

COMPANIES ACT 2006

EXPLANATORY NOTES

TERRITORIAL EXTENT AND DEVOLUTION

Part 2: Company Formation

28. This Part of the Act is about how companies are formed. It replaces or, as the case may be, restates equivalent provisions in the 1985 Act.

Section 7: Method of forming company

29. This section replaces sections 1(1) of the 1985 Act. It retains the current requirement that individuals who wish to form a company must subscribe their names to the memorandum of association (“memorandum”). *Subsection (1)* introduces the new provisions about forming a company. In line with the recommendations of the CLR, it is provided that a single person is able to form any sort of company (not just a private company) (Final Report, paragraph 9.2).
30. *Subsection (2)* reproduces the existing requirement that a company may not be formed for an unlawful purpose.

Section 8: Memorandum of association

31. This section replaces section 3(1) of the 1985 Act.
32. Under the Act, the memorandum serves a more limited, but nonetheless important, purpose: it evidences the intention of the subscribers to the memorandum to form a company and become members of that company on formation. In the case of a company that is to be limited by shares, the memorandum will also provide evidence of the members’ agreement to take at least one share each in the company.
33. The memorandum of a company formed under the Act will, therefore, look very different from that of a company registered under the 1985 Act. In addition it will not be possible to amend or update the memorandum of a company formed under the Act.
34. These changes to the memorandum are based on the CLR’s recommendation that there should be a single constitution (Final Report, paragraph 9.4). In line with the principles behind this recommendation, in future key information regarding the internal allocation of powers between the directors and members of a company will be set out in one place: the articles of association (“articles”).
35. By virtue of section 28, provisions in the memoranda of existing companies will be treated as provisions in the articles if they are of a type that will not in be in the memoranda of companies formed under the Act. Existing companies will, therefore, not be required to amend their articles to reflect these changes, but they can do so if they wish. They will however be able to alter or update provisions in their constitution which are now set out in their memoranda by amending their articles, for example to reflect changes to the law made by the Act.

Section 9: Registration documents

36. This section replaces various provisions in sections 2 and 10 of the 1985 Act. It prescribes the types of information or “documents” that must be delivered to the registrar when an application for registration is made and the registrar to whom the information must be delivered.
37. The changes to the way in which certain information is delivered to the registrar are required as a result of the changes that have been made to the memorandum. In future, information which is currently set out in the memorandum will be provided to the registrar in accordance with the provisions of this section, which prescribes, amongst other things, the contents of the application for registration. In all cases this application must state:
- the company’s proposed name;
 - whether the company’s registered office is to be situated in England and Wales (or Wales), in Scotland or in Northern Ireland;
 - whether the liability of the company’s members is to be limited and if so whether it is to be limited by shares or by guarantee;
 - whether the company is to be a private or a public company.
38. In the case of a company that is to have a share capital, the application must also contain a statement of capital and initial shareholdings (see section 10). In the case of a company that is to be limited by guarantee the application must also contain a statement of guarantee (see section 11).
39. In all cases the application must also contain a statement of the company’s proposed officers (see section 12) and a statement of the intended address of the company’s registered office (that is, the postal address of the company’s registered office as opposed to a statement confirming the jurisdiction in which the company’s registered office is to be situated – which is also required).
40. The application for registration must also contain a copy of any proposed articles (to the extent that the company does not intend to use the model articles (see sections 19 and 20) and must be accompanied by the memorandum (see *subsection (1)*) of this section and a statement of compliance (see section 13).
41. In future it will be possible to form a company on-line and the various types of information referred to in the section are, therefore, capable of being delivered as a series of data entries as well as in paper or such other form as the registrar may permit or prescribe. The registrar has power under section 1068 to prescribe the form and manner in which documents are to be delivered to her.

Section 10: Statement of capital and initial shareholdings

42. This section is a new provision. It sets out the contents of the statement of capital and initial shareholdings.
43. Currently, in the case of a limited company with a share capital the memorandum is required to state the amount of the share capital with which the company proposes to be registered and the nominal amount of each of its shares. This is known as the “authorised share capital” and acts as a ceiling on the amount of capital which can be issued (although this limit can be increased by ordinary resolution). The CLR recommended that the requirement for a company to have an authorised share capital should be abolished (Final Report, paragraph 10.6).
44. The Act gives effect to this recommendation and in future, information about the shares subscribed for by the subscribers to the memorandum, which is currently set out in the

memorandum itself, will be provided to the registrar in the statement of capital and initial shareholdings.

