



# COMPANY LAW MEMO 2009

Newsletter Issue 5

September 2009

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Welcome to the *Company Law Memo 2009* newsletter, highlighting important recent developments in company and insolvency law. You can also access comprehensive updates to specific paragraphs via our online updating service. We always welcome suggestions from readers, so please contact us if you have any comments.

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## NEWS ROUND-UP

### New FSA remuneration code

See *CLM* ¶2701

The FSA has introduced a new code of practice that requires **companies in the financial services industry** (which are regulated by the FSA) to establish, implement and maintain remuneration policies that are consistent with effective risk management. Its aim is to promote and sustain market confidence and financial stability, recognising that inappropriate remuneration policies, practices and procedures have contributed to the current market crisis. The code will come into force on 1 January 2010, but firms are expected to make any required changes to their policies and procedures by that date, with any changes to remuneration structures and contracts being implemented with effect from that date. Transitional arrangements apply in relation to the amendment or termination of employment contracts.

Full details of the requirements of the new code are available from the FSA website:  
[http://www.fsa.gov.uk/pages/Library/Policy/Policy/2009/09\\_15.shtml](http://www.fsa.gov.uk/pages/Library/Policy/Policy/2009/09_15.shtml).

### Further consultation on the disclosure of directors' loans in company accounts

See *CLM* ¶2897

The Government is once again considering the issue of disclosures about directors' loans in company accounts. It previously consulted on proposed changes to the new Companies Act relating to such disclosures by banking companies and the holding companies of credit institutions (see *CLM 2008 Newsletter Issue 6*). However, the proposed changes were subsequently removed from the draft regulations (now SI 2009/1581; see *CLM 2009 Newsletter Issue 3*). The Government is now considering this issue more widely, including the disclosure of loans to directors of **all companies**. The Government has proposed three options:

- » amending only the provision relating to banking companies (s 413(8) CA 2006) to require these companies to disclose only aggregate figures with no breakdown for individual directors, as was the position under CA 1985;
- » requiring banking companies to disclose the same level of detail as other companies (by repealing s 418(8) altogether); or
- » requiring more detailed disclosures by all companies.

The consultation paper can be found on BIS's website:  
<http://www.berr.gov.uk/consultations/page52469.html>. Comments are invited by 23 October 2009. The timing of any resulting changes coming into force will depend upon the extent of those changes.

### OFT considers wider use of director disqualification powers

See *CLM* ¶3032

The OFT has proposed changes to the circumstances in which it will apply for the disqualification of directors following **breaches of competition law**. The proposals aim to increase the responsibility company directors take for competition law compliance. The OFT believes that its current guidance, under which it is only likely to apply for a disqualification order in cases where the director was directly involved in the breach, does not maximise the deterrent effect. The OFT is considering revising this guidance so that it would be likely to apply for a disqualification order in more cases, including:

- » in all cases where it thinks a director is unfit to be concerned in the management of a company, whether or not his conduct directly contributed to the breach of competition law;
- » in relation to a breach of competition law which has not been proven in a decision or judgment or in cases where no financial penalty has been imposed; and

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# News



## NEWS ROUND-UP cont...

- » where the company has benefited from lower levels of leniency (for example, in cartel cases).

More detail on the proposed changes can be found on the OFT website:  
[http://www.of.gov.uk/shared\\_of/consultations/of1111con.pdf](http://www.of.gov.uk/shared_of/consultations/of1111con.pdf). Comments are invited by 20 November 2009.

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### Companies House and Revenue and Customs announce a joint approach to online filing

See CLM ¶4185+

Companies House and Revenue and Customs have announced **plans to offer a joint filing facility** for company annual accounts and company tax returns. The aim is for Companies House to accept company accounts in a data format known as Inline eXtensible Business Reporting Language (iXBRL), which will enable companies to make a single online transmission for **filing** their **annual accounts** and their **company tax return** (including attachments). All company tax returns will have to be submitted online in this format from 1 April 2011.

Revenue and Customs will introduce their iXBRL service in November 2009 and Companies House will add the iXBRL software filing for unaudited accounts to their service by the summer of 2010. It is intended that this will be available for all the main types of companies' accounts by the summer of 2011.

