

› THE COMPANIES ACT 2006 – 1 OCTOBER 2009 IMPLEMENTATION



With effect from 1 October 2009, the Companies Act 2006 (“2006 Act”) introduces the final tranche of changes to company law in the United Kingdom, covering, amongst other matters:

- › registers of directors and members
- › annual returns
- › memorandum and articles of association
- › authorised share capital requirements
- › share buy-backs
- › allotments of shares
- › directors and secretaries

1 October 2009 therefore marks the conclusion of the phased implementation of the 2006 Act, although much of the old Companies Act 1985 (“1985 Act”) is replicated in the 2006 Act. This briefing note addresses the latest provisions and comments on some of the likely practical implications of their introduction.

Register of Directors / Register of Secretaries

As of 1 October 2009, a company must keep a stand-alone register of its directors (and a separate register of its secretaries, if applicable) which must be available for public inspection. Private companies must also keep a register of directors' residential addresses, although this register must be kept confidential.

Every director must file two addresses with the Registrar:

1. a service address for the public record (which can be the company's registered office address). The use of service addresses under the 2006 Act will enable a director's home address to remain confidential and provide comfort to directors who have long felt that the public disclosure of home addresses exposes them to potential threats; and
2. a residential address (which will be disclosed only to specified public authorities and, in most cases, to credit reference agencies – although directors whose association with particular companies puts them at risk of violence or intimidation can apply for higher protection, so that their home addresses will not be disclosed to credit reference agencies).

“The use of service addresses enables a director's home address to remain confidential.”

An existing company need not comply with the above provisions until the date when its first annual return after 1 October 2009 is lodged or due.

In the case of a company incorporated before 1 October 2009, the relevant existing address of a director or secretary will be deemed, from 1 October 2009, to be a service address (i.e. not confidential) unless the Registrar is notified otherwise.

If a director wishes to make confidential his residential address, and use the company's registered office as his service address (for example), he must take the necessary steps to inform the Registrar accordingly. As his residential address will already be on the public record in existing filings at Companies House, (a) the Registrar will make a charge for each document on the register which needs to be blanked out, and (b) it can only be done for documents lodged since 2003, so earlier address details will always remain.

Register of Members

As of 1 October 2009, companies will be obliged to inform any person who asks to inspect or obtain a copy of its register of members whether the information in the register is up-to-date, and, if it is not, the date to which it has actually been made up. Failure to do so can lead to a fine.

In addition, where a person asks to inspect the register of members, the company must make the register available for inspection between 9am and 3pm on the day specified in the person's notice and for a period of at least 2 hours in duration (provided it is a working day and the notice allows for the minimum prescribed notice period, being 10 working days in normal circumstances).

In light of these impending changes to the law, and the new penalties for non-compliance, companies should ensure that they have considered and implemented adequate procedures for responding to requests to inspect their register of members.

“From 1st October, if a complete set of articles is not lodged within 15 days of any change, a penalty of £200 will be payable by the company.”

Where registers are kept by Semple Fraser as part of our registered office service, it will therefore be important for our clients to tell us of any such requests they receive.

Annual Returns

An annual return under the 2006 Act will be largely the same as under the 1985 Act, albeit with certain consequential differences reflecting other changes within the 2006 Act, but the form itself will now be much longer – 14 pages as opposed to 4. This makes allowance for the fact that, in every annual return, as with any return relating to any changes in the issued capital of a company, there must now be included a separate statement of capital setting out the current issued share capital of the company at the relevant date.

New rules already apply in relation to the disclosure of shareholders' addresses in annual returns made up to dates on or after 1 October 2008. Private companies need not disclose the address of any shareholder, whatever the level of their holding.

Where a company has less than 20 shareholders the provisional 'shuttle' annual return (provided by Companies House) will, after 1 October 2009, automatically include the required information as previously provided by the company. This then only needs to be updated by the company as necessary, proving less onerous given that addresses of members will be excluded. The shuttle return does not, however, include members' information for companies with more than 20 shareholders. These companies will therefore require to modify their own procedures so that shareholders' addresses are excluded from annual returns.

