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Given the size and complexity of the Companies Act 2006, this Guide does not purport to contain a comprehensive summary of the Act’s provisions but merely to highlight changes to company law which we believe to be of particular interest. This Guide is intended to give general information only, and should not be relied on as legal advice.

Please refer to www.linklaters.com/regulation for important information on the regulatory position of the firm.
Introduction

This is Part 4 of our Guide to the reforms to company law effected by the Companies Act 2006 (the “Act”). The Guide is intended as an introduction to the major issues for listed companies and their UK subsidiaries arising from the Act, and reflects the position at 15 December 2006. The other Parts of the Guide, which can be obtained on request from your usual contact at Linklaters, are:

Part 1: Directors and derivative claims
Part 2: Narrative reporting, liability and auditors
Part 3: Share capital and capital maintenance

Scope of the Act

When the Act was first introduced in the House of Lords in January 2006, as the Company Law Reform Bill, it was described as “gargantuan”.¹ In the course of its passage through Parliament, around 400 additional clauses were introduced, and hundreds of amendments made. It is now said to be the largest piece of legislation ever passed by Parliament, with 1300 Sections and 16 Schedules. Its impact on the administration and management of UK companies will be correspondingly far-reaching – not so much because there are many radical reforms, but because of the sheer number of more modest changes.

The growth of the Act during its progress through Parliament was largely not the result of substantive new measures being added. Instead, it came about because of the restatement of existing provisions of the 1985, 1989 and 2004 Companies Acts.² These Acts are therefore repealed, with the exception of a small number of provisions – principally those dealing with community interest companies and with investigations (as these apply more widely than to companies). The Act is longer than the existing Companies Acts in part because the drive for simplification has led to a less concise, but easier to understand, drafting style.

The reforms contained within the Act have a variety of provenances, including:

– the Company Law Review commissioned by the Government in 1998 – this involved a large number of practitioners, business people and academics in a wide-ranging consideration of how existing company law could be improved upon,

– various Law Commission recommendations (the Law Commissions are independent bodies established by Parliament to keep the law under review and recommend reforms), and


Based on these initiatives, the Government developed the new law with the key objectives of:

– enhancing shareholder engagement and a long-term investment culture,

¹ Lord Hodgson of Astley Abbots, Hansard col. 188, 11 January 2006.
– ensuring better regulation and a “think small first” approach,
– making it easier to set up and run a company, and
– providing flexibility for the future.

The Act is in many respects deregulatory – with private companies benefiting most – but there are also a number of areas where new obligations or potential burdens are introduced, particularly for publicly-traded companies. The result is a widening of the gap between the regulatory burden for publicly-traded companies and that for private companies, which could encourage more businesses to stay, or go, private.

Implementation timetable
The Act was granted Royal Assent on 8 November 2006. A small number of its provisions came into force on that date, or are expected to be effective from January 2007. These include provisions regarding:
– electronic communications with shareholders,
– electronic filings with the Registrar of Companies,
– the implementation of the Transparency Directive, including conferring on the Financial Services Authority new rule-making powers with respect to periodic reporting and major shareholding disclosures, and
– a new regime on the liability of issuers and directors for financial and narrative reporting.

The Government has committed to bring the remaining provisions into force by October 2008. This extended implementation period is necessary, because there remains a great deal of work to be done before the new companies legislation is complete. In particular:
– the Act requires many detailed provisions to be laid down in secondary legislation. No regulations have yet been released in draft for public consultation. The Act also provides for new forms of model Articles for public and private companies, and for companies limited by guarantee. Although some initial consultation has taken place, further consultation on these documents is expected in 2007, and
– the Government has stated that it intends to consult early in 2007 on how certain provisions of the Act will apply to existing companies. An initial consultation on this topic took place during the summer of 2006 and it is clear that complicated secondary legislation will be required to deal with matters such as allotment authorities, memoranda of association and pre-emption rights.

Until the full legislative package is nearer completion, it will be difficult for companies to make definitive plans as to how to deal with implementation. The Government has, however, promised to consult in February 2007 on its detailed implementation plans and to “work with the business community to ensure widespread and effective communication of the Act’s provisions so that all parties fully understand the new provisions and are in a position to take advantage of the benefits”.3

Executive summary

The Government’s key objectives for the Act included “think small first” – a strong emphasis on making life easier for private companies by reducing administrative burdens and eliminating antiquated procedures. The reforms to various aspects of company administration certainly bring benefits to private companies – including subsidiaries of public companies – although these benefits need to be balanced against the major effort required by both public and private companies to understand, and to take advantage of, the new legislation. Key changes include:

- revised procedures for obtaining consent from shareholders to use electronic communications, and communications by means of a website, to disseminate company information, which should lead to significant savings in printing and postage,
- important measures to allow indirect shareholders, who hold shares through intermediaries, to receive information directly from the company, either in hard copy or electronic form,
- provisions enabling indirect shareholders to exercise certain rights which have previously only been able to be exercised by registered shareholders, in the interests of shareholder engagement,
- the right of a proxy to vote on a show of hands, which may lead to difficulties in the case of multiple proxy appointments,
- the creation of a legislative power to force specified categories of institutional investors to disclose how they have voted their shares,
- reduced time limits for public companies to hold Annual General Meetings, and to publish and file accounts,
- a simplified (and more accessible) regime for the authorisation of political donations and expenditure,
- a reduced notice period (from 21 to 14 days) for shareholder meetings at which special resolutions are to be proposed,
- the consolidation of the provisions of a company’s constitutional documents into the Articles of Association,
- elimination of the requirement for a company to have an objects clause, so freeing companies from the uncertainties of the *ultra vires* rule,
- the creation of new model Articles of Association, for both public and private companies, written in modern English and reflecting the new legislation,
- a package of measures which benefit private companies, including a simplified written resolution procedure and the abolition of the requirements (i) to have a company secretary, (ii) to hold an Annual General Meeting and (iii) to reappoint auditors annually,
- the introduction of procedures to remove inaccurate or incorrect information from the public record, and
- a new right to challenge the improper or opportunistic registration of a company name to which someone else has a better claim.
Shareholder communications

In this section we focus on the changes that will affect communications between listed companies and their investors, including electronic communications, the information rights of indirect investors and disclosure of interests in shares.

Electronic communications

There have been considerable developments in electronic communications law relating to companies over recent years. Significant changes to the 1985 Act were made in 2000, facilitating electronic communications to (and from) companies for a wide range of documents. These new provisions have been reflected by most publicly-traded companies in changes to their Articles. However, the existing communication regime currently suffers from the major defect that it is only possible to communicate electronically with shareholders if they consent to this, and provide fax or email details to facilitate the communication process. The Act’s provisions on electronic communications provide the next step in the modernisation process. The Government’s stated objective is to help companies increase efficiency and lower costs by reducing their use of paper.

Generally speaking, the Act permits documents and information to be sent by or to companies either in hard copy form or in electronic form. “Electronic form” includes the use of electronic means (such as email or fax) as well as the use of other means to convey information which is in electronic form (such as sending a disk by post). In certain cases, the Act also facilitates communication by means of a website - most importantly in relation to communications by companies with its shareholders.

Companies will be keen to take early advantage of potential cost savings, and the relevant provisions are to take effect on 20 January 2007, to coincide with the implementation of the Transparency Directive. For listed companies, the use of electronic means for communicating with shareholders (or other securities holders) will be affected by the FSA’s Transparency Rules (DTR 6) which also have effect from 20 January 2007.

