

GARSDIE & CO LLP



GUIDANCE ON CA2006 EIGHTH COMMENCEMENT ORDER

The Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860) will bring into effect on 1 October 2009 all of the provisions of the Companies Act 2006 that are yet to be commenced, including:

- Part 1 – General introductory provisions (ss. 1 and 3–6);
- Part 2 – Company formation (ss. 7–16);
- Part 3 – Company’s constitution (ss. 17–28 and 31–38);
- Part 4 – Company’s capacity and related matters (ss. 39–43 and 45–52);
- Part 5 – Company’s name (ss. 53–68 and 75–81);
- Part 6 – Company’s registered office (ss. 86–88);
- Part 7 – Re-registration as a means of altering a company’s status (ss. 89–111);
- Part 8 – Company’s members (ss. 112–115, 120, 122–127 and 129–144);
- Part 10 – Company’s directors (ss. 162–167 and 240–247);
- Part 12 – Company secretaries (ss. 275–279);
- Part 17 – Company’s share capital (ss. 540–43, 545–640, 641(1)(b), 645–651, 653 and 655–657);
- Part 18 – Acquisition by limited company of its own shares (ss. 658–737);
- Part 24 – Company’s annual return (ss. 854–859);
- Part 25 – Company charges (ss. 860–894);

- Part 31 – Dissolution and restoration to the register (ss. 1000–1034);
- Part 33 – UK companies not formed under companies legislation (ss. 1040–1042);
- Part 34 – Overseas companies (ss. 1044–1059);
- Part 35 – Registrar of companies (ss. 1060–1067, 1068(1)–(4), (6) and (7), 1069–1076, 1081–1084, 1093–1101, 1108–1110 and 1112–1120);
- Part 36 – Offences under the Companies Acts (ss. 1121–1123, 1125, 1127–1133);
- Part 37 – Companies: supplementary provisions (ss. 1134–1136, 1137(2), (3) and (5)(a), 1138–1142, 1149–1156);
- Part 38 – Companies: interpretation (ss. 1158–1160 and Schedule 6, 1163, 1166, 1168, 1171, 1173 and 1174 and Schedule 8 (other definitions etc.);
- Part 39 – Companies: minor amendments (ss. 1180–1181);
- Part 40 – Company directors: foreign disqualification (ss. 1182–1191);
- Part 41 – Business names (ss. 1192–1208);
- Part 44 – Miscellaneous provisions (ss. 1275 and 1283);
- Part 45 – Northern Ireland (ss. 1284–1287).

We will be issuing guidance in this paper and at regular intervals between now and the end of September. We will be producing checklists for various common tasks to aid you through the transitional period and with planning issues

Company Formation and incorporation

The Act will also change the process of company formation, with the following documents having to be submitted to the registrar in order to incorporate a company limited by shares (s. 9 (2006)):

- (a) a memorandum of association stating the names of the subscribers and signed by them;
- (b) an application for registration setting out the proposed name, situation of the registered office, whether the liability of the members is to be limited by shares or by guarantee and whether the company is a public or private company;
- (c) a statement of capital and initial shareholdings;
- (d) a statement of the company's proposed officers;
- (e) the address of the registered office;
- (f) a copy of any proposed articles of association; and
- (g) a statement of compliance.

It should be noted that the 2006 Act will not require a company to have an objects clause. Indeed s. 31 will provide that a company's objects will be unrestricted, unless its articles specifically restrict them. The objects of existing companies will be deemed by s. 28 to form part of the company's articles and may operate as a restriction for these purposes. Directors will still be under a duty to observe any such restrictions and be liable to the company for any breach (s. 171 (2006)).

The Companies Act 2006 makes changes to the form of a company's constitutional documents. The Companies Act 1985 requires a company to include a substantial amount of information in its memorandum of association and allows a company's constitutional rules to be divided between its memorandum and articles of association.

The Companies (Registration) Regulations prescribes the form of the memorandum of association required under the Companies Act 2006. The forms in Schedules 1 and 2 of the regulations serve the limited purpose of providing evidence of the intention of the subscribers to form a company and become members of that company and, in the case of a company that is to have a share capital on formation, to take at least one share each. The memorandum will not even state how many shares each subscriber will take on formation as this information will be included in the separate statement of capital.

