

GUIDANCE NOTE

COMPANIES ACT 2006: MAIN CHANGES AFFECTING ARTS AND CULTURAL ORGANISATIONS (updated October 2009)

The following are the main provisions of the Companies Act 2006 which are in force as at 1 October 2009 affecting arts and cultural organisations which are limited companies, in each case with guidance about any action that needs to be taken now, or are recommended.

The Act has now been fully implemented.

This note only gives guidance of a general nature and is not intended to constitute advice in any specific circumstances. Please contact me if you need specific advice.

Preliminary note about legal structures and terms used

Most arts and cultural organisations are **Companies Limited by Guarantee** (whether or not registered charities) whose 'Members' are individuals or bodies which guarantee to pay a nominal sum if the company becomes insolvent and goes into liquidation. Any surplus income cannot be distributed to Members.

These notes have been designed specifically for organisations which are Companies Limited by Guarantee but most apply equally to **Companies Limited by Shares** (sometimes called 'shareholding companies' or 'trading companies'). Companies Limited by Shares have 'shareholders' (rather than guarantor 'members') and may distribute profits to shareholders by way of dividend or capital.

All Companies have two-tier structures: the 'Members' or 'shareholders' who have the power to make major changes such as change the constitution and who appoint or elect the Directors. And the 'Directors' (often called 'Trustees' 'the Board', the 'Management Committee' and other terms) who run the company on behalf of the Members or shareholders and whose details must be sent to Companies House.

In many arts organisations, the same people are Directors and Members; however some arts organisations have broader more democratic memberships where the Members are a wider group and usually elect the Directors.

Arts organisations which are also registered charities cannot by law have paid Directors or Board members; this often means, confusingly, that the person who is 'the Director' or 'Executive Director' or 'CEO' is not in fact a Director, but is an employee of the Company who reports to the Directors.

PROVISIONS WHICH CAME INTO EFFECT ON 6th APRIL 2008

1. DELIVERY OF ANNUAL ACCOUNTS TO COMPANIES HOUSE

The delivery time for accounts has been reduced by one month, from 10 months to 9 months following the end of the financial year. Full calendar months for filing periods have also been introduced; where the accounting period ends on a month end, the accounts filing period will end on a month end, except for the first accounting period.

2. CHARITABLE COMPANIES: AUDIT REQUIREMENTS

For financial periods beginning on or after 1st April 2008 there are no longer special rules regarding audit exemption for charitable companies. They can qualify for audit exemption under company law in the same way as any other company.

The Act simplifies the rules about when a professional audit is required and gives both charities which are companies, and those which aren't, similar thresholds.

For charities which are companies, accounts will have to be professionally audited if the charity has:

- gross annual income over £500k; or
- a balance sheet total (aggregate assets) over £2.8m.

Charitable companies with an income between £90k and £500k and assets of £2.8 m or less are not required to have their accounts audited if they provide an accountant's report. For a charitable company with income of £90,000 or less then neither a professional audit nor an accountant's report is required unless its assets are over £2.8m

3. LIMITATION OF LIABILITY AGREEMENTS WITH AUDITORS

Auditors and companies can now enter into binding agreements limiting auditors' liability for negligence, default or breach of trust or duty. A number of conditions apply.

4. COMPANY SECRETARY

The office of company secretary becomes optional for private companies.

- If companies decide they no longer need a company secretary they will need to inform Companies House via WebFiling or on Form 288b.
- Companies will be required to amend their Articles of Association if there is a specific reference to the company having a secretary. However if the Articles only refer to the secretary's duties there is no need to make an amendment.
- Companies which amend their Articles must file a written or special resolution together with an updated version of the Articles.
- Companies may have a sole director and no Company secretary.

PROVISIONS WHICH CAME INTO FORCE ON 1ST OCTOBER 2008

5. DIRECTORS' DUTIES

- The Act includes a new set of legal duties which apply to all Directors:
 - To act within powers
 - To exercise independent judgment
 - To exercise reasonable care skill and judgment
 - Not to accept benefits from third parties
 - To declare interest in a proposed transaction or arrangement with the Company (nature and extent)
 - Duty to promote the success of the Company in order to achieve its purposes and to have regard (amongst other factors) to:
 - Likely consequences of any decision in the long-term
 - The interests of employees

- The need to foster business relationships with suppliers, customers and others
 - The impact of the company's operations on the community and environment
 - The desirability of the company maintaining a reputation for high standards of business conduct
 - The need to act fairly as between members
- For financial years starting on or after 1st October 2007, Directors' Reports must now include a 'Business Review' describing how the Directors have performed these new duties. However this requirement will only affect the largest arts bodies since it only applies to companies whose turnover is more than £5.6 million, balance sheet total is less than £2.8 million or which have 50 employees or less; for financial years starting after 1st April 2008 the financial thresholds increase to £6.5 million, £3.26 million.