More information on the technical requirements and mandatory dates will be published by Companies House and Revenue and Customs in due course.

### ASB consults on the future of UK GAAP

See CLM ¶4211+

The ASB is consulting on its proposals for the future **financial reporting requirements** for UK entities. The consultation follows the publication of the new International Financial Reporting Standard for Small and Medium-sized Entities (**IFRS for SMEs**, published by the IASB).

The ASB proposes to replace UK GAAP, for financial years beginning on or after 1 January 2012, with a **three-tier approach**:

- » Tier 1: publicly accountable UK entities would be required to apply IFRS;
- » Tier 2: all other UK entities could apply the IFRS for SMEs; and
- » Tier 3: small entities could choose to continue to apply the FRSE.

Companies which are not "publicly accountable" could choose to apply IFRS if they wished, as they can now. In addition, small companies could choose to apply the new IFRS for SMEs, rather than the FRSE.

The ASB is also seeking views on whether the current legal **definitions of public accountability** should be retained (ss 384, 467 CA 2006) or replaced with the IASB's wider definition, which broadly states that a company has public accountability if:

- » it trades its debt or equity instruments in a public market; or
- » holds assets in a fiduciary capacity for a broad group of outsiders as one of its primary businesses (e.g. banks, building societies, securities brokers).

The consultation paper is available from the ASB website:  
<http://www.frc.org.uk/asb/press/pub2054.html>. Comments are invited by 1 February 2010.



## NEWS ROUND-UP cont...

### New Takeover Panel practice statement on shareholder activism

See CLM ¶¶6765+, ¶¶6805+

The Takeover Panel has issued a new practice statement to address the concerns that activist shareholders who co-operate with each other (e.g. by acting jointly to influence a company's board) would be treated as "acting in concert" and trigger the **mandatory offer** provisions in the Takeover Code (Practice Statement 26 of 2009).

The Panel clarifies that the Code provisions are not intended to act as a barrier to co-operative shareholder action, and a mandatory offer will only be **triggered if** those shareholders:

- » reach an agreement or understanding to propose a "**board control-seeking resolution**", i.e. one to replace the existing board with directors who have a significant relationship with the shareholders in question so that they can effectively control the board. Whether the relationship is "significant" depends on its strength and the time period over which it has developed; and
- » then **acquire shares** in the company, giving them 30% or more of the company's voting rights (or further voting rights where they already hold more than 30%).

The Panel considers that "board control-seeking" resolutions are rare **in practice** and therefore, for the majority of normal co-operative action, the mandatory offer provisions are not triggered. Even when they are, a mandatory offer will not be required if the activist shareholders take steps to prevent the acquisition of voting shares in the company. The Panel is also more likely to require those shareholders to dispose of the acquired shares over a time period rather than making a mandatory offer.

A copy of the practice statement is available on the Panel's website:  
<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PS26.pdf>.

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## RECENT CASES

### Northern Rock's former shareholders' appeal

*SRM Global Master Fund LP and others v the Treasury* [2009] EWCA Civ 788

As expected, the former shareholders of Northern Rock appealed against the High Court's decision to dismiss their application for judicial review of the statutory compensation scheme (see *CLM 2009 Newsletter Issue 2*). The grounds for the appeal were numerous and varied but were based upon the claim that the terms of the statutory compensation scheme are incompatible with the human rights principle that any state seizure of property must be balanced by fair compensation. The Court of Appeal rejected their appeal and upheld the decision of the High Court.

The former shareholders are now expected to seek permission to appeal to the Supreme Court (which has assumed the appellate jurisdiction of the House of Lords).

### Scheme of arrangement altering creditors' proprietary interests

See *CLM* ¶¶6501, ¶18879, ¶18880

*Re Lehman Brothers International (Europe) (In Administration) (No.2)* [2009] EWHC 2141 (Ch)

A scheme of arrangement that proposes to extinguish creditors' proprietary rights in order to facilitate the distribution of the company's assets is outside the **scope of the statutory procedure**, and therefore cannot be sanctioned by the court.