Communication by means of the company’s website

The key feature of the new company communications regime (Sections 1143–1148 and Schedules 4 and 5) is that, if the new statutory procedures are correctly followed, shareholders will have to deliberately “opt out” of website communications rather than to “opt in”, as at present. If they do not opt out, shareholders will be deemed to have agreed to the company communicating with them by means of its website. This should significantly reduce the volume of shareholder communications in hard copy form.

To take advantage of this new regime, a shareholders’ resolution, or permission contained in the company’s Articles, is necessary authorising the company to communicate with shareholders by posting documents on its website. Companies will also need to ask shareholders individually for their consent for website communications (unless such consent is already in place), making sure that this request clearly explains that shareholders who do not respond within 28 days will be deemed to have consented to non-receipt of hard copies of documents if the company posts them on its website. A request for consent may
only be sent to a shareholder once every 12 months. Annual updating of company records is therefore likely.

A company must notify shareholders who have consented (or deemed to consent) to website communications when it posts new shareholder documents on its website. Such notifications will need to be sent in hard copy, unless the shareholder has also consented to email or fax communication and has provided relevant details. The notification must explain how to access the document on the website and, in the case of a notice of meeting, must include details of the date, time and place of the meeting (Section 309). The need for notifications in hard copy will limit the cost savings that companies can achieve. Furthermore, a reduced take-up of hard copy summary financial statements could in some cases make the cost of preparing and printing these documents exceed the amount saved, compared with sending the full annual report to shareholders who request hard copy documentation. Nevertheless, companies with large shareholder bases should expect to make considerable savings.

A similar regime will apply for communication via the website with holders of debt securities and other debentures, subject to authorisation by holders of the relevant class(es) of securities or to authorisation having been included in the instrument creating the debt securities in question.

Email and other electronic communications

The Act does not require shareholder approval for communication by email, fax or other electronic means, but this requirement is separately imposed on listed UK companies under the FSA’s Transparency Rules (DTR 6.1.8). It is arguable that authorisation should be treated as given if the company already has appropriate powers in its Articles to communicate electronically with its shareholders. However, as shareholder approval is required anyway for website communication, separate authorisation of electronic communication is not a significant additional burden.

In addition to shareholder approval, these methods of communication will not be effective under the Act unless the shareholder has agreed (generally or specifically) to this form of communication. This reflects the current position under the 1985 Act, and pre-existing agreements (as with communication by means of the website) should be effective for this purpose.

From a practical point of view, it will be necessary to obtain email addresses rather than fax numbers, and shareholders should be encouraged to provide such details to enable rapid and cheap dissemination of information, and to eliminate the need for hard copy communication to facilitate use of the website, as described above.

Right to hard copy version

Wherever electronic communications are used, a shareholder or debenture holder is still entitled to require the company to send him a hard copy version of documents within 21 days, even if he has consented or is deemed to have consented to electronic communications. Hard copies must be provided free of charge and it will be an offence to fail to provide them. The requirement will lead to additional expense and work for companies who will need to keep track of separate communication systems.
**Hard copy communications**

Hard copy communications must be sent to shareholders at their registered address or at some other address specified for this purpose.

It is common for companies to provide in their Articles (as does Regulation 112 of Table A) that no notices need to be sent to shareholders with registered addresses outside the UK, and for whom no service address in the UK has been provided. Whilst this provision will continue to be effective for the requirements of the Articles, it will not override any **statutory** requirements to provide notices, documents or other information to all shareholders in hard copy form, in which case the company communications provisions of the Act will need to be followed.

In addition, listed companies are subject to an existing obligation under the Listing Rules to ensure equality of treatment for all holders of listed shares who are in the same position, and in this context the provision of information relating to meetings and the exercise of voting rights is specifically identified as being required to be sent to shareholders “at least in each EEA State”. This requirement will be deleted with effect from 20 January 2007 but replaced by a more far-reaching provision under the Transparency Rules (DTR 6.1.8), effectively reflecting the Listing Rules requirement but without the limitation relating to EEA States. Companies (particularly if they are listed) will therefore need to be cautious when relying on their Articles as authority for non-circulation of notices and other documents to shareholders, in case of conflicting and overriding requirements under the Act or the Transparency Rules.

**Practical implications**

Companies which wish to take advantage of the new regime will need to obtain shareholder approval in general meeting. At the same time, it would probably be helpful for most companies to make certain consequential changes to their Articles (such as notice provisions) to bring them in line with the new regime where necessary. Companies should at the same time seek consent, from those shareholders who have not already provided details for electronic communication, for website publication and electronic communications. As a result, the seeking of such approvals and any related changes to constitutional documents are likely to become a feature of the next AGM seasons. For companies keen to embrace the new regime as soon as possible, the necessary changes could be made at their 2007 AGMs. This should allow them to cut down on the substantial expense of producing a printed copy of the report and accounts for the 2008 and subsequent AGMs.

Companies will need to be careful in using the new regime. Although the Act sets out requirements which have general application, there are numerous provisions in the Act which refer to specific notices or other documents and lay down additional requirements where electronic communications, or communication by means of a website, are to be used for them.
Sending or supplying documents to a company

The Act covers not only how companies communicate with others, but also how companies can be communicated with. Schedule 4 deals with communications to a company. Where one company is dealing with another, Schedule 5 (communications by a company) prevails over Schedule 4. Electronic communication with a company will be possible, subject to the company agreeing (or being deemed to have agreed) to this method of communication. Such communication can only be sent to an address specified (or deemed to have been specified) by the company. Under Section 333, for example, where a company has given an electronic address in a notice calling a meeting, or in an accompanying proxy form, it is deemed to have agreed that any document or information relating to proceedings at the meeting or to the proxies (as the case may be) may be sent electronically to that address.

Enfranchising indirect shareholders

In line with a general trend towards more active shareholder engagement, the Act aims to help “indirect investors”, who hold shares through one or more intermediaries, to become more involved in a company’s affairs through access to information, and the exercise of rights, normally reserved to registered shareholders.

Nomination of non-shareholders to exercise shareholders’ rights

Section 145 enables a registered shareholder to nominate another person to exercise or enjoy all or any the shareholder’s rights (including voting rights) to the extent specified by the shareholder, subject to the inclusion of a provision to that effect in the company’s Articles of Association. This provision is available to both private and public companies. In a public company context, it seems unlikely that this provision will be used in practice because of the logistical difficulties to which it gives rise. The Articles would need to be carefully drafted to define the circumstances in and the extent to which shareholders’ rights could be passed to someone other than the registered holder, and the administration of the exercise of these rights (for example, to avoid duplication) would also be a major and expensive undertaking. The position is complicated by the fact that, although a person can be nominated by the registered holder to enjoy or exercise certain (or all) shareholder rights, only the registered holder can enforce rights against the company.

