

The Companies (Guernsey) Law, 2008 - Transitional Provisions guidance

Background

When the Companies (Guernsey) Law, 2008 ('the new Law') was introduced, a number of savings and transitional provisions were contained in Schedule 4 to the Law and in addition the Commerce & Employment Department issued the Companies (Transitional Provisions) Regulations, 2008, the Companies (Transitional Provisions) (No. 2) Regulations, 2008 and the Companies (Transitional Provisions) (No. 3) Regulations, 2008 to manage the transition from the Companies (Guernsey) Law, 1994 Law ('the old Law').

The new Law was a very significant change in company law so the Department decided to carry out a post implementation review to identify any further necessary amendments and to ensure the Law remained internationally competitive. To ensure stability for the industry during that process the Department extended a number of the time limited transitional provisions under the Companies (Transitional Provisions) Regulations, 2008 on a number of occasions.

A range of amendments to the new Law were enacted in November 2014 and September 2015.

As a result the remaining time limited transitional provisions will expire on **31 December 2016**.

Purpose of this guidance

The purpose of this guidance note is to make company directors, company secretaries, and corporate service providers aware of the fact that there is no intention to further extend the transitional provisions. The expiry of the transitional provisions will mean that companies formed before the new Law commenced in July 2008 ('pre-2008 companies') should review their memorandum and articles of incorporation and take independent legal advice if they are uncertain of the effect of the expiry of the transitional provisions in their individual circumstances.

It may not be strictly necessary for all pre-2008 companies to amend their memorandum and articles upon expiry of the remaining time limited transitional provisions, however the directors should review their articles to satisfy themselves that the company will not be adversely affected by the expiry of the transitional provisions.

Will amendment of memorandum or articles be desirable?

Firstly if your company was incorporated under the new Law you may not need to take any action as a result of the expiry of the transitional provisions.

Secondly, if your company was formed before the commencement of the new Law and you have already amended your memorandum or articles to comply with all the requirements of the new law, you also may not need to take any further action as a result of the expiry of the transitional provisions.

If your company is a pre-2008 company, you may wish to amend your company's memorandum and/or articles if any provisions are invalid and unenforceable under the new Law. It may not be strictly necessary to do so, provided you are aware that the operation of certain provisions may be affected by the expiry of the transitional provisions. As a director you may be satisfied that your company can continue to operate under the old memorandum and articles although some provisions may be void and of no effect.

In all cases you may also wish to consider whether to make any amendments to your memorandum and articles as a result of the amendments to the new Law since it came into force, including those due to be introduced later this year.

You should seek independent legal advice if you are uncertain of the effect of the expiry of the transitional provisions, or amendments to the new Law, on your company.

Which transitional provisions are expiring?

The transitional provisions that will expire on **31 December 2016** are the following, under the Companies (Transitional Provisions) Regulations 2008:

Those with General Effect:

- Regulation 2(2): This regulation preserves the effective operation of any provisions of a pre-2008 company's memorandum of incorporation even if they are rendered invalid and unenforceable by any provision of the new Law.
- Regulation 3(2): this regulation preserves the effective operation of any provisions of a pre-2008 company's articles of incorporation even if they are rendered invalid and unenforceable by any provision of the new Law. Once it expires there may be provisions in your company's articles that will cease to have effect. By way of example, some pre-2008 companies may have provisions in their articles that restrict voting by proxies in general meeting. Section 192 of the Law makes such provisions void and once the transitional provisions expire those parts of the articles will cease to have effect.

Those with Specific Effect:

- Regulation 6: section 132(3) of the Law does not apply in relation to any shadow director until 31.12.2016

- Regulation 12: section 171 of the Law does not apply in relation to the secretary of a company until 31.12.2016. It should be noted that the duties of a company secretary under this section, where one exists, are currently mandatory but this is to be amended to allow flexibility in the allocation of these duties as between the company secretary and the directors.
- Regulation 17: section 283 of the Law, prohibiting conversion of a company's shares into stock, does not apply in relation to an existing company until 31.12.2016. It should be noted that this prohibition will be repealed as part of the company law amendments.
- Regulation 19: Sections 291, 292 and 293 set out the manner in which a director of a company may issue shares in that company. Regulation 19 provides that the provisions of the 1994 Law and the other relevant principles of law in force immediately prior to the date of commencement of the new Law continue to apply to pre-2008 companies until 31.12.2016. Once this regulation expires pre-2008 companies will be required to comply with the procedures set out in the 2008 Law, as amended. It should be noted that sections 291, 292 and 293 are to be amended to increase the flexibility of company directors to issue shares.

What parts of the new Law may render a provision of the memorandum and/or articles invalid and unenforceable?