LBIE carried on a brokerage business and held the proprietary interests in assets on behalf of institutional clients. When it went into administration, the administrators had difficulties distributing the assets because they could not accurately ascertain the creditors' entitlements. Therefore, they proposed to enter into a scheme of arrangement with the creditors who had both pecuniary and proprietary claims, under which the creditors would have to release their existing claims in return for a new claim under the scheme.

The court would not sanction the proposed scheme because it was designed to extinguish the existing proprietary rights of the creditors in question. This was outside the scope of the statutory scheme of arrangement provisions and therefore the court had no jurisdiction to sanction it. In practical terms, this meant that those creditors who voted against the scheme were not bound by it.

### Court considers whether interim costs orders can be reviewed

See *CLM* ¶7156

*Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2009] EWHC 2014 (Ch)

The High Court has considered whether an interim costs order made in favour of a claimant who is unsuccessful in the proceedings as a whole (for example, due to exaggeration of his claim) can be reviewed. It confirmed that this will depend upon the wording of the interim costs order made.

BEBL Ltd acquired the landlord's interest in premises after DE Ltd's lease of those premises had been terminated. A schedule of dilapidations served subsequently by BEBL Ltd led to these proceedings. BEBL Ltd succeeded on the trial of a preliminary issue, namely whether a particular defence was available to DE Ltd. The court found that it was not and ordered DE Ltd to pay BEBL Ltd's costs on that issue. However, BEBL Ltd was unsuccessful in the main proceedings as it turned out that its dilapidations claim had been significantly exaggerated. DE Ltd argued that BEBL Ltd's costs of the preliminary issue were unjustified as it would not have pursued the preliminary issue (and quite possibly there may not have been any

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## RECENT CASES cont...

proceedings at all) if such exaggeration had not occurred. DE Ltd succeeded in having the interim costs order reduced to nil and BEBL Ltd appealed.

The appeal was allowed. The High Court confirmed that the interim costs order made was intended to deal with the costs of the preliminary issue as a discreet set of costs, which were to be paid by DE Ltd to BEBL Ltd whatever the ultimate outcome of the proceedings. Unless the costs order itself specifically states that it is dependent upon the outcome of the action, it should be dealt with on a self-contained basis.

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### Shareholder's liability for preferential payments

See CLM ¶7819+

*Re Oxford Pharmaceuticals Ltd* [2009] EWHC 1753 (Ch)

An unlawful preference given by a company to its **holding company** does not necessarily mean that the holding company's shareholders have also been preferred.

OP Ltd incurred substantial debts which it did not repay, and a legal dispute eventually arose between it and one of its creditors. While the dispute was ongoing, OP Ltd made several payments to its holding company (and a guarantor for its liabilities) MI Ltd, which was solely owned by Mr M. Mr M was a director of both OP Ltd and MI Ltd and also provided guarantees for both companies' liabilities. Within a year of those payments, another creditor of OP Ltd petitioned for its liquidation, and a winding up order was made. The liquidator applied for a declaration that payments made by OP Ltd to MI Ltd were preferences in favour of MI Ltd and Mr M (on the basis that he was a shareholder in MI Ltd).

Considering the seriousness of the position with its creditors, and the perception that the legal dispute represented a serious risk to its future viability, the court inferred that OP Ltd had the desire to improve MI Ltd's financial position in the event of its liquidation, which in turn influenced its decision to make payments to MI Ltd. Therefore, the payments constituted unlawful preferences in favour of MI Ltd and had to be repaid. However, the court rejected the argument that Mr M was also preferred because, even though Mr M might have received some incidental benefit from the preferential payments as a shareholder of MI Ltd, the payments were in fact made to MI Ltd.

## LEGISLATION

All of the legislation discussed below comes into force on 1 October 2009.

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### Limited partnership law reform

See *CLM* ¶17

SI 2009/1940; SI 2009/2160

Two new statutory instruments have been published to bring into effect some of the proposed reforms of limited partnership law. The Legislative Reform (Limited Partnerships) Order 2009 will amend the Limited Partnerships Act 1907 to clarify the **registration procedure** for limited partnerships, as discussed in *CLM 2009 Newsletter Issue 4*. The Limited Partnerships (Forms) Rules 2009 set out new versions of the forms for registering a limited partnership (LP5) and notifying Companies House of an increase in the limited partners' contributions (LP6).

