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UK Companies Act 2006—Changes to Constitutional Documentation of UK Companies

The purpose of this advisory is to highlight changes that should be considered for the constitutional documentation of UK companies (including UK subsidiaries of US entities) in light of the final stage of implementation of the UK Companies Act 2006 (the "2006 Act").

The 2006 Act has now been fully implemented with the final remaining provisions (with some minor exceptions) effective as of 1 October 2009.

These provisions include:

- a new simplified procedure for forming companies;
- new rules on the constitution of companies. A UK company's constitution was traditionally contained in two separate documents—the memorandum of association and articles of association. Going forward, for new companies the memorandum of association will now simply be a short statement of the name and type of company, initial share capital and the consent of initial shareholders to subscribe to the company, and there will be an assumption that a company will have unlimited capacity subject to any express limitations in the articles of association. Any objects set out in an existing company's memorandum of association will, after 1 October 2009, be deemed to be part of the articles and to be a restriction on the business activities of the company unless such restrictions are removed by the adoption of new articles of association (see 'Why should existing articles be amended?' below). The articles of association will become the key constitutional document;
- a new civil penalty of £200 where amendments to the articles of association of a company are not notified to the UK Companies House within 15 days (this is in addition to potential criminal prosecution);
- the removal of the requirement for the company to set a limit on the number of shares that directors can issue (authorised share capital). Under transitional provisions, any existing authorised share capital will remain as a restriction applying to an existing company unless and until it is removed (see 'Why should existing articles be amended?' below);
- abolition (in cases where the company is a private company and has just one class of share) of the requirement for shareholder authority (in the articles of association or by shareholder resolution) for the issue of new shares. Where an existing company has an authority to allot shares in its articles or stipulates an authorised share capital, the articles will need to be amended to remove any such restrictions (see 'Why should existing articles be amended?' below). For public companies or private companies with more than one class of share, the position is largely unchanged—directors will only have power to allot new shares if authorised by ordinary resolution (a simple majority of shareholders consenting) or the articles

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(in either case, the maximum number of shares which can be allotted and an expiry date not exceeding five years must be specified);

- introduction of new model articles of association as the default articles for companies incorporated after 1 October 2009, to replace 'Table A' style articles;
- permitting companies to change their names other than by shareholders' special resolution (requiring at least 75% consent) by any alternative means provided for in the company's articles. The articles could provide that an ordinary resolution is adequate, or even that a simple board resolution would suffice. It would obviously be necessary for a company's articles to be amended (to set out the alternative mechanism) to take advantage of this provision (see 'Why should existing articles be amended?' below);
- allowing companies, with the agreement of all shareholders, to "entrench" certain provisions in their articles, e.g., provide that certain provisions can only be amended with approval of the holders of more than 75% of the shares; and
- new rules allowing directors to keep their home addresses confidential.

Why should existing articles be amended?

There is no legal requirement that a UK company must update its articles, and a company may continue to operate after 1 October 2009 under its existing constitution. However, updating the articles of association would allow a company to:

- remove provisions that have been overridden by the 2006 Act, as they could mislead and confuse the directors and shareholders as to the correct procedures, rights and obligations; and
- allow the company to take full advantage of the deregulation brought in by the 2006 Act (see above).

Amending the articles could clearly therefore have significant benefits for a UK company.

One option open to an existing UK company is to adopt the new model articles in their entirety in place of its current articles. However, the model articles have been designed for small, owner-managed businesses and may not be suitable for all private companies. Furthermore, the model articles do not contain many of the provisions that companies may wish to have in their articles, such as:

- issue of nil or partly paid up shares (and the associated remedies of lien and forfeiture);
- alternate directors;
- rights of members and proxies at company meetings;
- simplified change of name procedure;
- provision as to how to appoint a company secretary (should the company wish to do so); and
- provisions relating to directors' conflicts of interest.

We would therefore recommend that directors review (in conjunction with legal advisers) the articles of their company to determine if they should be amended for any of the reasons discussed above. It is likely that in most cases a less drastic option than adopting wholesale the model articles would be appropriate, i.e., the company could choose to amend some individual articles to take advantage of the deregulatory provisions of the 2006 Act where appropriate.

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