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New issues by old companies under the 2006 Act

The procedures for issuing new shares under the Companies Act 2006 ('2006 Act') are potentially much simpler than under the Companies Act 1985 ('1985 Act'). Companies incorporated under the 2006 Act (i.e. on or after 1st October 2009) can take full advantage of the new regime immediately. However, companies incorporated under any previous Act (i.e. before 1st October 2009) must pass through a number of hoops before they can do so. This article explains the difference between the new and old rules and the transitional provisions that apply to companies incorporated before 1st October 2009. Throughout the article, we refer to these companies as 'existing companies' as they were companies that were already in existence on 1st October 2009, the date on which the new regime came into force and on which it first became possible to incorporate a company under the 2006 Act.

Authorised share capital

Under the 1985 Act, every company limited by shares was required to include in its memorandum of association a clause setting out its 'authorised share capital', which operated to limit the amount of share capital that the company could issue. A typical clause for a small private company would say something like: "The share capital of the company is £100 divided into 100 shares of £1 each." A company with such a clause could not issue any more than 100 £1 shares without increasing the amount stated as its authorised share capital. If authorised by its articles to do so, a company could effect this increase by ordinary resolution and, on doing so, was required to file a copy of the resolution at Companies House together with a notice of the increase on Form 123 (s. 121 & 123, 1985 Act).

Under the 2006 Act, the concept of authorised share capital has been abolished. Companies incorporated under the 2006 Act are not required to adopt an authorised share capital clause at all, although they can still voluntarily place a limit on the amount of share capital which can be issued by making suitable provision in their articles.

For existing companies (i.e. those already in existence before 1st October 2009), the authorised share capital clause is now deemed to form part of the company's articles rather than its memorandum by virtue of s. 28 of the 2006 Act. It is also treated as a provision setting the maximum amount of shares that may be allotted or issued by the company.

However, as there is nothing in the Act which requires any company to have an authorised share capital clause, it can be amended or deleted in the same way as any other article provision. In the ordinary course of events, this would require a special resolution. However, existing companies are allowed to amend or revoke the clause by ordinary resolution by virtue of a transitional provision contained in para. 42 of Schedule 2 to the Eighth Companies Act 2006 Commencement Order (SI 2008/2860). [All of the transitional provisions referred to in this article from Schedule 2 to SI 2008/2860 are reproduced on page 5.]

Accordingly, when an existing company sets out to issue new shares for the first time under the 2006 Act regime, it may need to decide (if it has not already done so) whether to keep its authorised share capital clause or whether to revoke it so that there is no limit.

If it decides to keep the clause, it may need to increase the limit in order to proceed with the new share issue. If it decides not to keep the clause, it could revoke it by ordinary resolution in accordance with para. 42 and/or delete it by following the procedures for amending the articles.

Before deciding which option to take, it will be necessary to take into account whether the directors will be required to obtain authority from the members under the 2006 Act in order to allot any new shares.

If they are, it may not be considered quite so important to retain the restriction in the old-style memorandum clause on the maximum amount of shares that may be allotted.

Authority to allot

Allotment is the crucial stage in the share issue process at which the company enters into a binding contract with subscribers for the issue of new shares. Under the 1985 Act, it was an offence for the directors of any company to allot new shares unless they had been authorised to do so by a resolution of the members or by the company's articles.

This is also generally the case under the 2006 Act, subject to the following exceptions. The directors of a private company incorporated under the 2006 Act, which has only one class of share, do not need to be given authority in order to allot new shares of the same class (s. 550, 2006 Act). This rule does not automatically apply to an existing private company. However, such a company may adopt the rule by passing an ordinary resolution to that effect (SI 2008/2860, Sch. 2, para. 43) (see *example resolution 3* on page 4).

In all other cases, the directors of a company are not permitted to exercise any powers of the company to allot shares in the company (or securities convertible into shares) or to grant any right to subscribe for shares unless they are authorised to do so by a resolution of the company or by the articles of association (s. 549 as amended by SI 2009/2561), although this restriction does not apply in the case of subscribers' shares agreed to be taken on the formation of the company, the allotment of shares (or the grant of rights to subscribe for or convert securities into shares) under

an employees' share scheme and the allotment of shares pursuant to rights to subscribe for or convert securities into shares in the company. For this purpose the sale of treasury shares by the company is treated as if it were an allotment.

