service address and the fact that the two addresses are the same will not be obvious from the company's public record.

If directors wish to take advantage of the option to use a service address on public record, they should arrange for this address to be filed at Companies House for each of their directorships. Otherwise, the Registrar will show their address currently shown on public record as their service address.

LLP members can also show a service address on public record.

NOTE:

- It is not possible to remove documents previously filed at Companies House which may include details of residential addresses. It is therefore not possible to remove residential addresses already registered on public record before 1 October 2009. However, company searches (for instance) performed after 1 October 2009 will only show service addresses.
- It is important that directors check periodically whether the service address they have given is still active. If the post is returned from the service address as undeliverable, the Registrar of Companies has the power to make a director's residential address public.
- Since 1 October 2009 a director's residential address can only be disclosed to the regulatory authorities including the police and HMRC. It may also be made available to credit reference agencies but vulnerable directors will be able to apply to the Registrar for their residential addresses not to be provided to credit reference agencies.

Authorised share capital

Authorised share capital has been abolished for all companies formed on or after 1 October 2009.

Directors of new companies with only one class of share have an assumed power to issue any number of shares they think appropriate without having to obtain authority from the shareholders.

What is the position for companies formed before 1 October 2009?

The concept of authorised share capital has been abolished for all companies formed on or after 1 October 2009 and there is no limit on the number of shares directors can issue. The directors now have an assumed power to issue any number of shares they think appropriate.

However, this does not automatically apply to existing companies. They need to pass a resolution to amend a company's Articles in order to take advantage of this new liberal regime.

Directors of private companies with more than one class of share will still require authority to allot shares either by the Articles or by a separate resolution of the members.

Purchase of own shares and payment out of capital

Purchase of own shares and payment out of capital are now permitted unless specifically restricted or prohibited by the Articles.

Payment out of capital must be supported by a solvency statement.

The new Act permits the repurchase of shares by a company unless this is restricted or prohibited by the company's Articles. This reverses the position under the previous Companies Act (the 1985 Act) which prohibited the repurchase unless authorised by the Articles.

Private companies are able to redeem or purchase shares out of capital unless the Articles restrict or prohibit that right. A solvency statement by the directors and a special resolution is required. If the issue of redeemable shares and purchase of own shares are not already prohibited or restricted by the Articles, a company may wish to consider whether the Articles should be amended to include this restriction or prohibition for payments out of capital.

New procedure for changing company names

Simplified procedure for changing company's name.

Companies are able to change their name by one of the alternative procedures which include:-

- Company's resolution (requiring majority of less than 75%)
- A conditional resolution (effecting a change on some event occurring, for example a merger)
- Board resolution
- Such means as may be provided in the company's Articles of Association.

Changes to Companies House forms

New forms to be used for all changes that have taken place on or after 1 October 2009.

All Companies House forms have changed from 1 October 2009. Companies now have to use new forms for all events that have taken place on or after 1 October 2009 as the Registrar will reject old forms. However, company events which took place before 1 October 2009 should be reported on old forms even if the form is filed on or after 1 October 2009 (this excludes the Application for Striking Off which now must be filed on the new form irrespective of the date of signature).

Because of this rule, both old and new forms will be available on the Companies House website and care should be taken when choosing the appropriate form.

Statement of capital

Since 1 October 2009, a statement of capital must be filed

- on incorporation of a new company,
- with the annual return form filed on or after this date, and
- with each notification of a change in capital.

Since 1 October 2009 all companies with share capital have to file a Statement of Capital as part of:

- The documentation necessary to incorporate a company on or after this date, or
- The annual return filing made up to a date on or after 1 October 2009, or
- Any filing in respect of allotment of shares, redenomination of shares, cancellation of re-purchased shares, notice of consolidation or sub-division of shares or reduction of capital taking effect on or after that date.

A statement of capital shows a snapshot of the company's share capital at a given date. Companies House provides a statement of capital form (SH19) for this purpose.

New rules as to proper delivery of documents to the Registrar

Use black ink for typeface and any signatures.

Show company's name and registration number on a page other than the front page of the financial statements.

A 14 day concession to re-file rejected

documents in the correct format has been removed.

Since 1 October 2009, in order for paper documents to be considered to be properly delivered to the Registrar, they must be typed in black ink on white paper. The Registrar's Rules also require the use of black ink for signatures although the Companies House staff seem to have taken a more relaxed view on this and have been prepared to accept documents signed in blue ink. However, this practice may change without notice (i.e. documents signed in blue ink may be rejected) and we would recommend that black ink is used when signing accounts and forms to be filed at Companies House.