Memorandum of Association

From 1 October 2009, the memorandum of association of a company will lose its general importance. For companies incorporated after 1 October 2009, the memorandum will simply comprise a statement that the subscribers (a) wish to form a company, (b) agree to become members, and (c) will take a specified number of shares each.

For companies that were incorporated before 1 October 2009, their current memorandum will effectively be split into two parts whereby the details contained in the new memorandum (the details of the subscriber shareholders) will be treated as the memorandum of the company and the rest of the provisions (including the objects clause etc) will be treated as part of the company's articles.

This means that any new companies will not have the old "objects clause" imposed as a restriction, rendering the directors more freely able to run the company as they see fit.

Older companies, however, will have their existing "objects clause" transferred into their articles and it will continue to operate as a limitation on the directors' authority.

Any such restriction, or indeed the transferred memorandum in its entirety, can be removed by a resolution, just as you would for changing any part of a company's articles. You should therefore consider whether it is now appropriate to remove any provisions of your existing "objects clause".

It has always been the case that when changes are made to a company's articles, a complete set of the new articles should be lodged with the Registrar. In practice, this has not been complied with unless the changes were major, but from 1 October if a complete set of articles is not lodged within 15 days of any change, no matter how small, a penalty of £200 will be payable by the Company.

Authorised Share Capital and Allotments of Shares

As of 1 October 2009, companies limited by shares are no longer required to have an authorised share capital. The effect of this is that the directors (assuming they have the authority of the members) can allot shares without limit.

If shareholders wish to restrict the number of shares that can be issued then a suitable provision can be inserted into the articles to that effect.

For existing companies, the authorised share capital currently stated in their articles will act as a ceiling on the amount of shares that may be allotted. This restriction can be removed by an ordinary resolution amending the articles.

“Directors of a company can allot shares by means of a simple board resolution.”

A private company with only one class of share will no longer require the prior authority of its members to allot new shares. Instead, provided the articles do not state otherwise, the directors of a company can allot shares by means of a simple board resolution.

However, for companies incorporated prior to 1 October 2009, this is not an automatic power. The members must first resolve, by way of an ordinary resolution, that the directors should have this power going forward. Once authority is granted, it can only be revoked by amending the articles to provide otherwise.

Public companies, and private companies with more than one class of share, still require prior authorisation of members for any allotment

“The directors' statement makes the purchase out of capital more simple, but at the same time a wider category of liabilities must be examined by the directors.”



and the 2006 Act largely replicates relevant provisions of the previous legislation regarding the requirements of such authority.

The requirement to make a return to the Registrar within one month of any allotment of shares still applies. However, the return of allotment must now be accompanied by a statement of capital, which will essentially be a snapshot of the company's issued share capital (containing information such as the total number of shares of the company and the rights of each class of share). As before, it is still an offence to fail to make a return to the Registrar of an allotment.

In light of these changes, private companies incorporated before 1 October 2009 with one class of share might consider passing a resolution to allow directors to allot shares (i.e. to facilitate the administration of their company). Private companies incorporated after that date may wish to consider amending their articles to preclude their directors from having such powers (i.e. to ensure that members maintain control).

Share Buy-Backs

The provisions for share buy-backs which come into effect on 1 October 2009 largely replicate the existing provisions of the 1985 Act. There is no change to the general prohibition on a company purchasing its own shares with the limited exceptions that both private and public companies may purchase shares out of distributable profits or from the proceeds of a fresh issue of shares made for the purpose of financing such buy-back, whilst private companies also have the ability to purchase shares from their capital.

“The Registrar may ignore certain keywords (such as 'UK', 'GB' or '.com') when considering a name and so reject the application.”

