News

January 2009

Articles of Association: time for more changes?

A number of provisions of the Companies Act 2006 (the Act) are now in force. The remainder of the Act will, with some minor exceptions, be implemented on 1 October this year.

We now consider how changes to be introduced this October, a number of them deregulatory in nature, will affect a company's constitution and the up-dates which companies may wish to make to their articles as a result.

A fundamental change to be made by the Act relates to the contents of a company's constitutional documents. As from 1 October, the majority of the provisions of an existing company's memorandum of association (memorandum), including the objects clause and any entrenched provisions, will be deemed to be part of the articles.

This reflects the fact that, for companies incorporated on or after 1 October, the memorandum will become a much more simplified document than at present. It will merely record the intention of each subscriber to form a company and to take at least one share in that company.

There is no need for an existing company to make any filings at Companies House, or to take any other steps, to reflect the deemed transfer of the relevant provisions from the memorandum to the articles. This will take effect by operation of law.

What are the other main changes to be made by the Act this October?

Objects clause: companies incorporated on or after 1 October will have unlimited objects unless there are any restrictions contained in the articles.

Authorised share capital: the requirement to have an authorised share capital will be abolished with effect from 1 October. As from that date, there will be no ceiling on the amount of shares a company can issue: shares can be created and allotted by board resolution subject to any necessary shareholder authorisation or any restriction in the company's articles.

Any existing provision in a company's memorandum as to the amount of authorised share capital will be treated as a provision of the articles setting the maximum amount of shares that the company may allot.

Directors' authority to allot shares: the directors of private companies with only one class of shares will no longer need shareholder authority to allot unless so required by the articles. Directors of public companies, and private companies with more than one class of share capital, will still need shareholder authority to allot shares.

Can existing companies take advantage of these provisions?

Yes, but they will need to seek shareholder authorisation to do so. For example, existing companies may wish to ask shareholders:

- to approve the removal of the existing limited objects of the company (deemed as from 1 October to be included in the company's articles)
- to remove the cap on allotment (subject to any guidelines issued by institutional investors)
- to give directors the new power to allot shares without shareholder authority (existing private companies with one class of shares only).

However, there are some provisions that will automatically apply to existing companies. Such companies will be able to take advantage of certain new powers to change their capital in the same way as companies formed on or after 1 October without the need for shareholder approval.

We review the situation in light of the provisions of the Companies Act 2006 to be introduced in October as well as other changes coming into force later this year.

In our Alert of January 2008, we discussed the impact on a company's articles of the provisions of the Companies Act 2006 coming into force in 2008 as well as those that had been implemented in 2007. A copy of that Alert is available at: http://www.hammonds.com/FileServer.aspx?oID=22234

Is there anything else in the pipeline which will affect a company's articles?

Yes: the Government has announced its intention to revise certain provisions of the Act already in force relating to company meetings.

The proposed changes, which are still at the consultation stage, are due to take effect on 3 August. The reason for their introduction is two-fold:

- to implement the provisions of the EU Shareholder Rights Directive (227/36/EC) (the Directive). These provisions affect only traded companies (companies incorporated in the EU whose shares are traded on a regulated market such as the main market of the London Stock Exchange but not AIM or PLUS) and aim to improve the corporate governance of such companies
- to address a number of issues that have come to light since the implementation in October 2007 of the Act's provisions on general meetings. This category of changes will apply to all companies.

What are the main points to note about the changes proposed for 3 August?

For traded companies, these include the following:

- notice of general meetings: the notice period for annual general meetings of traded companies will remain at 21 days. However, traded companies may only rely on the provision in the Act which permits a 14 day notice period for other general meetings if they have passed a shareholder resolution to this effect and offer members the facility to vote by electronic means. If these conditions are not met, a notice period of 21 days will apply
- Chairman's casting vote: the savings provision that allows companies registered before 1 October 2007 to retain or re-instate provisions in their articles giving the Chairman a casting vote will cease to apply to traded companies
- participation of shareholders in general meetings: members of traded companies will have a statutory right to ask questions at general meetings relating to the business of the meeting and the company will be under an obligation to answer such questions
- facilitation of electronic communications: traded companies must include an electronic address in every instrument of proxy sent out in relation to general meetings as well as in every invitation to appoint a proxy.

For all companies, the proposals include the following:

- enhancement of shareholder rights: members representing at least 5% of voting rights will be able to require directors to call a general meeting. At present, the threshold is generally 10% (subject to some exceptions)
- corporate representatives and proxies: the voting rights of multiple corporate representatives and proxies are to be clarified.

What course of action do you suggest in response to these developments?

We would recommend a review of your company's articles in light of all the changes coming into force this year, bearing in mind that the changes proposed for August are still in draft form. For companies which did not up-date their articles last year, this review should also take account of the changes introduced by the Act in 2007 and 2008.

Companies, in particular listed companies, will also need to review their procedures in relation to general meetings given the changes to the law in this area scheduled to come into effect on 3 August.

We would be pleased to discuss with you in more detail any of the issues raised in this newsletter and would be pleased also:

- to review the specific terms of your articles and advise on any necessary changes
- to prepare an up-dated set of articles in line with your instructions
- to assist in the preparations for your next general meeting.

FURTHER INFORMATION

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