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### Amendment of the Community Interest Companies Regulations

See *CLM* ¶62+

SI 2009/1942

The CIC Regulations (SI 2005/1788) are amended to implement some of the reforms that were the subject of consultation earlier this year (see *CLM 2009 Newsletter Issue 4* for details of the consultation).

The changes to the CIC Regulations will:

- » extend the definition of an **asset-locked body** to include industrial and provident societies, and insert new provisions into the CIC Regulations to allow CICs to convert into such a society;
  - » clarify the explanation of when a group of individuals constitutes a section of the community, which interprets the **community interest test**. The changes aim to avoid random groups of people (e.g. people with brown hair) from qualifying as beneficiaries; and
  - » harmonise the CIC Regulations with the **new Companies Act**, for example by amending the references to a CIC's constitution to omit references to the memorandum and changing references to the accounting provisions in CA 1985 to their equivalent in CA 2006 and related regulations.
- 

### Updates to existing legislation for the new Companies Act

See *CLM* ¶88+, ¶104+, ¶6745+, ¶7364

The regulations concerning **European Companies** (SI 2004/2326) are amended to reflect changes made by the new Companies Act, including the extension of the legislation to the whole of the UK (SI 2009/2400; SI 2009/2401; SI 2009/2402). The amendments also:

- » set out **new** versions of the **forms** to be used by European Companies for the registration of certain events at Companies House; and
- » revoke Part 3 of the regulations, relating to the **employee involvement requirements** of European Companies. This will be replaced with two new sets of regulations: one for European Companies with a registered office in GB (SI 2009/2401) and one for European Companies with a registered office in Northern Ireland (SI 2009/2402). These regulations are separated because of the different employment law regimes in GB and Northern Ireland. There are no substantive changes to the previous requirements.

## LEGISLATION cont...

The regulations concerning **EEIGs** (SI 1989/638) are take into account the new Act (SI 2009/2399). The amendments also:

- » allow an EEIG to register an **alternative name**, other than its grouping name, under which it proposes to carry on business in the UK; and
- » set out **new forms** to be used by EEIGs for the registration of certain events at Companies House.

Various consequential amendments update the **Takeover Code** without altering the substance of the relevant provisions (Takeover Code Instrument 2009/3).

Finally, the **Insolvency Rules** 1986 (SI 1986/1925) are amended to reflect minor changes as a result of the new Companies Act, including relevant consequential amendments to certain forms (SI 2009/2472).

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### New rules for unfair prejudice proceedings

See *CLM* ¶2105+

SI 2009/2469

New rules applicable to unfair prejudice applications revoke and replace the 1986 rules (SI 1986/2000). The new rules **apply to** petitions for relief from unfair prejudice presented to court on or after that date and do not introduce any substantial changes. The **new form of petition** is set out in the Schedule to the rules.

### Register of directors' disqualification orders and undertakings

See *CLM* ¶3074

SI 2009/2471

New regulations concerning the **disclosure of disqualification information** have been published, which revoke and replace the 2001 regulations (SI 2001/967). The new regulations principally update old ones to take into account the new Companies Act and other new legislation.

### Amendment of the CPR

See *CLM* ¶7118+

SI 2009/2092

The CPR are amended to reflect changes made by CA 2006 and the establishment of the Supreme Court for the UK (and the abolition of the appellate jurisdiction of the House of Lords). The **changes also include:**

- » new definitions of "expert" and "single joint expert", with guidance on the appointment of a single joint expert (Part 35); and
- » the substitution a new Part 63, relating to intellectual property claims.



## FOCUS ON... CA 2006 FINAL IMPLEMENTATION

At long last, the remainder of the new Companies Act will be implemented tomorrow, 1 October 2009. All of the provisions coming into force are noted in CLM 2009, along with explanations of changes in the law where appropriate. The highlights of this implementation phase are summarised here.