Information rights

Of greater practical benefit to investors is the new “information rights” regime, which was introduced following an ill-starred Opposition amendment in the House of Lords, which deemed the incorporation in the Articles of all traded companies of a provision conferring shareholder rights on any person nominated by the shareholder (whether or not the beneficial owner). A storm of protest from various quarters resulted, not least because the amendment left unexplained how these rights were supposed to operate in practice. A compromise was negotiated with the Government to give beneficial shareholders direct rights to company information. This applies only to companies whose shares are traded on a regulated market (Sections 146–
This can be deployed to confer rights on indirect investors to receive information made available by the company to its registered shareholders. The shareholder (and not, for example, the investment manager if not the registered holder) may nominate another person on whose behalf he holds shares to enjoy both the right to receive a copy of all communications sent to members and also certain additional rights (to require copies of accounts, and hard copies of documents provided electronically or by means of the company’s website). Information rights are enforceable by the shareholder, rather than the nominated person, as if they were contained in the company’s Articles.

This is not an automatic right: the nomination process requires the indirect investor to request the shareholder to nominate him and, in order to receive hard copies of information, to provide an address for that purpose. If no address is given, the nominated person will be taken to have agreed to website communications. The general provisions on electronic communications (described above) apply in the case of nominated persons in the same way as to shareholders, so that even where a nominated person has requested hard copy information, the company can ask him to agree to electronic communications.

Where a notice of meeting is sent to a nominated person, the notice must be accompanied by a statement alerting him to the fact that, under an agreement with the shareholder who nominated him, he may have a right to be appointed as a proxy, have someone else appointed as a proxy, or give voting instructions. The standard wording for shareholders about the right to appoint proxies is to be omitted, or disapplied, in the case of notices of meetings sent to nominated persons.

To prevent companies being forced to supply information to investors who are not interested in these communications, companies will be allowed to enquire of a nominated person whether he wishes to retain information rights, and the rights will cease if no response is received within 28 days. However, this enquiry can only be made of a nominated person once a year. Nomination rights cease on the death or bankruptcy of either the member or the nominated person.

Other rights

All companies – public and private – will be obliged (Section 152) to allow nominees, or others who hold shares on behalf of more than one person, to split voting and other rights in respect of their holdings, so that they can be exercised in different ways.

There is also a procedure (Section 153) to allow indirect investors to participate in making requisitions relating to the circulation of a statement relating to a meeting (all companies), the circulation of a resolution for an AGM (public companies), and an independent report on a poll and website publication of audit concerns (quoted companies).  

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4 The regime would therefore cover UK companies traded on a non-UK regulated market in the EEA, as well as UK companies admitted to the FSA’s Official List.

5 i.e. UK-incorporated companies that are UK, EU or Nasdaq/NYSE listed but not AIM listed companies.
Practical implications
Although the DTI has stated that bespoke drafting of Articles to deal with the new nomination rights should not be necessary, it is hard to see how shareholder enfranchisement under the general provisions of Section 145 can be achieved without careful redrafting. In respect of both these general provisions and the information rights regime, it will be necessary for companies to work out with their registrars how shareholders are to notify companies of nominations made and how records of nominations are to be kept. In addition, the information obligations imposed on traded companies will need to be assessed in the light of the company’s ongoing communications strategy.

Disclosure of interests in shares
The Act repeals the current regime for notification of “interests” in the shares of public companies, as set out in Sections 198–211 of the 1985 Act.

The company investigations regime on the other hand (currently under Section 212 of the 1985 Act), which operates to force disclosure of shareholder information, has been restated in the Act without substantive amendment (Sections 791–827).

The regulation of disclosure of major shareholdings will now be the responsibility of the FSA, as part of the implementation of the Transparency Directive. The FSA is given powers by the Act (amending the FSMA) to make new rules in this respect, covering both UK and non-UK companies admitted to trading on a regulated market (as required by the Transparency Directive) and also UK public companies admitted to AIM and Plus. The Section 212 shareholding investigation regime remains unchanged

The FSA’s new major shareholding disclosure rules (DTR 5) will take effect on 20 January 2007. Broadly, they “copy out” the relevant provisions of the Transparency Directive. These are based on shareholdings and the ability to exercise voting rights in certain circumstances rather than “interests”, as under the existing 1985 Act regime. The obligation to disclose will fall on the shareholder (whether direct or indirect) and also in some circumstances on other persons entitled to exercise the voting rights attaching to those shares.

A full discussion of the provisions of DTR 5 is outside the scope of this Guide, but significant points to note include:

– the FSA rules impose new obligations on companies to disclose their total voting share capital,
– while in many respects the new rules retain the basic disclosure requirements that apply under Section 198 of the 1985 Act, there are some differences, particularly as regards holdings in financial instruments in companies’ shares, that could result in less transparency for issuers. If they have reason to think a person may be interested in their shares, they will, however, still be able to investigate interests on the existing basis under Sections 791–827 of the Act,
– the new rules under DTR 5 do not apply to unquoted public companies, but do apply to overseas companies listed in the UK.

6 Plus is the market formerly known as Ofex.

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Voting and meetings

Voting

Enhanced proxy rights

The Act gives enhanced statutory rights to proxies in both public and private companies (Section 324). Shareholders will be able to appoint more than one proxy, all of whom will be entitled to exercise all or any of a shareholder's rights to attend, speak and vote at a meeting on a show of hands or on a poll.

Multiple proxy appointments are specifically permitted, in the case of both public and private companies, provided each proxy represents a different part of the appointor's holding. A proxy will have one vote on a show of hands, subject to the Articles, but the Articles may not provide for a proxy or proxies to have fewer votes on a resolution on a show of hands than the appointing member would have if present.

These provisions appear to give additional voting power to a shareholder who both appoints a proxy (or proxies) and attends the meeting in person, although this effect can be excluded by the Articles. As a result, the new provisions could assist shareholder activists and pressure groups by enabling them to appoint multiple proxies to increase their voting power on a show of hands. In theory, this issue could be addressed by providing in the Articles that the proxies appointed by a single shareholder should not have more than one vote on a show of hands (on the basis that this is the number of votes the member would have if present). In practice, this would not be a workable or popular solution. The significance of these issues is reduced by the increasing trend, encouraged by Sir Paul Myners' reports in 2004 and 2005 on impediments to voting UK shares, towards voting on a poll on all substantive resolutions.

The deadline for delivery of proxy forms to the company must not be earlier than 48 hours before the meeting (Section 327). In a change to current practice, weekends and bank holidays must be ignored in calculating this period. This means that shareholders potentially have slightly less time to deliver their proxy forms, although a company's Articles can provide for delivery of a proxy notice later than the minimum 48-hour period.

Publication of poll results

Quoted companies will be required to publish the results of polls at their general meetings on their websites, showing votes cast “for” and “against” (Section 341). A failure to comply will not affect the validity of the poll or the resolution.

The information must be made available on a website maintained by or on behalf of the company “as soon as reasonably practicable” and be kept available for two years. Access to the poll information and the ability to obtain a hard copy must not be subject to payment of a fee or be otherwise restricted.

The requirement for website publication of poll results is in line with, and should eliminate some inconsistencies in, current best practice.

The Combined Code (as in force for financial years beginning on or after 1 November 2006) recommends that companies publish on their websites details
of proxies lodged at any general meeting where votes are taken on a show of hands, as well as the number of votes “for” and “against” the resolution.

**Independent report on polls**

A new right has been included for the shareholders of a quoted company to require the directors to obtain an independent report on any poll taken at a shareholders’ meeting (Sections 342–351). Like other requisition rights under the Act and existing law, the requisitionists must hold 5 per cent of the voting rights or number at least 100 members holding shares on which, on average, the amount paid up per member is at least £100. The requisition must be received by the company not later than one week after the date on which the poll was taken.