In relation to an existing company, an authority to allot in force immediately before 1st October 2009 under section 80 or 80A of the 1985 Act (or the equivalent provisions in the Northern Ireland Order) has effect on and after that date as if given under section 551 of the Companies Act 2006 (SI 2008/2860, Sch. 2, paras. 44 and 45).

The required authority under s. 551 may be either conditional or unconditional and may authorise the directors to allot shares in specified circumstances or may be expressed in more general terms. It must, however, state the maximum amount of shares which may be allotted thereunder and the date on which it will expire, which must be not more than five years from the date of the resolution or, if the authority is contained in the articles of association adopted at the time of incorporation, not more than five years from the date of incorporation of the company.

The authority may be given by ordinary resolution and, even if given by special resolution or in the articles of association, may be revoked, varied or renewed by ordinary resolution. Any resolution renewing an earlier authority must again specify an expiry date, within five years from the date of the renewal resolution, and must state the amount of securities which may be allotted (or the amount remaining to be allotted). A copy of any resolutions giving authority to allot must be filed with the Registrar and attached to any copies of the articles (ss. 29 and 30).

If the terms of the authority given so permit, the directors may allot securities after the expiry of the authority if the securities are allotted in pursuance of an offer or agreement made by the company before the authority expired. If securities are allotted without the required authority, this does not affect the validity of the allotment, but any director knowingly and willfully permitting or authorising such allotment will be guilty of an offence.

Example resolutions

1. Ordinary resolution to increase share capital
THAT clause [No.] of the Company's memorandum of association (which is now treated as part of the articles by virtue of section 28 of the Companies Act 2006 and as a provision setting the maximum amount of shares that may be allotted by the Company by virtue of SI 2008/2860, Schedule 2, paragraph 42) be amended to read "The company's share capital is £x,xxx.".[1]

Note 1: It is no longer strictly necessary to state how the share capital is divided up using words like "divided into y,yyy new shares of £z.zz each". However, if there is more than one class of shares, or it is intended to create a new class, it may be desirable to do so in order to place different restrictions on the amount of shares that may be allotted for each class. It should be noted that s. 550 would not apply if this were the case.

2. Ordinary resolution to revoke share capital clause
THAT clause [No.] of the Company's memorandum of association setting out the share capital of the Company, which was in force immediately before 1st October 2009 and which is now deemed to form part of the Company's articles by virtue of Section 28 of the Companies Act 2006, be revoked pursuant to paragraph 42 of Schedule 2 to the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

3. Ordinary resolution of an existing private company to apply s. 550
THAT the directors of the Company shall have the power to allot shares in accordance with Section 550 of the Companies Act 2006 (power of directors to allot shares etc: private company with only one class of shares).

4. Ordinary resolution giving directors authority to allot shares under s. 551
THAT with effect from the time of the passing of this resolution the directors be unconditionally authorised, pursuant to section 551, Companies Act 2006, to allot shares in the company up to a maximum amount of £ ..... [in accordance with the provisions of Article ..... of the articles of association of the company] at any time or times during the period of five years from the date hereof and at any time thereafter pursuant to any offer or agreement made by the company before the expiry of this authority.

General Note: All of the above resolutions are made subject to the requirements of Part 3, Chapter 3 of the 2006 Act. Accordingly a copy of the relevant resolution must be filed at Companies House (s. 30) and embodied in (or attached to) the company's articles of association (s. 36).

Procedural checklist for a share issue under 2006 Act

A Authorised share capital

1. If the company was incorporated under the 2006 Act (i.e. on or after 1st October 2006), proceed to B (Authority to allot) after checking whether the articles contain a voluntary limit on the amount of share capital which may be allotted. If they contain such a limit and the limit would be breached by the proposed issue, the relevant article will need to amended by special resolution.

2. If the company was incorporated under a prior Companies Act (i.e. before 1st October 2009) check whether the authorised share capital clause has already been deleted or revoked and, if so, proceed to B (Authority to allot). [Note: Any resolution(s) to delete or revoke the authorised share capital clause should have been filed at Companies House and should have been embodied in the company's articles of association.]

3. If the authorised share capital clause has not been deleted or revoked, check whether the amount stated in the clause needs to be increased in order to proceed with the proposed issue? If not, proceed to B (Authority to allot).

4. If so, the company must either:
   (a) increase the amount stated as the authorised share capital (see *example resolution 1*); or
   (b) revoke the operation of the authorised share capital clause (see *example resolution 2*).

