

Charities group

Companies Act 2006 and companies in charity structures – September 2008 update

The Companies Act 2006 has brought in important changes to how companies are constituted and administered. This client information sheet aims to help you understand the latest legislative requirements for charitable companies and highlights the provisions of the Act, which come **into force on 1 October 2008**. **Action is required NOW** to make essential amendments to most charitable companies' articles of association. A further review of all companies is also recommended.

New rules in the Companies Act 2006 make important changes to how companies are constituted and administered. This client information sheet summarises:

- the new rules which are already in force affecting all existing charities set up as companies limited by guarantee (see section one)
- the key changes affecting all existing charities set up as companies limited by guarantee which come into force on 1 October 2008 (see section two)
- detailed guidance on the directors' duties to avoid conflicts of interest and to make declarations of interests (see section three)

All charities that are or use companies should be aware of the changes brought in to date and will be able to take advantage of new rules affecting members to ease company administration. A number of the new rules apply irrespective of provisions in your current articles of association. We have focused on charitable companies in this note but the new rules (with some differences) will affect all companies including trading and other companies owned by or associated with charities.

Further changes to the rules will be brought in on 1 October 2009. We will keep you informed of these.

Free assessment

We are offering a free service to charities to examine the memorandum and articles of any company with which they are associated to advise:

- whether an ordinary resolution of members is needed to empower directors to authorise conflicts of interest
- whether a change should be made to the articles immediately to take account of changes to the rules affecting conflicts of interest
- whether in 2009 changes should be made to the memorandum and articles to take account of other changes of law under the Companies Act 2006
- whether a general review of the company's governance is indicated on the face of the memorandum and articles

If you would like more information, please contact elizabeth.davis@bllaw.co.uk

Recommendations

We recommend:

- **an immediate review of the memorandum and articles of association of all charitable companies to avoid a breach of duty arising from changes to the conflict of interest rules (strongly recommended)**
- **a further review to identify changes to bring any memorandum and articles up to date with the Companies Act changes when they are fully in force in 2009 to take advantage of or to reflect all of the new rules including:**
 - all charities set up as companies
 - all not-for-profit companies
 - all Community Interest Companies (CICs)
 - all trading companies owned by your charity
 - any companies limited by shares

When to start?

Now, because changes to the rules relating to conflicts of interest mean that company directors could be **in breach of duty from 1 October 2008** if adjustments to articles of association are not made.

Unless your charity has a particular need to make other changes at this stage, we recommend that you should carry out a further review during 2009 to prepare for the final changes in October 2009. However, if you wish to change articles to reflect the changes to notice periods, general meetings, etc, to avoid confusion now, we can help. This might be particularly useful for subsidiary companies where elimination of a requirement to hold annual general meetings might be helpful.

Please let us know if you are interested in receiving updates on when to start and how to carry out a review.

■ **put directors' duties in your trustees' governance packs**

In addition, we recommend that all directors of charitable companies are provided with a note of their duties both as company directors and charity trustees as part of their trustees' governance pack.

If you need our help on what it should say, please let us know.

Further information

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Section one

Provisions currently in force

Rules currently in force	Action points
<p>Company information on emails and websites</p> <ul style="list-style-type: none"> ■ The rules requiring information about the company (registered name, number, address, place of registration and private limited status) to be printed on certain business documents has been extended to catch emails which are business letters, as well as the company's website. 	<ul style="list-style-type: none"> ■ Amend email sign-offs and website to include required company information.
<p>Electronic communications</p> <ul style="list-style-type: none"> ■ New provisions set out a framework for companies to communicate with their members by email or via a website. ■ The new provisions enable any company information or documents authorised by or required to be sent under the Companies Act 2006 to be sent to members by email (provided that the member has agreed, notified his email address and not revoked such agreement) or published on the charity's website (provided the member has agreed or been deemed to agree and not revoked such agreement). ■ Members may also communicate electronically with companies, for example in relation to proxy voting papers and notices of meetings, where the company has given an electronic address in the relevant notice. ■ In order to receive communications from the company via a website, the company must check that its articles permit it to circulate company information electronically. If it does not, it will need to amend its articles or the members must pass a resolution authorising the use of the website for this purpose. 	<ul style="list-style-type: none"> ■ For more information on how your charitable company can take advantage of these new rules please contact us. ■ Check that the articles of association cater for email communications adequately.
<p>Directors</p> <ul style="list-style-type: none"> ■ The age limit of 70 for directors has been repealed. 	<ul style="list-style-type: none"> ■ If articles of association contain an upper age limit for directors, amend as part of overall review.
<p>Annual General Meetings (AGMs)</p> <ul style="list-style-type: none"> ■ AGMs are now optional for private companies. ■ Only 14 days notice is required to call an AGM (although a company's articles may require longer). ■ For financial years on or after 1 October 2007, there is no longer a legal requirement to give the members a chance to look at and ask questions about the annual accounts and reports (known as laying the accounts before the members). Companies must still send copies of the accounts to every one who is required to receive a notice of a general meeting and anyone else who is required to receive notices. 	<ul style="list-style-type: none"> ■ If your charitable company's articles of association require an AGM to be held and for accounts to be laid before the members these requirements must continue to be complied with. ■ If you wish to dispense with calling an AGM and/or laying the accounts before the members the articles of association will need to be checked and, if necessary, amended. New retirement mechanisms will also need to be set out in the articles if retirement of directors is linked to the AGM.