The directors must appoint an “independent assessor” within one week of the requisition to prepare a report. The independence requirements correspond to those for the company’s auditor although the independent assessor need not be an auditor. In addition, anyone who has another role in relation to the poll is also excluded to avoid them being required to report on their own work.

The appointment and identity of the independent assessor together with the report must be made available on the company’s website on the same basis as poll results. Reports must state (giving reasons) whether the procedures for the poll were adequate, whether the votes (including proxy votes) were fairly and accurately counted and whether the validity of proxy appointments was assessed. The independent assessor is granted powers to attend meetings (where appointed before the poll is taken) and gain access to information from the company and its directors, employees, shareholders and agents. It will be an offence to fail to provide the relevant information or knowingly/recklessly to make a false statement.

Concern has been expressed at the additional administrative burden of an independent report on any poll and it remains to be seen to what extent this power is used both by those with legitimate concerns and those seeking to draw attention to a separate agenda.

**Institutional disclosure of voting**

There has been a growing trend in the UK towards voluntary disclosure by institutions of how they exercise voting rights following the release in October 2002 of the Institutional Shareholders’ Committee’s Statement of Principles on the Responsibilities of Institutional Shareholders and their Agents. This requires agents (i.e. fund managers) to report details on how they have discharged their responsibilities to their clients, including a judgement on the impact and the effectiveness of their engagement.

After deletion by the House of Lords, the Commons reinstated (with only slight amendments) provisions giving power to the Secretary of State for Trade and Industry and to the Treasury to make regulations requiring voting disclosure by specified categories of institutional investor (including unit trust schemes, investment trusts, pension schemes and collective investment schemes).

The provisions (Sections 1277–80) specify in some detail the kind of information that regulations could require to be disclosed. This includes information about
the exercise or non-exercise of voting rights by the relevant institution and any instructions given or delegation made about the exercise or non-exercise of voting rights. Information about any delegation of voting functions or instructions to act on the recommendations or advice of another person may also be required.

The Government has stated it will not make regulations under this power if it considers that disclosures made on a voluntary basis are providing a satisfactory level of information. Nevertheless, institutional investors have objected strongly to this power. Although the detailed regulations would have to be consulted on and affirmatively approved by Parliament, they argue that it is not necessary to legislate in this area as sufficient transparency can be obtained by voluntary means, whilst a compulsory regime could impose undue administrative burdens and costs on investors.

Written resolutions
Public companies may not use written resolutions – all resolutions of members (or a class of members) of a public company must be passed at a meeting (Section 281). See “Private company deregulation – Written resolutions” below for the provisions regarding written resolutions of private companies.

AGM business

Timetable

When AGM is to be held: The Act requires that public companies must hold AGMs within six months of the end of the financial year (Section 336). This replaces the rule that there must be no more than 15 months between one AGM and the next.

Filing and publishing accounts: The time limit for a public company to file its reports and accounts with the Registrar of Companies is reduced from seven months to six months after the year-end and it must send the report and accounts to members at least 21 days before the date of the meeting at which the accounts are to be laid (Sections 442 and 423–4). For listed companies, however, the FSA’s new Transparency Rules will shorten the timetable further, requiring publication of the annual report and accounts within four months of the year-end.

Notice period: The notice period required for the AGM of a public company remains at least 21 days (Section 307) (contrasting with other meetings for which the minimum notice period is 14 days – see “Simplification of notice periods and short notice requirements” below). The Combined Code, however, requires the notice of AGM and related papers to be sent at least 20 working days before the date of the meeting.

Shareholder requisition of AGM resolutions
The right for members (that is, shareholders holding 5 per cent of the voting rights or 100 members holding on average £100 of paid-up capital) to requisition resolutions to be passed at an AGM (Sections 338–340) is subject to two significant changes:
– if the requisition is delivered before the end of the financial year preceding the AGM, the company may not require the requisitionists to pay the expenses of circulating the resolution (Section 340), and
– the 5 per cent/100 member threshold applies to holders of voting rights eligible to be cast on the relevant resolution. Thus if, say, a member was seeking to have a company wound up, the votes of any preference shareholders would generally be exercisable on such a resolution and would have to be counted for the purposes of the 5 per cent threshold.

The Act also makes clear that a company can disregard a request for a resolution which cannot properly be put to a meeting because it would be ineffective (for example, because it is inconsistent with the company’s constitution or a provision of statute), or is defamatory, frivolous or vexatious.

**Political donations**

The Act simplifies and clarifies the regime requiring shareholder authorisation of companies’ political donations or expenditure (Sections 362–379). The current legislation (Part 10A of the 1985 Act, Sections 347A–K) is ambiguously drafted and wide ranging and there has been much uncertainty and debate about its application. As a result, directors currently run the risk of incurring personal liability for accidentally failing to comply with these provisions – including liability to repay unauthorised donations/expenditure, plus interest and damages. No ratification of unauthorised payments is permitted and access to the court process for relief where a director has acted honestly and reasonably is specifically excluded.

**Welcome changes**

The Act’s extensive redrafting of this legislation brings some welcome changes to what is currently an unnecessarily burdensome process. Most notably:

– where several companies within a group may make political donations or incur political expenditure, there will be no need for a separate authorising resolution of the holding company to be proposed in respect of each relevant company – a single resolution may cover a holding company and/or one or more of its subsidiaries,

– an authorising resolution can also be drafted to apply to a company and all of its subsidiaries (whether they are subsidiaries at the time the resolution is passed, or become subsidiaries at any time during the currency of the resolution) without identifying them individually,

– only the ultimate UK holding company of a subsidiary making political donations or expenditure (rather than each holding company within a group) will need to pass an authorising resolution. As at present, no resolution of the subsidiary itself is required if it is wholly owned by a UK company,

– trade unions are expressly excluded from the definition of a “political organisation” and “donations” (in the artificially wide meaning the term carries for these purposes) to trade unions are no longer caught by the legislation, provided such donations are not made to a union’s political fund,

– the regime for overseas subsidiaries – which imposed obligations on UK holding companies to procure such subsidiaries not to make political
donations or incur political expenditure without appropriate authorisation by the holding company – is abolished, and

– the prohibition on retrospective ratification by shareholders of unauthorised payments is to be lifted, and the exclusion of the directors’ right to appeal to the court for relief is to be removed.

Remaining concerns and uncertainties

However, despite these improvements, some concerns and uncertainties remain:

– directors of a parent company will still be at risk of personal liability where a subsidiary (wholly or partly owned) makes an unauthorised payment/donation and the directors of the parent company fail to take all reasonable steps to prevent such payment/donation. The entitlement to apply to the court for relief where the directors have acted reasonably and honestly will be undermined by a finding that the directors have failed to take all reasonable steps,

– shareholder action can still be taken to enforce director liability, subject to restrictions, by 50 members or the holders of not less than 5 per cent of the company’s issued share capital. However, new provisions now also allow shareholders of subsidiaries and holding companies to bring proceedings to hold the directors of the holding company to account if subsidiaries under their control have made unauthorised donations,

– the definition of “political donation” continues to be wide. More specific provision in this area would be most welcome. For example, there is no specific exemption for paid leave for local councillors since the DTI takes the view that such paid leave does not constitute a political donation caught by the 1985 Act or the redrafted provisions in the Act.7 This contrasts with advice obtained from Leading Counsel (Mr David Mabb QC) by The Law Society. A specific exemption could have been provided, as for trade unions,

– authorising resolutions can (as at present) cover a four-year period, although the normal practice for those companies that take authority under the existing provisions has been to seek annual renewal. It is not clear that a company can take a four-year authority permitting an annual amount of donations/expenditure,

– an authorising resolution may authorise any, or each, of the following:
  – donations to political parties or independent election candidates,
  – donations to other political organisations,
  – political expenditure,

specifying, for each (if applicable) of the above three heads, a limit for the period for which the resolution has effect. Where the authorising resolution covers a parent company and all of its subsidiaries, it appears that each limit can be an aggregate amount for them all, although the drafting on this point is imprecise and is likely to cause uncertainty when the provisions are deployed. Where a resolution does not deal with subsidiaries collectively, separate limits need to be set for each head, and company, to which the resolution relates. This seems likely to result in unwelcome complexity for

7 Explanatory Notes to Company Law Reform Bill (version 24 May 2006), paragraph 588.
the drafting of authorising resolutions, even where the option is taken to apply the authorisation on a group-wide basis.