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### Names

See *CLM* ¶248, ¶275

The rules on when a company's name is regarded as the "same" as another on the register are more strictly defined (SI 2009/1085). See *CLM 2009 Newsletter Issue 3* for details of the relevant regulations.

There are two new ways in which companies can **change** their names: by conditional special resolution and by an alternative procedure set out in the articles. The **conditional special resolution** will be useful in situations where a significant change in the business is planned, for example where a company merges with another business. Passing a conditional resolution will allow the shareholders to consider the change of name in advance (along with various other matters that are likely to arise before the merger), and the actual change can be triggered once the merger has gone ahead by making the appropriate filing at Companies House.

Allowing companies to change their names by an **alternative procedure** set out in the articles gives companies far more flexibility. There is no restriction on this power. For example, companies could decide to enable the directors to change the company's name by board resolution, or allow a particular class of shareholders to do it.

Companies can still change their names by special resolution. There are specific Companies House forms that need to be used in each of these situations.

### Incorporation and constitution

See *CLM* ¶394+, ¶517+

One of the most significant changes brought in by the new Act is the change to a company's constitution. Although the **memorandum** still exists, it is a very basic document only relevant to incorporation, setting out the company's name, subscribers and how many shares they agree to take on incorporation. Companies incorporated on or after 1 October 2009 will only use this new-style memorandum. However, the changes apply to all companies. For those incorporated before 1 October 2009, all of the extra information in their old-style memoranda is deemed to be included in their articles (s 28 CA 2006). This has three main consequences:

- » companies will not be able to take advantage of some of the new more flexible provisions introduced by the new Companies Act unless they change these articles. For example, under the new Act, companies' objects are unlimited unless their articles limit them. An objects clause imported from the memorandum has the effect of limiting the company's objects to those stated;
- » the clauses imported from the memorandum can now, for the most part, be changed in the same way as other provisions in the articles. This means that, for example, shareholders lose their right to object to an alteration of the objects. It also means that provisions entrenched in the memorandum can be changed. The new Companies Act does allow companies to include entrenchment provisions in their articles instead (although they will only be able to make a provision more difficult, not impossible, to change). However, the implementation of this provision has been postponed while the Government consults on its effects on class rights (reg 2(2) SI 2009/2476); and
- » companies must ensure that when they provide copies of their articles to shareholders and others, they include the imported provisions or attach a copy of the memorandum marked up to show which provisions are now included in the articles.

Focus on...



## FOCUS ON... CA 2006 FINAL IMPLEMENTATION cont...

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# Focus on...

A company's **articles** are still a matter for its own discretion. However, Table A 1985 has been replaced by Model Articles as the default articles for newly incorporated companies that do not choose to draft their own articles. There are three sets of Model Articles, tailored to the most common types of company: private companies limited by shares, public companies and private companies limited by guarantee. Companies can still choose to file their own articles. Companies incorporated before 1 October 2009, whether under Table A 1985, an older version of Table A or their own tailored articles, will continue to be governed by those articles. However, they should consider amending their articles in order to benefit fully from the new Act (see *CA 2006*).

The new Act introduces a new **incorporation procedure**. Instead of the old set of documents, Form IN01 will have to be filed, along with a new-style memorandum and the company's articles (unless the company indicates that it will rely entirely on the appropriate form of Model Articles). Applications for registration received by Companies House on or after 1 October 2009 need to be in this new form.

### Shares and share capital

See *CLM* ¶707, ¶760+, ¶921, ¶1317, ¶1374

Companies no longer have to have an **authorised share capital**. Instead, a statement of capital will be filed on incorporation and when changes are made to a company's share capital (these statements are included in the relevant new Companies House forms). Companies can, however, choose to have an authorised share capital set out in their articles if they wish. Therefore, companies incorporated before 1 October 2009, whose authorised share capital provision has been imported from the memorandum into their articles, are in the same position as before (i.e. there is still a limit on how many shares can be issued). This provision can now be changed (whether to increase or remove it altogether) more easily than before, by ordinary resolution.

