



Company secretarial update

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When should I amend the articles of association?

On 7 November 2007, the Government announced that most of the Companies Act 2006 changes previously scheduled for 1 October 2008 are to be delayed until 1 October 2009. For many companies this has complicated the decision over when changes should be made to their articles of association.

The Companies Act 2006 (the Act) makes a company's articles of association its primary constitutional document containing the rights of shareholders, the management and administrative structure, and any restrictions on the objects of the company. New provisions relating to articles of association are designed to make it easier to set up and run a company but, with the changes being phased in over such a long period of time, at what point does a company step back to review and amend its existing constitution?

Reasons for change

Electronic communications

The opportunity to communicate with shareholders electronically came into force in January 2007. Many companies will already have taken advantage of the administrative and financial savings available. However, for those companies that have not, amendment of their articles allows the opportunity to assess the benefits of adopting an electronic communications regime.

Age discrimination against directors

The 70 year age limit for directors was removed in April 2007. As a result, provisions requiring a director's age to be disclosed could fall foul of the Employment Equality (Age) Regulations 2006.

AGM

October 2007 saw removal of the obligation for private companies to hold annual general meetings unless expressly required to do so by the articles of association.

Company Secretary

From 6 April 2008 private companies will no longer be required to appoint a company secretary. However, the functions currently undertaken by the company secretary will still need to be performed. Private companies wishing to remove the position will need to check that their articles do not expressly require such a role to be included.

Directors' conflicts of interest

From 1 October 2008 a director will have a statutory duty to avoid a situation in which he has a conflict of interest or a possible conflict of interest with the interests of the company. There will be no breach of duty, however, if the matter has been authorised by other disinterested directors.

Private companies will need to ensure that nothing in their articles invalidates the ability of the board to authorise conflicts of interest. PLCs will need to ensure that a provision is included in their articles to allow directors to authorise conflicts and potential conflicts of interest.

In both cases, articles should be updated to contain provisions dealing with the use of confidential information received other than as a director of a company, provisions allowing the director to be absent from meetings and the availability of board papers to protect a director being in breach of duty if a conflict or potential conflict of interest arises. Governance safeguards will also need to be put in place when directors decide whether to authorise a conflict or potential conflict.

What should companies do?

- These are just a handful of the reasons why companies need to review and amend their articles as soon as possible, ideally before October 2008, to avoid directors being in breach of new duties and conflicts of interest.
- For private companies, it is possible that this could be done using the new written resolution procedures. Listed PLCs will need to draft an explanatory note to shareholders setting out the proposed changes.
- Non-listed PLCs should consider the benefits of re-registering as a private company to take advantage of some of the deregulatory benefits of the Act applicable to private companies.

Uncertainty over multiple corporate representatives

On 1 October 2007 the second phase of the Companies Act 2006 (the Act) came into force. There is uncertainty however over how some of the provisions are to be interpreted, in particular those relating to multiple corporate representatives. Further legislation may need to be passed to clarify the interpretation of the provisions.

What implications do the new provisions have?

Under the new provisions companies can continue to appoint multiple corporate representatives to represent a shareholder at general meetings. This may be useful where a number of beneficial holdings are grouped together in an account under the name of one nominee and each beneficial owner wishes to attend and vote.

Uncertainty arises where multiple representatives attend and vote in different ways. If such circumstances arise there is a possibility that the shareholders vote will not be counted.

The consequences of this could be far reaching for a company relying on the vote of corporate representatives to pass a resolution and it has been recognised that this was not the intended effect of the new provision. It is likely that in the future new legislation will be passed to clarify this provision however until this happens or until the courts take a view on how it should be interpreted, companies must consider how to deal with this issue.

What is the solution?

Where possible, shareholders should be recommended to appoint a proxy to represent them at a general meeting. Under the Act, proxies now have the power to speak and vote on a show of hands and a poll at meetings.

A shareholder may prefer to be represented by a corporate representative as this allows their vote to be changed up until the time the vote is taken and their attendance does not need to be registered in advance.

If multiple corporate representatives do attend a general meeting, it is recommended that each corporate representative completes a voting directions card. The cards should be handed to a designated corporate representative (DCR) who will collate the results and lodge the final vote on behalf of the shareholder. The DCR is likely to be the first corporate representative who registers their attendance at the meeting on behalf of a particular shareholder or alternatively can be nominated by the shareholder.

Corporate shareholders may also wish to consider appointing the chairman of the meeting as the DCR. This relieves the corporate representatives of the responsibility of collating and lodging the final vote and helps to ensure that the voting direction of the corporate representatives is successfully placed.

What should companies do?

- Companies with a large number of corporate shareholders should review their AGM arrangements.
- Ensure that the process of appointing DCRs is clearly set out in the notice of meeting.
- Review their AGM registration arrangements, in particular, to ensure that they and their registrars have the appropriate processes in place to accommodate multiple corporate representatives.

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