Recommended action:

- Provide briefing to Board members on their new legal responsibilities
- Incorporate the duties into your role description for all Directors
- Review board decision-making processes to ensure that decisions are made using the new statutory factors and incorporate them into your board protocols including the preparation of board papers.
- Be ready to include a 'Business Review' for the Directors' Report for financial years starting on or after 1st October 2007 (large national organisations only).

6. DIRECTORS' SERVICE CONTRACTS

- New: Any Member can now request a copy of any Service Contract which the Company has with any Director on payment of a fee (to be prescribed).
- New: The approval of Members (usually at an EGM) is needed for any Service Contract which has a guaranteed duration of 2 years or more and which is entered into on or after 1st October 07; previously only contracts of 5 years or more required Members' approval.
- 'Service Contract' includes contracts of service (employment), contracts for services (freelance) and letters of appointment to the office of Director, whether or not the Director is remunerated.

Note: The new provisions will not apply to charitable companies with a paid 'director' or 'Executive Director' since this person will not be a Director of the Company (see preliminary note, page 1).

Required action:

- Obtain the approval of Members (usually at any EGM) to any new Service Contracts of over 2 years' duration which are entered into on or after 1st October 2007: approval obtained previously under previous law will suffice.
- Ensure procedures are in place enabling Members to obtain copies of any Directors' Service Contract on request.

7. ENHANCED PROXY RIGHTS

- New: Automatic right for all Members to appoint a proxy **to attend, speak and vote** at a General Meeting (even where Articles prohibit this). A proxy need not be a Member of the company.

- Articles of Association can grant more extensive rights to proxies but cannot be more restrictive.
- New: All notices of General Meetings must include a statement informing Members of their right to appoint a proxy to attend vote and speak on their behalf.

Required actions:

- Introduce language in all Notices of EGMs and AGMs sent out after 1st October 2007 which makes it clear that Members can appoint a proxy to attend vote and speak for them (even if proxy voting is not permitted or is restricted by the Articles).

Recommended action:

- Update the Articles of Association to include provisions consistent with the new Act.
- Companies may wish to encourage members to appoint the Chair as proxy but this cannot be mandatory. Members may now appoint who they wish as a proxy.
- Organisations with large memberships may wish to review their structure to reduce the number of Members.

8. WRITTEN RESOLUTIONS *(ie decisions made by Members signing sheet(s) of paper rather than in a Members' meeting ie AGM or EGM)*

- New: companies can now pass written Ordinary Resolutions by a simple majority and written Special Resolutions by a 75% majority; previously they had to be signed by **all** the Members.
- The change applies even if the Articles of Association specify otherwise.
- Written resolutions cannot be used for resolutions dismissing a Director or the auditors.

Recommended actions:

- No need to change the Articles to take advantage of these new provisions but Articles can be customised to provide (say) for longer than 28 days for Members to respond to written resolutions.
- If changing the Articles for other reasons, consider removing any wording that contradicts the Act.

9. ANNUAL GENERAL MEETINGS

- New: Companies will no longer be required to hold an AGM every year (though they may continue to do so).

Recommended action:

- The Directors of each Company should decide whether to continue to hold AGMs; they can be useful as an opportunity to report to Members and stakeholders on the company's activities and to allow election/re-election of Directors.
- If Articles currently require an AGM (most will), the Articles will need to be changed if AGMs are to be dispensed with.

10. NOTICE-PERIODS FOR GENERAL MEETINGS

- New: The notice-period required to convene all AGMs and EGMs is reduced to 14 days (even if a Special Resolution is to be passed), unless the Articles state otherwise.
- Companies whose Articles call for 21 days notice for AGMs and Special Resolutions (most will) will have to amend their Articles if they wish to take advantage of the shorter notice-period of 14 days.

Recommended action:

- Consider changing the Articles to reduce the notice period to 14 days.

11. PRESENTING ACCOUNTS TO MEMBERS

- New: There is no longer a requirement that the Accounts be presented or approved by Members at a general meeting, unless required by the Articles. Members must however still be sent the annual Accounts.
- If the Articles specifically require the annual Accounts to be presented at an AGM or EGM of Members (most will) then companies must amend the Articles to remove this provision if they wish to take advantage of the change.
- Change applies to annual reports and accounts for financial years ending on or after 1st October 2007.

Recommended action:

- Decide whether to continue to present annual Accounts to Members; if not, change the Articles of Association by Special Resolution (passed at an EGM or AGM) to remove this requirement.

12. ACCESS TO REGISTER OF MEMBERS

Under the existing law all companies must keep a Register showing names and addresses of Members and allow anyone to inspect this. The Companies Act 2006 introduces new rules which enable companies to restrict access to the Register.

- The request for access to the Register of Members must now include the name and address of the person seeking access and the purposes for which access is intended.
- Companies then have five days to comply with the access request or apply to the Court; the Court will allow companies to withhold access if access is not being sought for a proper purpose.
- Applies to all companies filing their annual returns made up to a date after 30th September 2007.

Recommended action:

- Provide a briefing on the new rules to staff members likely to be asked for access to the Register of Members.