As well as removing the need for an authorised share capital, the new Companies Act gives companies more flexibility in dealing with their share capital in other ways. The principal changes introduced on 1 October 2009:

- » allow directors of companies with only one class of share to **allot** without prior authority. This is automatic for such companies incorporated under the new Act; those already incorporated can give their directors this power by ordinary resolution;
- » remove the need for private companies to be authorised in their articles to issue **redeemable shares**. All companies can authorise their directors to determine the terms and manner of redemption (either in their articles or by ordinary resolution), rather than having to set out these details in the articles. Companies can restrict or prohibit the use of the power to issue redeemable shares and/or set out the terms and manner of redemption in their articles if they wish; and
- » remove the need for all companies to be authorised in their articles to **consolidate** or **sub-divide** their share capital, or to **purchase their own shares** (including where a private company wants to carry out an own share purchase out of capital). Companies can restrict or prohibit the use of these powers in their articles if they wish.

### Companies House filing

See *CLM* ¶3869, ¶3896, ¶3907, ¶4080, ¶9900

The main change in this area is that Companies House **forms** have been redrafted and retitled to suit the new Companies Act. The new forms are specifically tailored to suit each situation, for example there are different forms for appointing individual directors and corporate directors. Therefore, companies must take care to check the Companies House website to ensure that they use the correct form before filing. Any information filed using CA 1985 forms will be rejected. The filing fees remain the same, see *CA 2006*.



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# Focus on...

Another major change allows **directors** to file service **addresses**, instead of their residential addresses, on the public register. Only certain authorities, such as the police and Revenue and Customs, have access to them. Credit reference agencies also have access to the residential addresses, but a director can apply to Companies House for an exemption from this. Directors whose residential addresses are already on the register at Companies House can file Form CH01 to register a service address instead, although it is more difficult to get a residential address that appears on historic documents on the register removed (this will only be allowed in similar circumstances to the old confidentiality orders, such as in cases of intimidation or violence). Companies are obliged to keep a register of directors' residential addresses so that directors can be traced by the authorities if necessary.

The new Act enables companies to keep their **registers and other documents** open to inspection at their registered office or a single alternative inspection location (SAIL), rather than making different arrangements for different registers or documents as under CA 1985. Companies must notify Companies House when they start using a SAIL, if the address of the SAIL changes or if the records are returned to the registered office.

Companies House has wider powers to **correct mistakes** on the register, for example it can correct incomplete documents and remove information that should not have been included. Any changes will be annotated on the register.

### Charges

See CLM ¶4641+

Most of the provisions of the new Companies Act relating to charges mirror those in CA 1985. The biggest change companies will notice will be in the filing requirements at Companies House, as new **forms** must now be used. Companies are still required to submit the instrument creating the charge or series of debentures.

The new Act has clarified the question over whether overseas companies must register charges over their assets in the UK even if they have not registered a UK establishment. There is no need for these so-called **Slavenburg companies** to register their charges, as the new Act specifies that only overseas companies with a registered UK establishment need to register charges. Companies House will therefore not now accept registration of Slavenburg charges.

### Dissolution and restoration

See CLM ¶7502, 7545+

The new Act extends the ability to apply for **voluntary striking off** to public companies, on the same conditions (for example, that the company has not traded within the last 3 months). It also simplifies the **restoration** process, by providing for a new administrative restoration procedure for cases where the company should not have been struck off. In all other cases, there is now one restoration procedure to follow, whether the company was struck off under CA 1985 or the new Act (although there are different deadlines).

## FOCUS ON... CA 2006 FINAL IMPLEMENTATION cont...

### Other types of company

See CLM ¶77, ¶140+

The basis of the registration and general filing requirements for **overseas companies** operating in the UK is simplified by the new Act. Instead of different rules for branches and places of business, there is now only one regime for overseas companies with a UK establishment (the definition of UK establishment encompasses both branches and places of business). As with other matters, the Companies House forms relevant to overseas companies have changed.

The new Act applies, with appropriate modifications, to **LLPs** and **unregistered companies**.

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# Focus on...