The provisions in the 1985 Act provided an exemption for the first £5,000 of donations made by a company, available to each company within a group. The Act adjusts this exemption (Section 378) so that it will be available only on a group basis for any donations made within the period of a year, so removing a “cushion” that many companies felt justified their decision not to worry about passing a precautionary authorising resolution.

At present it is common for listed companies to pass a resolution authorising political donations and expenditure in an attempt to avoid inadvertent breaches of the law. This practice seems likely to continue, and even become more widespread, in view of continuing concerns and uncertainties as to the scope of the legislation.

**Simplification of notice periods and short notice requirements**

The Act contains a number of deregulatory provisions making it easier and quicker for companies (both public and private) to hold meetings. In particular, there is **no** requirement for 21 days’ notice to be given for a **special resolution**. All meetings can (subject to the Articles) be called on 14 days’ notice, except that, for public companies, AGMs must be held on at least 21 days’ notice (Section 307).

Since the key difference between a special resolution and an extraordinary resolution (requiring a 75 per cent majority of the affected class of shares on a variation of rights) is that an extraordinary resolution only requires 14 days’ notice, the shortening of the notice period required for special resolutions also has the incidental effect of doing away with the concept of extraordinary resolutions.

For listed companies, this, combined with the proposed power for the DTI to reduce the period for which pre-emptive share offers must remain open from 21 days to 14 days, could reduce the timetable for some rights issues from six weeks to four weeks. However, the proposed EU Shareholder Rights Directive would, in its current form, require as much as 30 days’ notice for all general meetings of companies traded on a regulated market. This could considerably add to timetables for capital raising and other transactions requiring shareholder approval and so potentially increase the cost of capital for listed companies.

The Act will allow members of a private company holding 90 per cent of the shares giving the right to attend and vote at a meeting (or such higher percentage as may be specified in the Articles, but not more than 95 per cent) to agree to hold a meeting (including an AGM) on short notice. Previously, reduction of the 95 per cent threshold was only available to private companies that passed an elective resolution (requiring the agreement of all the members). For public companies, the short notice threshold remains at 95 per cent, although short notice may not be agreed in the case of a public company’s AGM.
Constitutional reforms

In the interests of simplicity and the “think small first” concept, the Act makes some fundamental reforms to the way that companies are constituted and administered. These are most far-reaching in the case of private companies, but many of the changes – for example, the abolition of the objects clause and the revision of the *ultra vires* rule – will apply to all companies. Many of the constitutional changes will affect not just companies newly formed under the provisions of the Act, but also existing companies. The effect on existing companies will become clearer with the issue of transitional provisions, which will be consulted on from early 2007.

Memorandum and Articles of Association

**Memorandum provisions deemed to form part of the Articles**

The Act implements the recommendation of the Company Law Review that all rules on the internal workings of a company should be set out in one document, the Articles of Association. Currently, a company’s Memorandum of Association is a fundamental part of a company’s constitution, defining its purposes and the powers of the directors. The Memorandum of a company formed under the Act will only contain details of the initial subscriber(s) for shares and their agreement to form a company and to take the subscribers’ shares (Section 8). It will therefore become “an historical snapshot”, pertinent to the initial formation of a company, but with no continuing relevance.

For existing companies, provisions that were in the Memorandum will not be deleted by the Act, but will be treated as provisions of the company’s Articles (Section 28). Articles registered by a company will need to be contained in a single document and (similarly to the position under the 1985 Act) it will continue to be a requirement that such Articles be divided into paragraphs numbered consecutively (Section 18). Subject to transitional provisions, this may mean that existing companies at some point will need to file a new set of Articles which expressly include and number the provisions imported from the old Memorandum. If this is not done, then future references to the combined provisions may be unclear, for example, in resolutions which purport to amend or delete these provisions.

**Abolition of the objects clause**

The effect of the objects clause of an existing company will, however, be altered by the new regime. This follows a recommendation by the Company Law Review for a simplification of the law in relation to corporate capacity.

Historically, under the common law a company could only act within the powers set out in the objects clause in its Memorandum – anything outside the objects would be “*ultra vires*” or void. The Companies Act 1989 went a long way towards abolishing the concept of *ultra vires*, by providing that a transaction outside the company’s capacity would not thereby be invalidated (now Section 35(1) of the 1985 Act). This is replicated in Section 39 of the Act. The 1989 Act also provided a short form of objects clause that was intended to confer on a company power to carry on any business or trade whatsoever and to do anything incidental or conducive to the carrying on of such business or trade.

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Doubts as to what, in practice, were the limitations to the phrase “incidental or conducive” led to most companies preferring to retain the traditional long-form objects clause, drafted as widely as possible to try to ensure that the company’s capacity would not be limited in any way.

The Act goes further than the 1985 Act (as amended by the 1989 Act). It provides that a company’s objects will be unrestricted, unless the Articles specifically restrict them (Section 31).

It is unclear how this principle applies to the objects clauses which will usually be set out in the Memorandum of an existing company and will be deemed by the Act to form part of the Articles, as described above. On a common sense interpretation it may be thought that a surviving object should not be said to operate as a specific restriction on what the company can do, as a restriction would involve words stating that a company should not do a particular thing, which would be unusual for commercial companies. However, in a pre-consultation paper on transitional arrangements published in August 2006, the DTI stated that in their view such surviving objects clauses which are “drafted as a list of things that the company is set up, or has the power, to do – which is what most existing companies have – will, in future, be read as a restriction on what the company can do”.

Even if this view is revised, companies may wish to consider their individual Memoranda and decide whether any existing objects may be unnecessarily restrictive (or, at best, redundant) in the new deregulated regime and should be removed. It would seem unlikely that changes introduced by the Act should cause problems or require immediate action, given that the objects themselves will not have changed. At the same time it is possible that some companies may consider retention of the objects is useful to the company. For example, objects clauses frequently include provisions intended to permit the company to dispose of all or part of its business, to borrow, to give guarantees, to give benefits to present or former employees, to make charitable donations and so on. Some companies may wish to retain their express objects after the Act is enacted for the avoidance of doubt as to the powers of the directors – particularly with regard to matters involving benefits for directors or gratuitous payments. In our view, however, it should not be necessary to retain the objects clause in the absence, perhaps, of particularly unusual provisions, or unless there are specific restrictions to be preserved.

There are separate rules on capacity, and on dealings with third parties, applicable to charitable companies.