13. COMPANY RECORDS

- New: companies must keep records of Members' resolutions (passed at AGMs and EGMs and now including written resolutions) as well as records of Directors' meetings, for a period 10 years from the date of the meeting etc. Previously companies had to keep these indefinitely.
- The 10-year period is a minimum period and companies may decide to keep records for longer in appropriate cases.
- Companies must keep the records of Members' resolutions available for inspection for the full 10-year period (at the registered office or other location chosen by the company and specified in the annual return). Companies must make the records available to any member for at least two hours between 9 am and 5 pm on a working day specified in a notice by the member.

14. ELECTRONIC COMMUNICATIONS:

- The Act makes it easier for companies to communicate with members electronically.
- Companies still need to seek agreement from individual Members to receive information by email. If a Member does not agree or fails to respond, hard copies must be sent.
- Companies wishing to use website communications must pass a Members' resolution or change their Articles of Association, and seek agreement of individual Members; if a Member fails to respond in 28 days, his/her consent is presumed.
- If an individual Member has opted out of website communications, the company cannot ask for his or her agreement again within 12 months.
- Companies who want to post material on its website must notify the individual Members that the notice has been posted (either by email or hard copy).
- Members are entitled to hard copies on request **even if** they have consented to e-communications.

Recommended action:

- Companies wishing to use their websites to communicate with Members should review their Articles of Association and existing Members' resolutions in force to ensure the necessary powers are in place to use website communications.
- If powers already in place, ensure that provisions are wide enough to catch all electronic documents.
- Continue to seek consents from Members to use e-communications.

15. DIRECTORS' CONFLICTS OF INTEREST

- As before, Directors are under a duty to avoid conflicts of interest, not to accept benefits from third parties and to declare an interest in proposed transactions.
- There is a new provision which allows the other Directors to authorise a conflict of interest, provided that this is permitted in the Articles of Association. Before only the members could authorise this.

Recommended action:

- When updating Articles of Association, include a provision permitting other Directors to authorise transactions involving a Director who has conflict of interest.

16. COMPANY NAMES

- New right of objection to Registrar if name is the same or misleadingly similar to a name in which the objector has goodwill.

PROVISIONS WHICH CAME INTO EFFECT ON 1ST APRIL 2009

17. INCREASED PENALTIES FOR LATE FILING OF ACCOUNTS

- The penalties for late filing of the Annual Accounts have been increased to £150 (up to one month later), £375 (one to three months) and onwards.

Recommended action:

- Ensure that you have reminders and procedures in place to make sure that the accounts are filed on time. This applies equally to dormant companies.

PROVISIONS WHICH CAME INTO EFFECT ON 1ST OCTOBER 2009

18. MEMORANDUM AND ARTICLES OF ASSOCIATION

- The Memorandum of Association will in future be a much shorter document containing only the names and signatures of the subscribers, ie those individuals who agreed to form the company.
- The Memorandum no longer contains the Objects (purposes) of the company or other provisions such as powers, restrictions on member and Director benefits and the liabilities of members. For existing companies, these provisions are now **automatically transferred to the Articles of Association**.
- Companies will by law no longer have to specify their Objects in their constitutions. However
 - all registered charities will still need to have Objects which are approved by the Charity Commission;
 - Most companies limited by guarantee (non-charities) will also need to retain their Objects to satisfy their stakeholders.
- Companies may still amend their Articles of Association (including their Objects and any other provisions of the 'old' Memorandum which have been automatically transferred to the Articles) by Special Resolution at a Members' meeting, and by following the procedure set out in the Articles. Charities must still obtain Charity Commission approval to changes to their Objects.
- Any changes to the Articles of Association must be filed at Companies House within 15 days.

Required action:

- New companies formed after 1 October 2009: must file an abbreviated Memorandum of Association only, signed by the subscribers. They may either adopt the new model Articles of Association that replace Table A, or adopt customised Articles. See the Companies House website for details.

Recommended action:

- Although there is no action existing companies need to take, Boards may wish to take this opportunity of reviewing their Objects and Articles of Association to ensure they are up-to-date and compliant with the other changes introduced by the Act.

19. DIRECTOR'S ADDRESSES

- In the past, companies needed to file the residential addresses of all Directors and these were publicly available. As from 1 October 2009, every director must provide **both** their residential address **and** a 'service address' which can include the Company's Registered Office but cannot be a PO Box.
- **Only the service address will be on the public record** but residential addresses will be made available by Companies House to specified public authorities such as the Police and HMRC and credit reference agencies for vetting applications for credit (with some exceptions).
- Company Secretaries are in future only required to file a service address.

Required action:

- The Company's Register of Directors (which must be available for public inspection) need only contain Directors' 'service addresses' but each company must keep a separate register of their residential addresses (not available for public inspection)

Recommended action:

- As from 1 October Directors' residential addresses will automatically become their 'service addresses' but Directors wishing to have a different service address can change their details online.

20. SETTING UP A NEW COMPANY

- A number of changes have been introduced which make it easier to set up a new company, for details see the Companies House website.

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