The key changes to a company purchasing its own shares which are being implemented on 1 October 2009 are:-

- › a company no longer requires its articles specifically to authorise the purchase of shares – unless a prohibition or restriction is contained in its articles a company is permitted to purchase its own shares;
- › in submitting the appropriate form to the Registrar, the form must be accompanied by a statement of capital;
- › when a private company purchases its own shares out of its capital, the directors are now required to make a statement (rather than the current statutory declaration) on the

financial position of the company. The directors' statement does not require to be sworn before a solicitor or notary public (as was the case for the statutory declaration under the 1985 Act), but it is still an offence for the directors to make the statement without having reasonable grounds for the opinion expressed in it. The content of the statement is similar in every other respect to the statutory declaration required under the 1985 Act; and

- › the categories of liabilities that the directors must take into account when making the directors' statement for a purchase of shares from capital are far wider than those to be considered under the 1985 Act. When giving the statement the directors must take into account all liabilities, including contingent or prospective liabilities.

In summary, the 2006 Act has largely kept the existing statutory provisions on the purchase and redemption of shares. The directors' statement makes the purchase out of capital more simple but at the same time a wider category of liabilities must be examined by the directors.

Redemption of Shares

From 1 October 2009, unless the company's articles provide otherwise, directors will no longer require authority to issue redeemable shares nor have the terms and manner of redemption of the shares set out in the articles. The directors are therefore free to deal with these types of shares as they please, so long as the manner and terms of the redemption is agreed in advance of issuing any such shares.

The new law also allows for deferred payment for the shares as opposed to full payment on redemption as was the only option under the 1985 Act.

Reduction of Share Capital

A major overhaul in the way a private company can reduce its share capital was brought into force on 1 October 2008 with the introduction of a new "solvency statement" procedure. This route is an easier and cheaper process (for private companies only, public companies will continue to require court approval), as there is no longer the expense of having to apply for court approval of the resolution approving the reduction. Instead, the directors themselves can give the statement.

Further, a company's articles no longer need specifically to state that a reduction of share capital is possible – a company is able to do so unless its articles provide otherwise.

The main change coming into effect on 1 October 2009 is that the solvency statement must now be accompanied by a "statement of

“A person who knowingly or recklessly causes to be delivered to the Registrar a document that is false or misleading will be liable to imprisonment or fine.”

capital”, which replaces the “memorandum of capital”. This document states the company’s share capital as reduced by the resolution.

A significant change to the court procedure contained in the 2006 Act that comes into force on 1 October 2009 is that, if objecting, creditors must now show there is a real likelihood that the proposed reduction will put at risk the company’s ability to discharge those creditors’ claims or debts when they fall due (rather than the directors having to show to creditors that the reduction is in the best interests of the company, as was the case under the 1985 Act). The court may direct that the right of objection does not apply to any class or classes of creditors.

The court may make an order confirming the reduction on such terms and conditions as it thinks fit and must not confirm the proposed reduction unless it is satisfied that every creditor who may object to such reduction has consented or his debt has been discharged, determined or secured.

Generally, the radical changes to the statutory requirements for the reduction of capital for private limited companies are already in force and the provisions taking effect from 1 October 2009 are supplemental.

The Registrar

The sections of the 2006 Act which relate to the Registrar and which are to be implemented on 1 October 2009 will, generally speaking, only apply to filings made after 1 October 2009. New Companies House forms, and associated fees, will be implemented on 1 October 2009 but these are all currently in draft form and subject to change up to the implementation date.

A new offence will be created under the 2006 Act whereby a person who knowingly or recklessly causes to be delivered to the Registrar a document that is false or misleading will be liable to imprisonment or a fine. This general offence replaces various offences in the existing legislation relating to the provision of false information.

In respect of documents delivered on or after 1 October 2009, the Registrar is empowered to accept and register such documents even if they do not meet the requirements for proper delivery in respect either of the content of the document, or of the form, authentication and manner of delivery.

However, while the Registrar may accept the form which is perhaps inconsistent with the public records (e.g. showing that a new director is appointed although no separate appointment form has been lodged), the Registrar would then write to the company asking for corrective entries to be submitted and if this was not done

within the timescale specified in the request, the Registrar would put a notice on the company’s public record that the information held by the Registrar contains “inconsistent information”.