Where a company wishes to amend or remove a statement of objects in (or deemed to be in) the Articles, whether or not it contains restrictions, it will have to follow a special procedure for notifying the Registrar of Companies of the change. The change will not be effective until registered by the Registrar (Section 31).

**Company capacity and directors’ authority**

The clear statements in the Act that a company’s objects are unrestricted unless specifically restricted, and that acts of a company cannot be called into question even if they breach restrictions in the constitution, are welcome.
However, directors will still be under a duty to observe restrictions in the constitution (Section 171) and may be liable to the company (on the basis of a claim brought by the company or a derivative claim brought by shareholders) if they execute a transaction in breach of such a restriction.

Moreover, the Act fails to take the opportunity to clarify some doubts that apply in relation to the ability of third parties to transact with companies without the fear that the transaction may be voidable as a result of directors acting beyond their powers. The 1989 Act established that third parties dealing with a company in good faith do not need to concern themselves as to any limitation on the directors’ powers under the company’s constitution – and the Act arguably widens this principle by referring to “the powers of directors” rather than the “the powers of the board of directors”, which is helpful in relation to concerns about dealing with an individual director or board committee (as opposed to the board as a whole) (Section 40). However, concerns about what circumstances might constitute, under the existing law, not acting “in good faith” (despite a presumption of good faith unless the contrary is proved) typically lead third parties entering into high value transactions with a company, such as substantial bank loans, to take a cautious approach. The Act retains the existing position in relation to the requirement of good faith.

As at present, particular care will need to be taken by directors to ensure that they act in accordance with the company’s constitution, particularly in cases where directors or their connected persons are themselves party to the transaction (Clause 41). Directors may be personally liable to indemnify the company if they act in excess of their powers in relation to a transaction of this kind.

**Entrenched provisions**

The Act introduces new procedures and restrictions relating to the entrenchment of provisions in a company’s constitution (Sections 22–24). These will make it more difficult for companies to introduce such provisions, as well as requiring additional formalities when Articles containing entrenched provisions are amended.

A “provision for entrenchment” is defined as a provision in Articles “to the effect that specified provisions of the articles may be amended or repealed only if conditions are met, or procedures are complied with, that are more restrictive than those applicable in the case of a special resolution” (Section 22(1)).

For existing companies, any such provisions set out in their Memorandum will be deemed to be part of the Articles of Association (Section 28).

Companies will only be able to adopt provisions entrenching rights in Articles of Association on initial formation or with the agreement of all the members to the amendment of the Articles or by order of a court or other authority with power to alter a company’s Articles (Section 22). If a company has provisions for entrenchment in its Articles, it will have to make a statement to the Registrar of Companies confirming that the Articles have been complied with whenever the Articles are amended (even if the amendment does not relate to an entrenched provision).
Those affected by these new rules are likely to include joint venture companies and other companies whose Articles confer super-voting rights on a particular shareholder in relation to particular matters. The rules will also affect dual-headed groups which have special voting rights in their constitution to ensure that shareholders in each company are effectively represented at both companies’ general meetings. These types of companies may well have entrenched provisions in their Articles – an existing entrenched provision can be altered or removed in accordance with the Articles, but the introduction of a new one would require unanimity. Quoted companies for whom obtaining unanimity would be impossible would have to impose a new holding company on top of the existing company to achieve the same result.

Other provisions on Articles of Association
The Secretary of State will have the power to prescribe model Articles of Association for different types of company formed under the Act. Three sets of model Articles are planned – for public companies, private companies and companies limited by guarantee – which are to replace the “one size fits all” Table A.

The model Articles of Association being proposed for private companies limited by shares (the vast majority of which are small owner-managed companies, according to the DTI) as set out in the March 2005 White Paper are very short and commendably simple compared with the model Articles set out in Table A under both the 1948 and the 1985 Companies Acts. However, they contain no provisions on, for example, notices to shareholders, the conduct of shareholder meetings or alternate directors. The reason for the lack of provision relating to shareholder meetings is the presumption that private companies will not hold AGMs and will pass most resolutions by written resolution (see further below).

The minimalist approach in these model Articles will not necessarily suit private companies with significant numbers of shareholders or (for example) joint venture companies. These may therefore wish to consider whether to incorporate with fuller Articles of Association that at least lay down procedures for shareholder meetings, including Extraordinary General Meetings which will still be needed, even by private companies, to remove a director or auditor before the end of their term of office.

A first draft of the model Articles for public companies was issued in June 2006. These are similar in scope to the current Table A but aim to provide more modern drafting and layout. Like Table A, the finalised model Articles should provide a useful template and guidance, for example, on new issues such as nominated indirect investors. Nevertheless, many existing companies may prefer to retain their own forms of Articles making only any amendments necessary because of new provisions in the Act.

For existing companies, the version of the model Articles of Association that was in force at the time that a particular company was registered will continue to apply.

Some provisions in existing Articles may become unclear or redundant because of changes being made by the Act. For example, given that extraordinary and
elective resolutions will no longer exist, it will make no sense to refer to them in Articles, so existing companies may wish to amend their Articles of Association for greater coherence.

Existing companies should also consider whether there is any conflict between the provisions of their Memorandum and the Articles of Association. Under the current law, in the case of an inconsistency the Memorandum will prevail. Since Section 28 of the Act treats the provisions of the Memorandum as provisions of the Articles, the position going forward is unclear. Conflicts or ambiguities might arise, for example, where the Articles have been updated in the last two years to allow the company to assist directors with defence costs they may incur, permissible as a result of the 2004 relaxation of the law in this area. The equivalent provision in the Memorandum may not have been updated and therefore may typically refer to the company’s right to provide directors with insurance and an indemnity but without specifically referring to the company’s newly available ability to provide defence costs funding.

The constitutional documents of individual companies will need to be reviewed on a case-by-case basis to establish whether there are in fact any conflicts or ambiguities which might cause problems. On balance this seems unlikely, given that existing companies are operating perfectly well at present under the provisions of their current constitutional documents. Issues which are identified can, if necessary, be dealt with by amendment of the relevant provisions at a convenient time.

Penalty for failure to file changes
The Act includes a new provision to strengthen the power of the Registrar of Companies to enforce the requirement for companies to file an updated set of Articles of Association when they make an amendment. Failure to do so will (as at present) be a criminal offence (punishable by a fine of £1,000 and a daily default fine) (Section 26). In addition, the Registrar will have power (Section 27) to give notice to a company to comply with its filing obligations within 28 days. If the company does not comply, it will be liable for a civil penalty of £200.

Company formation
The Act is intended to simplify the rules on formation of companies, in keeping with the Government’s aim of “think small first”. For a company limited by shares, the documents and statements to be submitted to the Registrar of Companies will, under Section 9, be:

- the Memorandum stating the names of the subscribers forming the company, and signed by them,
- an application for registration (specifying many of the details that used to be contained in the Memorandum, such as the proposed name, details as to registered office, whether the liability of members is to be limited by shares or guarantee and whether the company is a public or private company),
- a statement of capital and initial shareholdings (the concept of authorised share capital has been abolished - see “Alteration of share capital” in Part 3 of this Guide),
a statement of the proposed officers (including directors and also secretaries for all public companies, and for private companies which wish to have a secretary),

the address of the intended registered office,

a copy of any proposed Articles of Association, and

a statement of compliance (which need not be witnessed and can be made in electronic or paper form). This will replace the requirement for a witnessed statutory declaration. Rules to be made by the Registrar of Companies (under Section 1068) will determine the form of this statement and who will have to make it.