The ability to re-register a public company directly as a private and unlimited company under the 2006 Act is new. Under the 1985 Act a public company would first have to convert from public to private and then convert to unlimited. Whether converting from public or private to unlimited under the 2006 Act, the consent of all the members will be required, as is currently the case for a conversion from private to unlimited under the 1985 Act.

Model Articles

Not everything that has removed from the model articles has been preserved in this way. For example, the model articles for private companies limited by shares do not make any provision for:

- making calls on shares or for liens or forfeiture in the event that a call is not paid (see below);
- the appointment of alternate directors;
- the retirement of directors, whether by rotation or following their initial appointment;
- uncertificated shares or share warrants (bearer shares);
- disposing of fractions of shares on a consolidation;
- the chairman to have a casting vote at general meetings;

· the appointment and removal of a secretary for companies that decide to appoint one – however, the secretary (if any) is included as one of the authorised persons who may attest sealed documents (see Article 49).

Other proposals

The 2006 Act also includes measures on:

1. Share premium – It will make it illegal to use the share premium account to write off a company's preliminary expenses on formation (see ss. 610–616).
2. Pre-emption rights – Although the current statutory minimum period of 21 days for acceptance of rights offers will be retained, the 2006 Act includes a power to increase this period as well to decrease it but to no fewer than 14 days (see s. 562). The Government is expected to consult on proposals to decrease the period for quoted companies in 2009.
3. Redenomination of share capital – At present, a company cannot convert its existing share capital into another currency without cancelling or buying back the shares it wants to redenominate and issuing a fresh batch of shares in another currency. The 2006 Act will introduce a simpler procedure to enable companies to convert their share capital from one currency to another, and to renominialise their shares, after conversion, to avoid having shares with a value expressed in fractions of a currency (see ss. 622–628).
4. Public/private split – The 2006 Act will give the Secretary of State a new power to require a private company to re-register as a public company if it issues shares or debentures to, or allows them to be transferred to, anyone other than those to whom the company, as a private company, would be allowed by law to offer such securities (see ss. 755–760).

Companies Act 2006 provisions on the secretary

The 2006 Act has abolished the statutory requirement for private companies to appoint a company secretary. The relevant provisions were brought into force in April 2008 by the Fifth Commencement Order.

A private company can still appoint a secretary and, if it chooses to do so, it will need to make an entry in its register of secretaries in accordance with s. 275 and notify Companies House of the appointment under s. 276. These provisions will not be brought into force until 1 October 2009. However, in the meantime the notification regime under the 1985 Act still applies.

The prohibition in s. 283(2) of the Companies Act 1985 on the appointment of a sole director as secretary was repealed on 6 April 2008 and is not repeated in the 2006 Act. However, s. 280 of the 2006 Act, which comes into force on 6 April 2008, repeats s. 284 of the 1985 Act by providing that 'a provision requiring or authorising a thing to be done by or to a director and the secretary of a company is not satisfied by its being done by or to the same person acting both as director and as, or in place of, the secretary.' Accordingly, there would be very little to be gained by a sole director taking on the role.

Office vacant

Section 274 replicates s. 283(3) of the 1985 Act by providing that where the office of secretary is vacant or there is for any other reason no secretary capable of acting, anything required or authorised to be done (a) by or to the secretary may be done by or to an assistant or deputy secretary (if any) or, (b) if there is no assistant or deputy secretary or none capable of acting, by or to any person authorised generally or specifically in that behalf by the directors. This section is being brought into force on 6 April 2008 subject to a transitional provision which substitutes “any officer of the company” for the words “any person” in paragraph (b) (see paragraph 5 of Schedule 1 to the Fifth Commencement Order).

This section is expressed as being applicable to both public and private companies. This may be useful for private companies where the company secretary is incapable of acting for some reason. However, where the office is vacant, it is arguable that the rules in s. 270(3), which deal with the case of a private company without a secretary and do not mention assistant or deputy secretaries, would also apply. This looks set to become a classic angels on pinheads’ argument. It is possible that a company could choose to apply either s. 270(3) or s. 274.