	<ul style="list-style-type: none"> ■ Many charitable companies with an active membership will wish to continue to hold an AGM and laying the accounts before the members at AGM. If this is the case, no action is required.
<p>Notice of all members' meetings</p> <ul style="list-style-type: none"> ■ Unless the company's articles provide for a longer period, the notice period for all general meetings will be 14 days, regardless of the type of resolution proposed to be passed at the meeting. 	<ul style="list-style-type: none"> ■ If your charitable company's articles of association require 21 days notice for all members' meetings these must be followed until amended. ■ If the charitable company's articles contain longer notice periods consider amending to take advantage of new rules.
<p>Written resolutions</p> <ul style="list-style-type: none"> ■ No longer necessary for all members to sign a written resolution. ■ Majority required depends on the type of resolution to be passed: <ul style="list-style-type: none"> – ordinary resolution – 50%+1 of all members eligible to vote – special resolution – 75% of all members eligible to vote ■ Written resolutions lapse if required majority is not achieved within 28 days of its circulation date (unless another period is specified in the articles). 	<ul style="list-style-type: none"> ■ Take note of new rules when proposing written resolutions - these new rules apply irrespective of anything in the charitable company's articles. No action is therefore necessary to take advantage of these rules. ■ Consider amending the charitable company's articles of association to remove the rule requiring all members to sign a written resolution. ■ Note: written resolutions must be passed by the relevant majority of the members eligible to vote; resolutions passed at meetings require a majority of those present and voting on the resolution (usually a lower threshold).
<p>Proxy voting</p> <ul style="list-style-type: none"> ■ All members have the right to appoint a proxy, irrespective of what the articles say. ■ Every notice of a members' meeting must include a prominent statement of the right to appoint a proxy – failure to do this is a criminal offence, although it will not invalidate either the meeting or resolutions passed. ■ Anyone appointed as a proxy will be able to vote on a show of hands (previously, proxies could only be counted on a poll vote). ■ The longest period that can be specified in the articles within which members must give notice of their wish to appoint a proxy to vote at a meeting is 48 hours prior to the meeting and only working days are taken into account (ie not weekends and bank holidays). The articles can (and often do) specify a shorter period, nearer to the meeting, eg 24 hours. 	<ul style="list-style-type: none"> ■ Take note of new rules when calling members' meetings. ■ Ensure that all of the charitable company's notices of meetings include the required wording. ■ Consider amending the charitable company's articles of association to reflect new rules.

<p>Members' resolutions</p> <ul style="list-style-type: none"> ■ Members having at least 5% voting rights (the articles can specify a lower threshold), can require the company to circulate to all other members, a resolution that may properly be moved and is proposed to be moved as a written resolution. ■ Members with this level of voting rights can also require the company to circulate to all other members, a statement of not more than 1000 words in respect of the proposed resolution. ■ Members having at least 10% voting rights (or, in certain limited circumstances, 5% voting rights), are entitled to request the company to call a meeting of the members at any time stating the general nature of the business to be dealt with and including if wished the text of a resolution to be moved at the meeting. 	<ul style="list-style-type: none"> ■ Check that the company's articles of association do not contain misleading provisions that conflict with these entitlements. If the articles allow for a reduced level of voting power, the reduced level will apply, but if greater, the provisions in the articles will not be effective and could lead to confusion.
<p>Company Secretaries</p> <ul style="list-style-type: none"> ■ Companies are no longer required to have a company secretary (although the articles can still require one if the charity so chooses). Anything required to be done by a company secretary can be done by one of the company directors instead or someone else for admin tasks (although signing documents on behalf of the charity will require a director's signature). ■ If your articles require you to have a company secretary you will need to amend them before you can take advantage of this provision. 	<ul style="list-style-type: none"> ■ Review whether you still want to have a company secretary. We would advise that in most instances you will still need to have one, as the company secretary's duties will still need to be carried out.
<p>Filing accounts</p> <ul style="list-style-type: none"> ■ The delivery time for accounts has been reduced by one month. Companies must now file their accounts within nine months of the year end. 	<ul style="list-style-type: none"> ■ Note the new rules and ensure you comply with the timescales.