The new provisions have been drafted to be consistent with online incorporation which will be offered by the Registrar of Companies from 1 January 2007.

One person acting alone will be able to form any kind of company (not just a private company) by subscribing his or her name to the Memorandum (Section 7). However, a public company will continue to need two directors.

Dematerialisation of shares

The Act contains provisions to enable regulations to be made for mandatory dematerialisation of shares (Sections 783–790). This follows pressure, particularly from the securities industry, to do away with the need to handle paper in the process of transferring shares. The regulations would extend the provisions under which shares are currently traded through CREST so that shareholders who hold their shares outside CREST would no longer have paper certificates for their shares. Instead, it is likely that their shareholdings would be recorded through some kind of book-entry system and they would receive statements of their holdings each time an acquisition or disposal was made.

From the point of view of issuers, it is not immediately obvious that this would have any particular benefit, as although they would not need to send out certificates, or pay registrars for the handling of paper-based transfers, there would still be costs involved in the maintenance of records and the production and postage of shareholding statements. The elimination of physical share certificates, and their replacement by shareholder statements, account numbers and PINs, would also have security implications, given the increasing risk of identity theft and internet fraud.
Private company deregulation

Company secretary

One of the principal deregulatory proposals for private companies is the abolition of the requirement for such companies to appoint a company secretary (Section 270).

The functions and tasks normally carried out by company secretaries – including maintaining company records and filing statutory returns – are not, however, being abolished. Directors of private companies which choose not to have a secretary will need to determine who should carry out these tasks. Private companies which wish to retain a company secretary may do so. As before, if a private company appoints a secretary then the secretary’s particulars must be put on the public record and the secretary will have the same status in relation to the company as the secretary of a public company. In particular, this means that they would be able, with a director, to execute company documents (Section 44).

In addition, a secretary of a private company – or a person carrying out the functions of a secretary – will still be an officer of the company and, as such, is potentially liable for offences under companies legislation.

AGMs

Another example of the Act’s “think small first” approach is the removal of the requirement for a private company to hold an annual general meeting. Under current law, a private company needs to pass an “elective resolution” (requiring the agreement of all the members) if it wishes to dispense with the holding of AGMs. The Act changes this “opt out” system to an “opt in” one, so that a private company will only need to hold AGMs if it wishes to do so.

A number of consequences flow from removal of the requirement for a private company to hold an AGM. The Act is drafted on the basis of an assumption that private companies will not hold annual or other general meetings. The following points are particularly noteworthy:

- **Accounts and reports:** There is no longer a need for a private company to lay accounts and reports in general meeting but it must send them to members within 9 months of the year end (reduced from 10 months) or, if earlier, by the date it actually files its accounts and reports with the Registrar of Companies (Section 424), and

- **Appointment of auditors:** The term of office of auditors of private companies will generally run from the end of the 28-day period following circulation of the accounts until the end of the corresponding period the following year. This will apply even if the auditor is appointed at a meeting where the company’s accounts are laid.

To avoid the need for an AGM, the auditors of a private company are generally deemed to be reappointed, subject to certain specified circumstances – for example, if the Articles of Association require actual reappointment or at least 5 per cent of the members (or any lesser percentage specified in the Articles) give notice to the company excluding deemed reappointment (Section 488).
Subject to transitional provisions, existing private companies may need to check that their Articles do not require them to hold AGMs before ceasing to do so.

**Written resolutions**

The Act (Sections 288–300) introduces new procedures for written resolutions of private companies. Rather than requiring unanimity for all written resolutions, the Act introduces the concept of ordinary and special written resolutions. An ordinary resolution can be passed by the agreement of 50 per cent of all those eligible to vote, while a special resolution requires the agreement of 75 per cent of those eligible to vote. Together with the removal of the requirement for private companies to hold an AGM, the new procedure should relieve private companies from the requirement to hold general meetings in normal circumstances although, as now, it will not be possible to pass a written resolution to remove a director or an auditor before the expiry of his/its term of office.

The main features of the new procedure are that:

- a written resolution can be proposed by the directors or by members holding 5 per cent (or a lower percentage if specified in the Articles) of voting rights, although the company can apply to the court for permission not to circulate a written resolution on the basis that the shareholders are abusing their rights,
- a resolution can be communicated to members in hard copy or electronic form or by means of a website, depending on how the company communicates with its members – the provisions of Schedules 4 and 5 on company communications (see “Shareholder communications” above) apply to private companies in the same way as to public companies. The form of the written resolution can be sent to all members simultaneously or by circulating the same copy of the resolution to members in turn, or by using a combination of the two,
- a written resolution does not have to be physically signed by shareholders. A member is treated as signifying his agreement to a resolution when the company receives from him an authenticated document (in hard copy or electronic form) identifying the resolution and indicating his agreement. Once signified in this way, agreement to a written resolution cannot be withdrawn,
- the resolution lapses if not passed before the end of the period specified in the Articles of Association (or, in the absence of a provision in the Articles, 28 days from the circulation date),
- the company must circulate a statement with the resolution informing the members how to signify agreement and the date the resolution is to pass if it is not to lapse,
- there is no longer a requirement to send a copy of the resolution to the auditors, and
- there is a new procedure for members to require the circulation of written resolutions, together with a statement of up to 1,000 words.

The reduction in the majority required to pass a written resolution and the flexibility in the means of circulation and assent should make life easier for private companies. Unlike the existing regime for written resolutions, the Act does not preserve the right of companies to follow other procedures for written
resolutions where these are laid down in their Articles of Association. This should not cause significant problems in practice, however, given the flexibility allowed by the Act.

**Offers of shares by private companies**

The one limitation on private companies, compared with public companies, is the inability to offer shares or debentures to the public. Under the 1985 Act, it is a criminal offence for a private company (other than one limited by guarantee and without a share capital) to do so. This is the price of the more relaxed regulatory regime, particularly in respect of matters such as shareholder meetings, that private companies enjoy.

The Act (Sections 755–760) maintains the basic prohibition, but importantly allows a private company to offer securities to the public:

- as part of arrangements under which it is to re-register as a public company before the securities are allotted, or
- if, under the terms of the offer, it undertakes to re-register as a public company within six months.

These provisions should make it easier for companies moving from the private to the public domain to complete offerings and raise capital without first needing to convert to public company status (including satisfying the £50,000 minimum capital requirement for public companies).

The prohibition no longer carries criminal sanctions. Where a company has offered securities in breach of this provision, the court can order the company to re-register as a public company, unless it does not meet the requirements for doing so and it is impractical or undesirable to require it to take steps to do so. Alternatively a remedial order may be made, requiring the company, an officer of the company or any other person knowingly concerned in the contravention to put anyone affected by the contravention in the position he would have been in if it had not occurred. This can include an order that the offending securities be repurchased at such price and on such other terms as the court sees fit.