Companies Act 2006 provisions on Companies House

The 2006 Act will:

- (a) give Companies House greater powers to specify the form and manner in which companies must submit information (ss. 1068–1073).
- (b) clarify what information should appear on the public register, and what should not (s. 1074).
- (c) enable Companies House to obtain incomplete information from companies over the telephone (s. 1075).
- (d) enable Companies House to remove items from the public register that have been erroneously placed there or that are ‘surplus’ and unnecessary; but where information has been properly placed on the register, but subsequently proves to be inaccurate or misleading, there will be a new and simple court-based procedure for ensuring that it can be removed (ss. 1093–1098).
- (e) create a new offence, making it unlawful knowingly or recklessly to deliver to the Registrar material that is misleading, false or deceptive (s. 1112).
- (f) allow public companies as well as private companies to make use of the voluntary striking-off procedure (ss. 1000–1011); and
- (g) enable Companies House to restore companies to the register by an administrative procedure in certain cases (ss. 1024–1034).

Annual return – shareholder information (para. 9.11)

Significant changes to the information on shareholders that must be provided on the annual return were brought into force on 1 October 2008 by the Companies Act 1985 (Annual Return) and Companies (Principal Business Activities) (Amendment) Regulations (SI 2008/1659) ('the 2008 regulations'). For annual returns made up to a date on or after 1 October 2008:

- non-listed companies are still required to give the names of all their shareholders together with details of their holdings but must omit shareholders' addresses;
- listed companies must omit all details regarding shareholders who hold less than 5 per cent of any class of share, but are still required to provide the names and addresses of those who hold 5 per cent or more.

Previously all companies were required to give the names and addresses of all shareholders.

The requirement to file an annual return is still governed by the Companies Act 1985 (the 1985 Act) and the changes have been made by amendments to sections 363 to 365 of that Act. The 1985 Act provisions will be replaced in October 2009 by Part 24 (sections 854 to 859) of the Companies Act 2006.

The changes apply to annual returns made up to a date on or after 1 October 2008. As of that date, the former rules in subsections 364A(4) to (7) regarding shareholder information are repealed and replaced by two new sections:

- section 364B – Contents of annual return: information about shareholders: non-traded companies
- section 364C – Contents of annual return: information about shareholders: traded companies

For returns made up to a date on or after 1 October, all companies must state on the annual return whether the company was a traded company at any time during the return period.

A 'non-traded company' is defined for these purposes in new section 364D as 'a company none of whose shares are shares admitted to trading on a regulated market (so that 'traded company' means a company any of whose shares are shares admitted to trading on a regulated market)'. A 'regulated market' is a market which appears on the list drawn up by an EEA State pursuant to Article 47 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (3).

The 'return period', in relation to an annual return, means the period beginning immediately after the date to which the last return was made up (or, in the case of the first return, with the incorporation of the company) and ending with the date to which the return is made up.

Non-traded companies

Section 364B provides that the annual return of a company which has been a non-traded company throughout the return period must contain the following shareholder information:

- a list of the names of every person who was a member of the company at any time during the return period;
- if the names are not arranged in alphabetical order, an index sufficient to enable the name of any person in the list to be easily found;
- the number of shares of each class held at the end of the date to which the return is made up by each person who was a member of the company at that time;
- the number of shares of each class transferred during the return period by or to each person who was a member of the company at any time during that period;
- the dates of registration of those transfers.

If either of the two immediately preceding returns has given the full particulars required by subsections (2) and (3), the return need only give such particulars as relate:

- to persons who became, or ceased to be, members during the return period; and
- to shares transferred during that period.

Particulars entered in an overseas branch register do not need to be included if copies of those entries have not been received at the company's registered office by the date to which the return is made up. Those particulars must, however, be included in the company's next annual return after they are received.

Companies House will not accept an annual return made up to a date after 30 September 2008 that includes the addresses of all the company's shareholders. It will return the form to the company if the wrong schedule is completed or it contains the incorrect details.

Traded companies

New section 364C provides that the annual return of a company that was a traded company at any time during the return period must contain the following shareholder information:

- the names and addresses of every person who held at least 5 per cent of the issued shares of any class of the company at any time during the return period;
- if the names are not arranged in alphabetical order the return must have annexed to it an index sufficient to enable the name of any person in the list to be easily found;
- the number of shares of each class held at the end of the date to which the return is made up by each person who held at least 5 per cent of the issued shares of any class of the company at that time;
- the number of shares of each class transferred during the return period by or to each person who held at least 5 per cent of the issued shares of any class of the company at any time during the return period; and

- the dates of registration of those transfers.

If either of the two immediately preceding returns has given the full particulars required, the return need only give such particulars as relate:

- to persons who came to hold, or ceased to hold, at least 5 per cent of the issued shares of any class of the company during the return period; and
- to shares transferred during that period (s. 364C(4)).