Company Names

The new proactive approach of the Registrar is shown in relation to company names. It has always been the case that a name which is the same as a registered company would be rejected, but this could be overcome by adding other words to differentiate the proposed name. From 1 October 2009, the Registrar may ignore certain keywords (such as “UK”, “GB” or “.com”) when considering a name and so reject the application. The exception is if the written consent of the other company or companies is received, which allows group companies to have similar names.

Further, from 1 October 2009 a company will be able to change its name not only by a special resolution of its members but also by any method provided for in the articles (e.g. a resolution of the directors).

Recommendations

The 2006 Act in its final implemented form is a long overdue modernisation of UK company law. Think small first, protecting the identity of those involved in companies and generally making the lives of the Registrar, directors and members easier, is a theme that runs through the changes and is a welcome change for most.

To make your life easier or to simply ensure that your internal systems are 2006 Act compliant, you should consider the following:-

- › producing a separate Register of Directors’ residential addresses – it must be stand alone and kept separate from the regular statutory records of the company;
- › intimating a service address to the Registrar if you wish to take advantage of the privacy protections;
- › formulating a procedure for allowing the inspection of your company’s Register of Members;
- › performing an audit of your company’s Register of Members – it is more important than ever that these are accurate and up-to-date; and
- › most importantly, organising a review of your current memorandum and articles and undertake a simplification of them in light of the changes that are coming into force.

“Directors' duties include a statutory obligation to take into account a wide range of external factors when making company decisions.”



OVERVIEW OF IMPLEMENTATIONS TO DATE

1 October 2009 marks the end of the staggered implementation of the 2006 Act; a process which commenced in January 2007. For easy reference we have set out below a brief summary of the new provisions under the 2006 Act that have already been introduced.

Accounts

Filing deadlines for accounts reduced by one month; private companies have nine calendar months, and public companies six calendar months, within which to file accounts.

Claims by shareholders

New “derivative claims” rules enable shareholders to bring claims against directors on behalf of the company (e.g. for breaching any of the new duties applicable to directors).

Company secretaries

The post of company secretary made optional for private companies (but remains mandatory for public companies).

Company names

Any person (i.e. an individual or a company) can object to a company's name on the Register if it is the same as one associated with such person and in which he has goodwill, or if it is sufficiently similar to such a name as to be likely to mislead by suggesting a connection between such person and the company. It is for the company in question to show justifications for the name, failing which the objection must be upheld and an order made requiring the company to change its name.

Directors

- ▶ The new statement of Directors' duties has been introduced, which includes a statutory obligation to take into account a wide range of external factors when making company decisions.
- ▶ Directors no longer need to provide details of their interests in shares or debentures of the company or its group.
- ▶ Directors will not be required to disclose in the Directors' Report in the Annual Accounts their interests in shares for reports signed on or after 6 April 2007.
- ▶ Any director's service contract which is subject to a guaranteed term of two or more years requires the approval of the company's shareholders.
- ▶ A company may make unlimited loans to its directors provided shareholder approval is obtained.
- ▶ Limits raised for substantial property transactions between the company and associated persons (e.g. directors) requiring shareholder approval.
- ▶ Payments for loss of office to persons connected with directors require shareholder approval.
- ▶ Companies must have at least one natural person as a director.
- ▶ There is a minimum age of 16 for directors. A director under the age of 16 on 1 October 2008 automatically ceased to hold office as of that date.

Electronic communications

A company is now able to communicate electronically with its own shareholders, provided the shareholders give their prior consent to such method of communication and the company's Articles allow it.

Financial Assistance

The financial assistance prohibition applicable to private companies has now been abolished.

Late filing penalties

Penalties for late filing have been increased, and the applicable penalty now doubles for any company which files late two years in a row.

Liability limitation agreements

A company may no longer purchase liability insurance for its auditor. “Liability Limitation Agreements” introduced which may cover, in relation to a company's accounts for one year, negligence, breach of duty, and/or default.

Meetings and written resolutions

- ▶ A private company does not need to hold an Annual General Meeting, unless required to do so by its Articles.
- ▶ The notice period for general meetings of private companies shortened to 14 days.
- ▶ Extraordinary resolutions and elective resolutions abolished.
- ▶ Written resolutions only require to be signed by shareholders representing the necessary majority.
- ▶ Directors obliged to keep minutes of all board meetings; failure to do so is a criminal offence.
- ▶ Board minutes must be retained for at least 10 years from the date of the relevant meeting.