Directors' duties

<p>Duties of directors of a charitable company</p>
<p>The duties of directors, which previously existed in case law, are set out in statute for the first time.</p> <p>There are seven general duties in relation to a charitable company:</p> <ul style="list-style-type: none"> ■ to act within the company's constitution and powers ■ to promote the success of the company in achieving its charitable objects and having regard (amongst other things)* to: <ul style="list-style-type: none"> – the likely consequences of any decision in the long term – the interests of the company's employees – the need to foster the company's business relationships with suppliers, customers and others – the impact of the company's operations on the community and the environment – the desirability of the company maintaining a reputation for high standards of business conduct – the need to act fairly as between members of the company ■ to exercise independent judgment to exercise reasonable care, skill and diligence

- to avoid conflicts of interest (due to come into force on 1 October 2008, see section three below)
- not to accept benefits from third parties (due to come into force on 1 October 2008)
- to declare to the other directors any interest in a proposed transaction or arrangement with the company as soon as practicable (due to come into force on 1 October 2008, see section three below)

* 1. Subject to directors' duties under insolvency provisions. 2. In a non charitable company the duty is to promote the success of the company for the benefit of its members as a whole.

Directors of charitable companies have additional duties of good faith as charity trustees; their job is to ensure that the charity's resources are used to further its charitable aims.

It is therefore difficult in practice to see what effect, if any, this new statement of the duties of directors will have on directors of charitable companies. It may become common practice for board minutes and annual reports to comment on how directors have met their duties.

Section two

Provisions in force from 1 October 2008

New rules	Action points
<p>Directors</p> <ul style="list-style-type: none"> ■ A company is required to have at least one director who is a natural person ie an individual. There is a grace period until October 2010 for any company that only had corporate directors on 8 November 2006. ■ The minimum age for a director is 16 years old (although the Secretary of State has power to make regulations for cases where under 16s may be appointed as directors – this may be important to youth charities). ■ The following duties apply to all directors: <ul style="list-style-type: none"> – duty to avoid conflicts of interest (see section three below for more detail) – duty not to accept benefits from third parties – duty to declare interest in proposed transactions and agreements (see section three below for more detail) 	<ul style="list-style-type: none"> ■ You should note the new restrictions on directors and ensure that your charitable company and any trading subsidiaries have at least one individual as a director and that all directors are over 16. Directors under 16 as of 1 October 2008 will automatically be resigned as a director at Companies House. You will therefore only need to update your company books. ■ The new duties under the Act are not new to directors of charitable companies as they have always been applicable under common law. However, the duty to avoid conflicts of interest has been expanded by the Act (see section three below for more detail). ■ You should make sure that all of the directors of your charitable company and any subsidiary companies are familiar with their duties.
<p>Objection to company names</p> <ul style="list-style-type: none"> ■ Individuals or companies can make an application to the Company Names Tribunal if they consider that a company has been opportunistically registered with the intention of extracting money from it or to prevent it registering a name in which they have goodwill. 	<ul style="list-style-type: none"> ■ It is good practice to regularly check the Register of Companies at Companies House (and the central register of charities) to ensure that no names that are the same or similar to