Section 364C(5) makes similar provision to section 364B about the inclusion of particulars entered in an overseas branch register.

Section 364D(2) provides that where a company has converted any of its shares into stock, the return must give information in relation to that stock corresponding to that required by section 364B or 364C (as the case may be) in relation to shares of the company, stating the amount of stock instead of the number of shares.

Principal business activities

The 2008 regulations also added two new classifications for use on the annual return when providing the company's principal business activities. Companies are allowed to select up to four classifications from the list set out in Schedule 3 to the Companies (Forms Amendment No. 2 and Company's Type and Principal Business Activities) Regulations 1990. These regulations have been amended with effect from 1 October 2008 to provide the following two additional classifications:

- 7499 Non-trading company; and
- 9999 Dormant company.

Authentication of documents

The Registrar's Rules will make specific provision for the method of authentication required for documents filed in paper form. Generally speaking, this will continue to be the same as it is now with the signature of a director or the company secretary.

Under the existing law, directors are sometimes required to make statutory declarations, which require their signatures to be witnessed, e.g. when submitting incorporation documents. In future, a simple statement signed without need of a witness, by one director or other person specified in the Registrar's Rules, will suffice under the 2006 Act.

Transitional arrangements

On implementation in October 2009, the vast majority of the Companies House forms will be new, and even where they are not the content will have changed under the 2006 Act. Accordingly, it is unlikely that many of the current Companies Act 1985 Act forms will continue to be acceptable. There may be some limited exceptions to this (e.g. existing form 287 Change of Registered Office) where the content

has not changed. In such circumstances Companies House might still accept the “old” forms for a period of, say, 12 months after implementation. However, it would probably prefer to implement the new versions of all the forms from the outset.

Companies Act 2006 provisions on auditors’ liabilities

Part 16 of the 2006 Act includes measures relating to auditor liability and audit quality that:

- (a) allow shareholders to agree to limit the liability of the auditors to the company, so that their financial liability relates to their responsibility for the loss (ss. 532–538);
- (b) require companies to publish the auditors’ terms of their engagement (s. 493);
- (c) give shareholders in quoted companies greater rights to question auditors and named partners for audit reports (ss. 527–531);
- (d) require audit reports to give the name of the individual lead auditor, as well as the audit firm (although provision is made for confidentiality in exceptional cases) (ss. 505 and 506);
- (e) introduce a new offence for recklessly or knowingly including misleading, false or deceptive matters in an audit report (s. 501); and
- (f) new procedures for the appointment of auditors by private companies (ss. 485–8).

The existence of any limitation of liability must be disclosed in the company’s financial statements.

Sections 485 to 488 on the appointment of auditors by private companies were brought into force on 1 October 2007. All the other provision of Part 16 of the 2006 Act on auditors came into force on 6 April 2008 (subject to transitional arrangements).

Companies Act 2006 provisions on accounts

The main proposals on accounts in Part 15 of the 2006 Act are as follows:

1. General – The 2006 Act replaced the whole of Part VII of the 1985 Act and the relevant schedules for financial years beginning on or after 6 April 2008.
2. Time limits for filing – The 2006 Act includes provisions to reduce the time limit for private companies to file their accounts from 10 to nine months and for public companies from seven months to six months.
3. Laying of accounts – Private companies are no longer required to lay their accounts before the members in general meeting but are still required to send a copy to each member and debenture holder.
4. Abbreviated accounts – The 2006 Act retains the option for small and medium-sized companies to file abbreviated accounts.

CA 2006 provisions on meetings

The provisions on company meetings and members' decision in Part 13 of the Companies Act 2006 were brought into force on 1st October 2007.

Private companies

The new provisions completely abolish the requirement for private companies to hold an AGM and the associated requirements to lay accounts and reappoint auditors.

Members of private companies will no longer have the right to demand that a private company holds an AGM or to propose resolutions at an AGM. However, members holding 10% of the voting rights will still be able to requisition a general meeting and members holding just 5% of the voting rights will be able to requisition a written resolution.

The 2006 Act makes it easier for private companies to take decisions by written resolution. It allows written ordinary resolutions to be passed by a simple majority of those eligible to vote, and written special resolutions to be passed by a 75% majority of those eligible to vote (ss. 288–300).