New Edition

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## Tax Memo 2009-2010

- helping to solve your tax problems

**Tax Memo 2009-2010** will be fully revised and updated to reflect law and practice as at the date of Royal Assent to the Finance Act 2009, and include commentary on the:

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- Restriction of tax relief available on pension contributions made by higher earners and the special annual allowance
- Abolition of the commissioners' system for tax cases and introduction of the new tribunals
- Implementation of the new harmonised system for tax penalties
- Changes to cross-border services for VAT (from January 2010)
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## COMPANIES ACT 2006: IMPLEMENTATION

### 1 October 2009 implementation

The remaining provisions of the new Companies Act come into force on 1 October 2009, along with a whole raft of related statutory instruments (the latest of which to be published are outlined below). This final implementation phase is the subject of this issue's *Focus on...* Details of how the law will change, the new references and related legislation can be found on a topic-by-topic basis throughout *CLM 2009*, with new material and changes that have been made since publication covered in updates to the relevant paragraphs.

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# CA 2006

### New regulations published

#### Consequential amendments, transitional provisions and savings

A final version of the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 has been published (SI 2009/1941). It mainly sets out amendments that need to be made to other legislation as a result of the new Companies Act. Most of the transitional provisions and savings relating to the implementation of the new Act can be found in the relevant Commencement Order, but there is a handful in this new Order. The Order also makes some minor amendments to the new Companies Act itself.

The **most significant** provisions address (for details, see the CLM updates to the relevant paragraphs noted below):

- » what happens when a company changes its name after 1 October 2009 but the name clause from its memorandum is deemed to have been imported to its articles (under s 28 CA 2006) (CLM ¶273, ¶374);
- » when the change in the nature of an unpaid call takes effect, in terms of which limitation period applies at which point (CLM ¶1217);
- » the repeal of directors' and managers' unlimited liability where the company's memorandum contains the appropriate clause (CLM ¶2181, ¶7864);
- » updates to CDDA 1986, most significantly to the factors to take into account when considering an application for disqualification of a director on the ground of unfitness, to take the new Companies Act into account (CLM ¶3023); and
- » Companies House filing under the Insolvency Act. The Order adds a new power to IA 1986, allowing a creditor or shareholder to enforce a company's filing obligations (CLM ¶7748, ¶8826, ¶9261, ¶9532).

A further set of regulations has been published **amending the 8th Commencement Order** (SI 2009/2476). This makes some last-minute changes to a handful of provisions that come into force on 1 October 2009:

- » it adds a saving so that names suggesting a connection with the Welsh Assembly still require the consent of the secretary of state (this will only operate until the new Companies Act is amended accordingly) (CLM ¶254);
- » it postpones the implementation of s 22(2) CA 2006, which enables companies to include entrenchment provisions in their articles on incorporation or by a unanimous shareholder decision. The Government wishes to consult on the effect of this provision on class rights (CLM ¶450). The same postponement has been made in relation to LLPs; and
- » it adds a new transitional provision dealing with when the longer deadline relating to the Crown's right to disclaim bona vacantia property applies (s 1013 CA 2006; CLM ¶7492).

#### Types of business and corporate structures

New regulations have been published under s 1043 CA 2006 to apply (as modified) the relevant parts of the new Companies Act to **unregistered companies** (The Unregistered Companies Regulations 2009, SI 2009/2436). Unregistered companies are rare: they are not formed or registered under the Companies Acts or any other public Act; they are formed under private Acts of Parliament or another form of specific authority, such as a royal charter. The parts of



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the new Companies Act applied to them include provisions regarding the constitution, trading disclosures, the registers of directors and their residential addresses and accounts.

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Regulations have also been published setting out how these companies and those registered under general Acts of Parliament other than the Companies Acts can **register** under the new Companies Act (s 1040 CA 2006; The Companies (Companies Authorised to Register) Regulations 2009, SI 2009/2437). These new regulations tackle the usual registration issues, and the effects of registering under the new Act. The Registrar of Companies (Fees) (Amendment) Regulations 2009 (SI 2009/2439) add the fee for registering such a company to the main fees regulations (The Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, below). The fee will be £20.