	<ul style="list-style-type: none"> names in which your charity has goodwill have been registered. You can carry out a search on the Companies House and Charity Commission websites free of charge.
<p>Trading disclosures</p> <ul style="list-style-type: none"> New regulations reinforce the requirement for all companies to: display their registered name at their registered office and any other location at which they carry on business; and to display their company name, registered number; place of registration and address of their registered office on all communications and documents (including letters, order forms, invoices and on the company's website). For cheques only the display of registered company name is required. Companies are required to disclose (within five working days) the address of their registered office or any place where a company's records are kept and details of the type of records kept to any person it deals with in the course of business on receiving a written request for such information. 	<ul style="list-style-type: none"> Check that all of the information required under the Act is displayed where it should be, on all of the communications from your charitable company and subsidiary companies, including all emails and on websites. Failure to comply with these requirements could result in a fine.
<p>Control of political donations and expenditure relating to an independent candidate</p> <ul style="list-style-type: none"> The provisions which control political donations and expenditure by companies which already apply to political parties and organisations have been extended to cover donations to and expenditure relating to independent election candidates. 	<ul style="list-style-type: none"> You may need to take note of these new rules, particularly if your charitable company is engaged in campaigning and political activity.
<p>Annual return</p> <ul style="list-style-type: none"> Annual returns made up to a date on or after 1 October 2008 will contain reduced information on members. 	<ul style="list-style-type: none"> You should ensure the new form is used for returns made up to a date of 1 October 2008 or later.

Section three

Duty to avoid conflicts of interest - in more detail

Conflicts of Interests – changes introduced October 2008	Action points
<p>The new duty to avoid conflicts of interest</p> <ul style="list-style-type: none"> Directors have a duty to avoid situations in which they have or can have a direct or indirect interest which conflicts, or possibly may conflict, with the interests of the company. This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity). <p>This duty is arguably much wider than previously, as it requires directors to avoid any situations in which a conflict may arise, rather than the conflict itself.</p>	<ul style="list-style-type: none"> All company directors should be made aware of the widening of the duty and should ensure that they act accordingly. Directors should update their conflicts of interest policy to reflect the wider duty.

<p>Exceptions to the duty</p> <ul style="list-style-type: none"> ■ The duty does not apply: <ul style="list-style-type: none"> – in relation to a transaction with the company (and a further requirement applies to charities – see next bullet); but there is a duty to declare the interest – AND in the case of charitable companies, to the extent that the companies' articles allow the duty to be disapplied: <ul style="list-style-type: none"> ▪ this could be a specific authorisation for a particular transaction or arrangement specified in the articles allowing directors to authorise future conflicts; or ▪ it could be a general authorisation in relation to descriptions of transactions or arrangements specified in the articles allowing directors to authorise future conflicts 	<ul style="list-style-type: none"> ■ Review memorandum and articles of association and consider whether revision would be helpful (most charitable companies either will not include a conflicts of interest provision or such provision will not cover the scope of the wider duty).
<p>Protections in the Act</p> <ul style="list-style-type: none"> ■ The duty is not infringed if: <ul style="list-style-type: none"> – the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or – if the matter has been authorised by the directors. This authorisation can be given by the directors where: <ul style="list-style-type: none"> ▪ the company's Articles do not invalidate such authorisation ▪ the directors consider, in good faith, the authorisation to be in the best interests of the company in achieving its purposes (if it is a charity) or for the benefit of its members as a whole (if it is not a charity) ▪ the director with the conflict of interest (and any other interested director) does not participate in the decision; and ▪ if the company was incorporated before 1 October 2008, a one-off ordinary resolution has been passed by the members to allow the new rule to apply ▪ AND for companies that are charities where the company's constitution includes a provision enabling them to authorise the matter, and the matter is authorised by them according to the constitution 	<ul style="list-style-type: none"> ■ Conflicts of interest (actual and potential) are created, for example, where directors are either employed by or sits on the board of other organisations (such as local authorities, primary care trusts, funding bodies, etc) that fund the charity's work or businesses which are affected by the charitable company's activities. ■ If a charitable company: check that the articles empower the directors to give the authority. ■ Consider asking the company's members to pass a one-off resolution to enable the use of the new power for directors to authorise conflicts. ■ Review current conflict situations and consider what action needs to be taken.
<p>Declarations of interest in transactions or arrangements with the company (this is a separate duty from the duty to avoid conflicts described above)</p> <ul style="list-style-type: none"> ■ The provisions on declarations of interest are not significantly altered, but require directors to declare their interests in transaction or arrangements which are proposed or existing. ■ The declaration may be made at a meeting of the directors or by notice in writing. 	<ul style="list-style-type: none"> ■ Ensure directors are aware of their requirements to disclose interests and do so regularly. ■ Make sure disclosures are very full. ■ Maintain a register of declarations of interest. ■ Check articles for any old Companies Act 1985 (or earlier) references that need updating.