B. Authority to allot

1. Authority to allot (see *example resolution 4)* is required if the company is:

   (a) a public company;
   (b) a private company with more than one class of share in issue;
   (c) a private company with only one class of share in issue but which proposes to issue new shares of a different class.

2. If the company is a private company incorporated under the 2006 Act (i.e. on or after 1st October 2006) which has only one class of share in issue and which proposes to issue new shares of the same class, authority to allot is not required (see s. 550)

3. If the company is a private company incorporated under a prior Act (i.e. before 1st October 2009) which has only one class of share in issue and which proposes to issue new shares of the same class, authority to allot will be required unless the members have previously resolved that s. 550 should apply.
   [Note: It should be possible to ascertain from the articles and or from the records held at Companies House whether such a resolution has been passed as the resolution should have been filed at Companies House and embodied in (or attached to) the articles.]

4. If the company is an existing private company with only one class of share and it proposes to issue shares of the same class and there is not an existing authority to allot, it could:

   (a) pass an ordinary resolution applying s. 550 so that the directors do not need to be given authority to allot new shares of the same class on this or any future occasion (see *example resolution 3*);
   (b) pass an ordinary resolution giving the directors authority to allot shares in accordance with s. 551 (see *example resolution 4*), ensuring that the authority does not allow any remaining restriction in the memorandum to be exceeded.

Extracts from Schedule 2 to the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860)

Saving for provisions as to amount of authorised share capital

42.—(1) This paragraph applies to any provision of a company's memorandum as to the amount of a company's authorised share capital that is in force immediately before 1st October 2009, as altered by anything done by virtue of section 121 of the 1985 Act or Article 131 of the 1986 Order (alteration of share capital) and in force immediately before that date.

(2) Any such provision—

(a) is treated on and after 1st October 2009 as a provision of the company's articles setting the maximum amount of shares that may be allotted by the company, and

(b) may be amended or revoked by the company by ordinary resolution.

(3) Chapter 3 of Part 3 of the Companies Act 2006 (resolutions and agreements affecting a company's constitution) applies to any such resolution.

(4) Nothing in sub-paragraph (2) affects the power of a company by special resolution to adopt new articles, with effect from 1st October 2009 or any later date, that make no provision as to the maximum number of shares that may be allotted by the company.

(5) Any such resolution as is mentioned in sub-paragraph (2) or (4) that is passed before 1st October 2009 is treated as passed on that date.

(6) An amendment of a company's articles on or after 1st October 2009 authorising the directors to allot shares in excess of the amount allowed by any such provision as is mentioned in subparagraph (1) has effect although not expressed as amending or revoking it.

Power of directors to allot shares etc: private company with only one class of shares (s. 550)

43.—(1) Section 550 of the Companies Act 2006 (power of directors to allot shares etc: private company with only one class of shares) applies to an existing or transitional company only if the members of the company have resolved that the directors should have the powers given by that section.

(2) A resolution under this paragraph may be an ordinary resolution (even if it takes the form of an alteration of the company's articles).

(3) Chapter 3 of Part 3 of the Companies Act 2006 (resolutions and agreements affecting a company's constitution) applies to any such resolution.

(4) Any such resolution passed before 1st October 2009 is treated as if passed on that date.

(5) Once the members of the company have resolved as mentioned in sub-paragraph (1), the application of section 550 in relation to the company is not affected by any subsequent resolution, except one altering the company's articles so as to prohibit (to any extent) exercise of the powers mentioned in the section.

44. For the purposes of section 550 of the Companies Act 2006 provisions of the articles of an existing or transitional company—

(a) authorising the directors to allot shares in accordance with section 80 of the 1985 Act or Article 90 of the 1986 Order, or

(b) added following an elective resolution under section 80A of the 1985 Act or Article 90A of the 1986 Order and authorising the directors to allot shares,

are not to be treated as provisions prohibiting the directors from exercising the powers conferred by section 550 in cases to which the authority does not extend.

Power of directors to allot shares etc: authorisation by company (s. 551)

45. An authorisation in force immediately before 1st October 2009 under section 80 or 80A of the 1985 Act or Article 90 or 90A of the 1986 Order has effect on and after that date as if given under section 551 of the Companies Act 2006 (power of directors to allot shares etc: authorisation by company).