Model Articles of Association

A revised version of Table A for companies formed on or after 1 October 2007.

Reduction of capital

A private company may reduce its share capital without a court order, so long as it provides a “Declaration of Solvency”.

Trading disclosures

A company must state its name, registered number, place of registration and registered office address on any electronic communications, including websites, email and online order forms.

Simple Fraser has produced detailed briefing notes on many of the above areas – if you would like a copy of any of these please email corporate@simplefraser.co.uk.

The matters covered in this publication are intended as a general overview and discussion of the subjects dealt with. They are not intended, and should not be used, as a substitute for taking legal advice in any specific situation. Simple Fraser LLP will accept no responsibility for any actions taken or not taken on the basis of this publication.

> THE EXPERTS

Bringing a specialist focus to bear on the finance industry, our Finance Group combines the firm's Banking, Insolvency and Corporate Finance Teams to work with banks, investors, sponsors and borrowers throughout the UK and beyond across a broad range of industries and sectors. Drawing on real expertise and market knowledge, we provide a consistently excellent quality of service allied to seamless delivery of a finance product which meets your business needs.

We service the full range of mainstream finance requirements and are regularly instructed in an array of complex and high profile transactions. We have built a strong team of dedicated finance professionals with a growing reputation for technical expertise underpinned by acute commercial awareness.

We understand how the finance industry works and, most importantly, how to meet the different priorities of clients with expert advice tailored specifically to their individual business needs. Experience has shown that the closer we can get to understanding your business, the more we can contribute to helping you realise your goals.

We understand that our role as lawyers is to help drive the deal forward, not get in its way. For example, we believe it is not enough to merely identify potential areas of risk. We always go further, providing practical advice on how any such risks can most effectively be managed to ensure delivery of the deal on the most beneficial terms, both now and into the future – that's the difference you can expect from the Finance experts at Semple Fraser.

KEY CONTACTS

Alex Innes

Partner, Banking, Head of Finance Group
t. 0131 273 3734
e. alex.innes@semplefraser.co.uk

Bill Fowler

Partner, Corporate & Commercial,
Finance Group
t. 0131 273 3736
e. bill.fowler@semplefraser.co.uk

Gordon Hollerin

Partner, Corporate Recovery & Insolvency,
Finance Group
t. 0141 270 2247
e. gordon.hollerin@semplefraser.co.uk

Scott Kerr

Partner, Corporate & Commercial
t. 0131 273 3730
e. scott.kerr@semplefraser.co.uk

Stuart Russell

Partner, Corporate & Commercial
t. 0141 270 2259
e. stuart.russell@semplefraser.co.uk



THE FIRM

Semple Fraser is a multi-national practice that advises clients throughout the UK from our offices in Glasgow and Edinburgh. We offer market-leading advice in the areas of banking, commercial property, construction, corporate, corporate recovery & insolvency, employment, environment & pollution, IT/IP, litigation, property finance, planning and tax.

Our success as one of the leading commercial law firms has been built on the simple principle of sticking to what we do best. In other words, we concentrate solely on providing specialist advice in the key areas of most importance to our clients, based on a thorough understanding of the unique issues and pressures affecting the business environments and industries in which they operate.

Over the years, this has resulted in the development of particular expertise in certain industry sectors – Finance, Commercial Property, Construction & Engineering and Waste, Renewables & Energy.

SEMPLER FRASER LLP

GLASGOW OFFICE

123 St Vincent Street
Glasgow G2 5EA
T +44 (0)141 221 3771
F +44 (0)141 221 3776

EDINBURGH OFFICE

80 George Street
Edinburgh EH2 3BU
T +44 (0)131 273 3771
F +44 (0)131 273 3776

E info@semplefraser.co.uk

Visit our website to sign up to receive regular communications and register for seminars:

www.semplefraser.co.uk