### Company names

See CLM ¶240+

New regulations amend the Company and Business Names (Miscellaneous Provisions) Regulations 2009 (SI 2009/1085) as of 1 October 2009. The Company, Limited Liability Partnership and Business Names (Miscellaneous Provisions) (Amendment) Regulations 2009 (SI 2009/2404) simply correct some minor errors in the original version.

### Shares and share capital

See CLM ¶399, ¶510, ¶664, ¶715, ¶946

An updated version of the regulations setting out the euro equivalent of the **authorised minimum** allotted share capital **for public companies** has been published (SI 2009/2425). As of 1 October 2009, the figure is reduced from €65,600 to €57,100.

However, in the following cases, the old figure of €65,600 continues to apply as a transitional measure:

- » where an application for a trading certificate was made before 1 October 2009;
- » where a private company passed a special resolution to re-register as a public company before 1 October 2009;
- » where a public company passed a special resolution to reduce its share capital before 1 October 2009 (for the purposes of determining whether the reduction takes the company's allotted share capital below the authorised minimum); and
- » where a public company's obligation to cancel forfeited shares runs from a date before 1 October 2009 (again, in order to determine whether the cancellation takes the allotted share capital below the authorised minimum).

Regulations have also been published to amend certain provisions of the new Act on share allotments (SI 2009/2561). The effect of these amendments is to clarify that the statutory **pre-emption provisions** do not apply:

- » if shares are allotted pursuant to the exercise of a right to subscribe for, or convert securities into, shares. The provisions will only apply to the granting of that right; or
- » to an allotment (or the grant of subscription or conversion rights) under an employees' share scheme. The regulations also clarify that, in these circumstances, directors do not need authority to allot.

### Companies House fees

New regulations set out the fees payable as from 1 October 2009 for various filings at Companies House (The Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101). The regulations revoke previous fees regulations for existing companies and LLPs in GB and Northern Ireland, although the **amounts** of the fees remain the same. Companies House intends to **review** the level of the fees in 2010.

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Separate regulations set out the fees payable by limited partnerships, and other entities (The Registrar of Companies (Fees) (Limited Partnerships and Newspaper Proprietors) Regulations 2009, SI 2009/2392), EEIGs and European Companies (The Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability Company) Regulations 2009, SI 2009/2403). The amounts of these fees also remain the same.

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### Guidance on articles

See CLM ¶¶443, ¶¶445

New guidance has been published to help companies understand **how the new Companies Act affects** their articles and what they should consider doing about it.

**BIS** has published draft guidance on the topic, which explains the approach taken by the Government when drafting the new Model Articles and the differences between Table A 1985 and the different sets of Model Articles.

More specific guidance has been published by the **City of London Law Society** (Company Law Committee). This guidance is aimed at public companies, and tackles issues of particular interest to listed companies. It explains the changes that companies should consider making to their articles, and how they can achieve this. Private companies should be aware that some of the suggestions do not apply to them. This guidance also assumes that companies want to take full advantage of the flexibility introduced by the new Act (for example, by removing the need for the articles to authorise an own share purchase or a consolidation or sub-division of share capital). However, the new Act still gives companies the option to control such powers if they wish (for example, by including a provision in their articles prohibiting or restricting their use). Therefore, companies should consider which approach is suitable for their needs.

Among the **suggested changes** are:

- » adding an alternative method of changing the company's name, for example by board resolution (CLM ¶¶275);
- » removing the provisions of the memorandum that will be deemed to be in the articles (CLM ¶¶399);
- » removing references to authorised share capital (CLM ¶¶707);
- » making suitable alterations regarding redeemable shares, consolidations/sub-divisions of capital and own share purchases (respectively, CLM ¶¶765, ¶¶769, ¶¶1317, ¶¶1374);
- » enabling remote participation at shareholder meetings (CLM ¶¶3255+); and
- » removing the chairman's casting vote at shareholder meetings (for companies incorporated on or after 1 October 2007 with Table A 1985 articles, this amendment already applies; CLM ¶¶3839).

Copies of these guidance notes can be found at:

<http://www.berr.gov.uk/files/file52470.pdf>; and

<http://www.citysolicitors.org.uk/FileServer.aspx?oID=641&IID=0>.

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