Secondly, when filing statutory financial statements or abbreviated accounts, a company's name and registration number must be included on one of the following:

- Balance sheet
- Directors' report
- Auditors' report, or
- Directors' remuneration report

The usual practice of showing this information elsewhere (e.g. on the cover sheet) should be amended.

Finally, the Registrar's concession, which currently permits 14 days for a company to re-file rejected documents in the correct format, is no longer available. Therefore, if a company's financial statements or other document whose late filing will lead to a penalty are rejected, on or after 1 October 2009, the company will incur a penalty for late filing if the corrected documents are not re-filed before the deadline expires.

LLP registers of members

Each LLP now must keep a register of its members and have it ready

for inspection according to the rules applicable to companies.

LLPs now have to comply with a new requirement to maintain a register of members. This register must be made available for inspection according to the rules applicable to companies (i.e. either at the LLP's registered office or a SAIL address - see below). Members' residential addresses must not be disclosed without a court order.

Changes to arrangements for inspection of company / LLP registers

Some or all statutory registers can be kept at a Single Alternative Inspection Address (SAIL).

Registrar must be notified of this address and given the list of registers kept there.

Location of Register of Members (353) forms filed prior to 1 October 2009 will not be "carried forward". New style forms must be filed to comply with the new rules.

Company's and LLP's registers can be kept either at the registered office or at a single alternative inspection location (SAIL). Only one SAIL address can be used at any time. A company / LLP can move some or all of its registers to the SAIL address. It will have to notify the Registrar which registers are held at a SAIL address or if a SAIL address has changed. A new form is available at Companies House for this purpose.

Companies which have filed a Location of Register of Members (353 form) prior to 1 October 2009 will have to file the new forms (which refer to the SAIL address) in order to comply with the new rules.

Should we change our company's Articles of Association and other corporate documents now?

There is no legal requirement to do so but we would strongly advise you to consider it.

There is no legal requirement to do so but it is advisable to review the existing Memorandum and Articles in the light of the changes brought in by the new Act. Whilst certain provisions of the new Act will override inconsistent provisions in the Articles, a number of new provisions require positive action by the company (i.e. passing of a resolution to amend the Articles). Your old-style Memorandum and Articles are likely to refer to superseded legislation and this will make them confusing to interpret.

To avoid uncertainty we suggest that each company should review its Articles, identify the provisions of the new Act which are deemed to be included from 1 October 2009 and consider if any amendments are needed to remove or restrict these new provisions or to take advantage of the new rules which are not deemed to be included.

Please remember, even if you do not take any action to change your Articles now, the first time any amendments made in the future, the new Articles will have to include the clauses from the Memorandum which are now deemed to be included.

Being prepared - action required

As a result of some of the changes referred to above we suggest you should

consider the following:

- Ensure the Registrar is notified of a service address for the directors / LLP members if this is to be different from the address already held on public record.
- Update the register of directors to include service addresses.
- Create separate registers of LLP members (one showing service addresses and another showing residential addresses).
- Ensure the company is in a position to supply a statement of capital on request.
- Consider the need to register a single alternative inspection location (SAIL) address.
- Consider need to review the company's Articles.

REMINDER

The following changes have taken place during the previous implementation stages of the new Act:

- Private companies do not have to hold annual general meetings unless they are specifically required by the Articles.
- Written resolutions no longer require unanimous consent of the members. The consent required to pass a written resolution is determined by the type of the proposed resolution itself. Ordinary resolutions can be carried by a simple majority (50% plus one)

and special resolutions will require consent of 75% members.

- Accounts filing deadlines have been shortened to 9 months after the year end. This applies to accounting periods beginning on or after 6 April 2008.
- Late filing penalties have been increased up to a maximum of £1,500 for a private company.
- Capital reduction can be supported by the solvency statement without the need to obtain a court order.
- A director must be aged 16 or over at the time of his appointment. There is no maximum age for a director.
- Private companies do not have to appoint a company secretary but they can still do so if they wish.
- A single director can execute company's documents in the presence of a witness who attest the signature.
- Proxies are able to exercise all the rights of a participant in shareholders' meetings.

Contact Us

If you would like us to review your Articles and advise on the changes necessary to bring them up to date or if you require clarification or action on any matter discussed in this Insight please contact your usual Buzzacott manager or partner or email your query directly to Vesna Sowden on sowdenv@buzzacott.co.uk.