45. Like the statement of guarantee (see section 11), the statement of capital and initial shareholdings must contain such information as may be prescribed by the Secretary of State, in regulations made under the Act, for the purpose of identifying the subscribers to the memorandum (i.e. the founder members of the company).
46. The statement of capital and initial shareholdings is essentially a “snapshot” of a company’s share capital at the point of registration. For public companies, this requirement is linked to the abolition of authorised share capital (see above). It implements (as far as public companies are concerned) Article 2 of the Second Company Law Directive (77/91/EC) (the “Second Directive”) which states:

“the statutes or instruments of incorporation of the company shall always give at least the following information... (c) when the company has no authorized capital, the amount of the subscribed capital...”.
47. The statement of capital and initial shareholdings must contain the following information:
 - the total number of shares of the company to be taken on formation by the subscribers to the memorandum;
 - the aggregate nominal value of those shares;
 - for each class of shares: prescribed particulars of the rights attached to those shares, the total number of shares of that class and the aggregate nominal value of shares of that class; and
 - the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of premium).
48. The reference to “*prescribed particulars of the rights attached to the shares*” in this section (and elsewhere in the Act where a statement of capital is called for), refers to such particulars as may be prescribed by the Secretary of State by statutory instrument (see section 1167).
49. Whilst the Second Directive only applies to public companies it is important that the information on the public register is up-to-date for both public and private companies. A statement of capital will, therefore, be required where it is proposed that a company formed under the Act will have a share capital on formation and, with limited exceptions (in particular, where there has been a variation of class rights which does not affect the company’s aggregate subscribed capital) whenever a limited company having a share capital makes an alteration to its share capital (and in certain cases where an unlimited company makes a return to the registrar).

Section 11: Statement of guarantee

50. This section replaces section 2(4) of the 1985 Act. It sets out the contents of the statement of guarantee that must accompany the application for registration where it is proposed that a company will be limited by guarantee on formation.
51. The statement of guarantee is essentially an undertaking, given by the founder members of the company, to contribute to the assets of the company up to a specified amount in the event of it being wound up. New members must also agree to make the same contribution.
52. A member of a company limited by guarantee is only liable to contribute to the assets of a company if it is wound up during the time that he is a member or within one year of him ceasing to be a member.

53. Like the statement of capital and initial shareholdings the statement of guarantee must contain such information as may be prescribed by the Secretary of State, in regulations made under the Act, for the purposes of identifying the subscribers to the memorandum (i.e. the founder members of the company).

Section 12: Statement of proposed officers

54. This section replaces section 10(2) and (3) of the 1985 Act and contains a new provision. Under section 10, details of the first director(s) and the secretary or joint secretaries must be given to the registrar at the time of application for registration. That requirement is carried forward but there are two changes:
- firstly, to the required particulars. These are specified in relation to directors in sections 163 to 166. The main change is that a service address must be provided for each director who is a natural person. This is in addition to the requirement for the usual residential address;
 - secondly, as recommended by the CLR (Final Report, paragraph 4.7), there is no requirement for a private company to have a company secretary but it may do so if it wishes (see section 270(1)). As now, a company which proposes to be registered as a public company must have a company secretary (see section 271).

Section 13: Statement of compliance

55. This section replaces section 12(3) and (3A) of the 1985 Act. At present, where an application for registration of a company is made in paper form, the application must be accompanied by a statutory declaration (made before a solicitor or commissioner of oaths) confirming that the requirements of the 1985 Act in respect of registration, and of matters precedent and incidental to it, have been complied with (see section 12(1) of that Act). This statutory declaration must be made by one of the persons whom it is proposed will be a founder director or secretary of the company (that is, on registration) or a solicitor engaged in the formation of the company.
56. Where the application for registration is made in electronic form, in place of the statutory declaration required under section 12(3) of the 1985 Act, the same persons may, alternatively, deliver an “electronic statement” to the registrar. This statement must confirm that the requirements referred to in section 12(1) have been met.
57. Based on the recommendations of the CLR (Final Report, paragraph 9.5), the current requirement for a statutory declaration or electronic statement, here and elsewhere in the Act, is replaced by a requirement to make a statement of compliance. This statement does not need to be witnessed and may be made in paper or electronic form. It will be for the registrar’s rules under section 1068 to specify who may make this statement (and the form of it). As with all documents delivered to, or statements made to, the registrar, it is an offence to make a false statement of compliance – see section 1112.

Section 14: Registration

58. This section restates section 12(1) and (2) of the 1985 Act. As now, where the registrar is satisfied that all of the requirements of the Act as to registration have been met she will register the documents delivered to her and issue a certificate of incorporation under section 15.

Section 15: Issue of certificate of incorporation

59. This section restates section 13(1)(2) and (7)(a) of the 1985 Act and contains a new provision in *subsection (2)*, which prescribes the contents of the certificate of incorporation issued by the registrar on registration of a company. The certificate of incorporation is conclusive evidence that the requirements of the Act as to registration

*These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006*

have been met, that the company has been registered, and (where relevant) that the company has been registered as a limited company or a public company.

60. There is one change to what the certificate of incorporation is required to state: in future this will include details of whether the company's registered office is situated in England and Wales (or in Wales), in Scotland or in Northern Ireland. The certificate will also state, where the company is limited, whether it is limited by shares or by guarantee.

Section 16: Effect of registration

61. This section replaces section 13(3) to (5) of the 1985 Act. It provides, amongst other things, that the subscribers to the memorandum, together with such other persons as may from time to time become members of a company, are a body corporate by the name stated in the certificate of incorporation and, in the case of a company having a share capital, that the subscribers to the memorandum become holders of the shares specified in the statement of capital and initial shareholdings. This means that on registration a company becomes a legal person in its own right, which is distinct from the people who own it (the members) and the people who manage it (the directors).