Unfortunately the Act has not taken the opportunity to update the antiquated definition of “offer to the public” for these purposes. It therefore remains out of line with the provisions of FSMA dealing with offers of securities to the public.
Company records and the Registrar of Companies

Company records

Record keeping requirements

The Act clarifies and updates existing requirements as to company records. Company records are now defined (Section 1134) and include any registers, minutes, agreements and other documents required to be kept by company legislation. They may be kept in hard copy or electronic form, provided that they are adequately recorded for future reference. If kept in electronic form, they must be capable of being reproduced in hard copy form. There is also a new provision that company records may be arranged in such manner as the directors see fit (Section 1135). This should enable companies to separate information about past members from that about current members and is intended to avoid disputes as to whether electronic registers fully comply with the detailed statutory requirements.

The Act generally reduces the time period for which companies must keep records:

- companies currently have to keep minutes of directors’ and company meetings indefinitely. The Act reduces this to 10 years from the date of the relevant meeting (Sections 248 (directors) and 355 (general meetings)),
- the retention period for records in relation to former members is reduced from 20 years to 10 years (Section 121).

Whilst these changes should reduce companies’ storage costs, there are concerns that a 10-year retention period might be too short if a company were involved in litigation that required the review of documents over a lengthy period.

Access to register of members

The Act attempts to deal with the problem of third parties purchasing copies of the register and using it for direct mailing or, in some cases, intimidation of shareholders. Shareholder registers have been frequently used by “boiler rooms” to gain access to share-owning individuals, who are then the target for unregulated and often fraudulent investment marketing activities.

The public right of access to the register and index of members’ names is retained, but anyone wishing to inspect and request copies needs to provide information about themselves and the use to which the information is to be put. A company can apply to the court for a direction that it need not comply with a request for inspection or copy on the grounds that it is not for a “proper purpose”. The period for compliance is reduced from 10 to 5 days. Within this time the company must either comply or apply to the court for relief from the obligation (Sections 116–117).

The objective of preventing abuse of the right to inspect and request copies of shareholder registers will be widely supported. Unfortunately, however, the provisions place the burden on the company to go to the expense of a court application, and the meaning of “proper purpose” is far from clear.
Where a person exercises his right of inspection or is provided with a copy of the register, the company is under a new obligation to inform him of the most recent date on which alterations were made to the register and to confirm that there are no further alterations to be made (Section 120). There is no obligation to update the information once it has been given, in the absence of a further request.

**Other changes on register of members**

Other changes to the law governing the register of members include:

- Regulations to be made under Section 1136 will give companies greater flexibility as to the location of the register of members,
- Joint holders of a share are to be treated as a single member. All their names must be stated but only a single address is required (Section 113),
- The period for which companies are liable for errors in the register is reduced from 20 years to 10 years (Section 128), and
- It will no longer be possible to close the register for 30 days each year. Companies whose securities are eligible for trading in CREST may not close their registers in any case but the ability to close the register is useful for larger private companies in relation to the declaration and payment of dividends and, if they continue to hold meetings, for determining the entitlement to attend and vote. These companies will instead have to follow the practice of listed companies of establishing a record date for dividend and voting entitlements.

**Dealings with the Registrar of Companies**

The Act seeks to streamline the system for company filings, in particular to ensure the accuracy and timeliness of information on the public register and to facilitate electronic communications:

- The Registrar of Companies will have greater powers to specify the form and manner in which companies submit information (Sections 1068–1071). The Registrar may not require documents to be delivered by electronic means – that power is reserved to the Secretary of State. However, from 1 January 2007, the Registrar must ensure that all documents required to incorporate a company may be delivered by electronic means,
- There is a new offence of knowingly or recklessly filing information that is misleading, false or deceptive in a material particular (Section 1112),
- In certain limited circumstances the Registrar of Companies will be able to contact companies who have provided incomplete or internally inconsistent information in order to obtain the missing element without having formally to reject the incoming form (Section 1075). This only applies where the companies have agreed with the Registrar of Companies that it should apply,
- The Registrar of Companies will be able to accept a replacement document where a document was delivered in the wrong form or contained unnecessary material (Section 1076), and
- The Registrar of Companies may notify a company of an apparent inconsistency on the public register and require it to provide additional or replacement documents to resolve the inconsistency (Section 1093).
The provisions of Sections 1075–1076 and 1093 seek to deal with the difficulty of removing incorrect information from the public record. There is currently no statutory power for the Registrar to do this and the courts only have limited jurisdiction to order amendments. The new clauses help but they may not go far enough to justify removing a document which is complete but incorrect, e.g. a change of name resolution filed by mistake or a document filed with the wrong company name and number. However, there is now a provision for the court to make an order for rectification of the register (Section 1096). Where the registration has had “legal consequences” (e.g. a change of name or reduction of capital), the order may only be given where the court is satisfied that (i) the presence of the material has caused or may cause damage to the company and (ii) the company’s interest in removing the material outweighs any interest of other persons in the material continuing to appear on the register.

In addition, under Section 1095 the Secretary of State may in the future make regulations requiring the Registrar, on application, to remove from the register materials which are invalid, ineffective, unauthorised or factually incorrect.
Company names

The Act contains provisions to assist victims of “name-squatting” and reforms to the manner in which a company can change its name.

Right to object to names

The Act creates a new right to challenge the improper or opportunistic registration of a company name to which someone else has a better claim (Sections 69–74). Under the existing law, an aggrieved party may write to the Registrar of Companies but the Registrar has limited powers to intervene.

Under the new provisions any person or company may object to a company’s name if it is the same as, or misleadingly similar to, one in which the applicant (i.e. the objector) has goodwill. Goodwill is described as including “reputation of any description” (although there is no further clarification of what evidence of reputation will be required). An objection may be made at any time after the name is registered, to a company names adjudicator (to be appointed by the Secretary of State).

There is a list of circumstances which will raise a presumption that the name was selected legitimately – for example, that the name was registered before the applicant started the activities in which it claims goodwill. If these do not apply, the objection will be upheld. Even if one of the specified grounds does apply, the objection will still be upheld if the applicant can show that the main purpose of the respondent in registering the name was to obtain money (or other consideration) from the applicant or to prevent the applicant from registering the name.

Change of name

Currently, a company can only change its name by special resolution or following a direction from the Secretary of State in circumstances which only apply to companies which are not required to use “limited” in their name. The Act provides four further means (Section 77):

− whatever means are provided in the company’s Articles of Association,
− on the determination of a new name by a company names adjudicator if an objection under the new right of challenge (Sections 69–74) is upheld,
− where the court so determines in an appeal against a decision of the company names adjudicator, and
− where a company’s name is restored to the register (under Section 1033).

In addition, there is a new procedure for a company to follow if it passes a special resolution to change its name, where the change is conditional on some other event. The notice given to the Registrar of Companies of the change must specify that it is conditional and state whether the event has occurred (Section 78).

Conditional resolutions to change a name have given rise to discussions with the Registrar of Companies in the past, so addressing them in the Act is welcome. They are frequently passed, for example, where a company plans to change its name on completion of an acquisition, disposal or merger. It is...
important to note that a conditional resolution will not enable a company to reserve a name and that the Registrar is not required to issue a new certificate of incorporation until further notice by the company that the event has occurred.

**Restricted names**

The Act also provides a new power for the Secretary of State to make regulations specifying what letters, symbols etc. may be used in a company’s registered name and what formats (Section 57). This has been prompted by the trend to adopt special script and symbols in company names and is intended to prevent companies adopting names that people would find hard to trace in the public record.
Further information

If you would like to discuss any aspect of the Companies Act 2006, please contact Lucy Fergusson (0207 456 3386), Steven Turnbull (0207 456 3534) or your usual contact at Linklaters.