The Registry is not able to provide an exhaustive list of the provisions in memorandum or articles or pre-2008 companies that could potentially be rendered invalid or unenforceable by the new Law, as individual memorandum and articles will vary greatly. However, the following is a non-exhaustive list of provisions of the Law which you should consider in a review of your company's memorandum or articles:

- Section 157 – exempting directors from liabilities: Provisions in articles that exempt directors from liabilities, or provide indemnities except in accordance with the provisions of the new Law, have been invalid since 1 January 2010 and are no longer effective.
- Section 190 of the Companies (Guernsey) Law, 2008 provides that any provision of the articles of a company is void insofar as it has the effect that a resolution cannot be proposed and passed as a written resolution.
- Section 192 – restrictions on voting by proxies: This section prevents a range of restrictions on proxy voting from being effective.
- Section 193 – restrictions on voting on polls or written resolutions are void: this section prevents a company from altering shareholder rights with respect to written resolutions and polls.
- Section 216 – Right to demand a poll: certain provisions in a company's articles that exclude shareholders from a right to demand a poll are void.
- Section 224 and 226: Notice requirements of appointment or termination of a proxy: this section prevents articles of association from imposing shorter time periods for notification or termination of a proxy appointment than are required under the Law.

This is not a definitive list and you should review your own articles against the requirements of the new Law.

What happens if you do nothing?

It may not be strictly necessary for you to take steps to amend your memorandum or articles, provided that you are aware that there may be provisions of those documents which are no longer effective, that you comply with the requirements of the new Law after 31 December 2016 and that you are satisfied that the memorandum or articles are otherwise suitable for your company's corporate governance. You should take independent legal advice if you are uncertain about the effect of the expiry of the transitional provisions on your company.

How do I change my memorandum or articles?

If you do choose to amend your memorandum or articles you must pass the necessary resolution and submit that resolution, along with a copy of the amended memorandum or articles, to the Registry.

Information on how to file resolutions online is available here: [Resolution filings—Guidance](#)

The standard memorandum is [available here](#).

The standard articles are [available here](#).

The memorandum and articles require a separate filing which costs £50 per submission.

Director's duties

As a company director you are responsible for ensuring that the company meets its obligations under the Companies (Guernsey) Law, 2008. As a director you should satisfy yourself that your company complies with the Law at all times. You should consider the implications of the expiry of the transitional provisions and how that may affect your company and its governance.

Persistent non-compliance with the Law can ultimately result in disqualification actions being brought against directors and also the company being struck off the register of companies.

Frequently asked questions

Q: When do the transitional provisions expire?

A: Some of the transitional provisions will remain in force indefinitely and others have already expired. For the remaining provisions which are time limited, they are set to expire on 31 December 2016.

Q: My company was formed after 1 July 2008, what do I have to do when the transitional provisions expire?

A: You may not need to take any action as a result of the expiry of the transitional provisions. You may however wish to consider whether to make any amendments to your memorandum and articles as a result of the amendments to the new Law since it came into force, including those due to be introduced later this year. You should take independent legal advice if you are uncertain about the effect of the expiry of the transitional provisions, or amendments to the new Law, on your company.

Q: My company is a cell company, what should I do?

A: Protected Cell Companies and Incorporated Cell Companies are complex arrangements. You should seek legal advice on how to address any changes required by the expiry of the transitional provisions.

Q: Section 38 of the Law says I can't alter my memorandum of incorporation except in certain cases, what should I do?

A: If your company is a pre-2008 company the transitional provisions allow you to pass a special resolution to amend the memorandum so that it meets the requirements of the Company Law. That transitional provision will continue to have effect. It may not be strictly necessary to make any changes, provided you are aware that the operation of certain provisions may be affected by the expiry of the transitional provisions.

Q: How do I alter my articles of incorporation?

A: Section 42 of the Law allows a company to alter its articles of incorporation by passing a special resolution. A special resolution requires the approval of not less than 75% of shareholders. Once the resolution has been passed by the shareholders it then must be filed with the Company Registry. Guidance on how to file the resolution and amended articles is available by clicking this link:

[Resolution filings—Guidance](#)

Q: Do I have to call a general meeting to pass a special resolution?

A: A special resolution can be passed at a general meeting or by written resolution.

Q: When should I file the change with the Registry?

A: All special resolutions must be filed with the Registry no later than 30 days after they have been passed.

Q: I don't have a copy of my memorandum or articles, where can I find them?

A: The Registry has copies of all memorandum and articles of incorporation, and any amendments that have been filed with the Registry. You can download a copy of those documents from the Registry website, subject to payment of the relevant fee. Guidance on how to do this is available here: <http://www.guernseyregistry.com/article/155035/Company-Searches>.

Disclaimer

The purpose of this guidance note is to provide information on The Companies (Guernsey) Law, 2008 Transitional Provisions.

It is not intended to be legal advice and should not be relied on as such.

The interpretation of the Companies (Guernsey) Law, 2008 is a matter on which the Guernsey Registry cannot advise and companies need to form their own view on compliance with the legislation.

Independent legal advice is advised where there is any uncertainty.

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25/08/2016