

The Companies (Transitional Provisions) Regulations – 2013

The purpose of this guidance note is to provide information on certain issues that should be considered with regard to the Companies (Transitional provisions) Regulations.

It is not intended to be definitive legal advice and should not be relied upon 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.

Background

The Companies (Guernsey) Law, 2008 came into force on 1 July 2008. The Law represented a fundamental change from earlier Companies Laws. As such, it was necessary to enact transitional provisions to manage the transition to the 2008 Law.

In addition to the Savings and Transitional Provisions in Schedule 4 of the Law, there were three sets of transitional provision regulations.

The first were the Companies (Transitional Provisions) Regulations, 2008 which came into force on 1 July 2008 and applied to every company that was in existence prior to that date. These regulations remain in force, albeit having been amended on a number of occasions, and make provisions relating to a number of sections of the 2008 Law.

The second were the Companies (Transitional Provisions) (No.2) Regulations, 2008 which came into force on 19 August 2008 and which have not been amended or repealed.

The third were the Companies (Transitional Provisions) (No.3) Regulations, 2008 which came into force on 28 October 2008 and which have also not been amended or repealed.

In some cases, the transitional provisions were not time bound. In such cases, these provisions will remain effective indefinitely – unless and until they are

repealed. The Commerce and Employment Department currently has no intention to repeal such provisions.

In other cases the transitional provisions were time bound in that they were expressed to have effect until a certain date or period had expired. In some cases these dates or periods have already passed and the provision, therefore, no longer has any effect. In others, the relevant dates have been extended – initially by the Companies (Transitional Provisions) (Amendment) Regulations, 2009 and subsequently by the Companies (Transitional Provisions)(Amendment) Regulations, 2011, the Companies (Transitional Provisions)(Amendment) Regulations, 2012 and the Companies (Transitional Provisions) (Amendment) Regulations, 2013

In the case of all those provisions that have had the relevant date extended, the expiry date of those provisions is now 31 December 2015 in all cases.

The purpose of this update is to remind companies of the transitional provisions – in particular those that remain effective indefinitely and those that remain effective until 31 December 2015, and to advise companies on what they should consider in order to comply with the provisions.

1. Companies (Transitional Provisions) Regulations, 2008

Transitional Provisions that were not time bound and will therefore have effect unless and until they are repealed

Regulation 2(1) - Section 15 Memorandum of Incorporation

A company in existence prior to 1 July 2008 should ensure that any necessary changes have been made to its memorandum as are necessary to ensure compliance with Section 15(2) of the 2008 Law as follows:

Section 15(2) of the 2008 states:

The memorandum shall state:

- (a) The company's name
- (b) That the company's registered office is situated in Guernsey
- (c) The type of company within the meaning of Section 2(1) {i.e. protected cell, incorporated cell or non-cellular}

(d)The type of company in respect of the liability of members within the meaning of Section 2(2) {i.e. limited by shares or by guarantee, unlimited or mixed liability}

Consideration may also be given to making provision in its memorandum for any matter mentioned in Section 15(7).

Section 15 (7) reads as follows:

'The memorandum may make provision for any other matter not referred to above, concerning the company, its members or officers.'

These transitional provisions allow for the memorandum to be altered by special resolution.

Professional legal advice should be sought for the avoidance of any doubt regarding compliance with the new legislation and the transitional provisions.

Any change to the company memorandum or articles will cost £50 per document.

See also information on regulation 2(2) on page 6

Regulation 3(1) – Section 16 Articles of Incorporation

When the 2008 law came into force, all existing companies were deemed to have disapplied the standard articles in accordance with Section 16(3) and this disapplication was deemed to be set out in the company's articles.

Therefore, if a company takes no action with regard to its pre-2008 Law articles of incorporation then the company will be deemed to have disapplied the standard articles as prescribed by the Commerce and Employment department.

If a company that was in existence prior to 1 July 2008 wishes to adopt standard articles, a special resolution is required in order to alter the articles and professional legal advice should be sought.

Any change to the company memorandum or articles will cost £50 per document.

See also information on regulation 3(2) on page 7

Regulation 4 - Section 60 Amalgamation of bodies corporate.

This provision allowed companies that had initiated but not completed an amalgamation under the Amalgamation of Companies Ordinance, 1997 to continue in accordance with the provision of that Ordinance.

When the amalgamation continued and was completed the bodies corporate were deemed to have amalgamated in accordance with Part VI of the 2008 Law.

Regulation 5 - Section 75 Migration of companies

This provision allowed companies that had initiated but not completed a migration under the Migration of Companies Ordinance, 1997 to continue in accordance with the provision of that Ordinance.

When the migration continued and was completed by the company, the company was deemed to have been migrated in accordance with Part VII of the 2008 Law.

Regulation 11 – Section 163 Avoidance of Transactions

This provision provided that Section 163 of the 2008 Law does not apply to any transactions entered into before 1 July 2008.

Regulation 14 – Section 175 Resolutions

This provision allowed a resolution that had been initiated, but not passed, a resolution on the date of the commencement of the 2008 Law, notwithstanding the provisions of the 2008 Law, to be passed subject to the provisions of the 1994 Law.

Such a resolution was deemed to have been passed in accordance with the provisions of the 2008 Law which apply accordingly but the resolution has the same legal effect and is valid and enforceable as if the provision of the 1994 law were still in force.

Regulation 15 – Section 207 Notice of meetings

This provision allowed notice of a general meeting given prior to the commencement of the 2008 Law to be valid under the 2008 Law if it was

given in accordance with the requirements of the 1994 Law and other relevant principles of law in force immediately prior to the date of the commencement of the 2008 Law.

Regulation 16 – Section 262 Auditor's report

This provision allowed companies which had a financial year which began before the commencement of the 2008 Law but which would end after the commencement of the 2008 Law to prepare the auditor's report in respect of the financial year in compliance with section 64(2) of the 1994 law instead of section 262(2) of the 2008 Law.

Regulation 18 – Section 287 Power of company to alter share capital

This provision allows a company that was in existence prior to the introduction of the 2008 Law to alter its memorandum so as to increase its share capital by creating new shares by ordinary resolution, notwithstanding the repeal of section 37(1)(a) of the 1994 law, and subject to the application of section 287(4)(5) and (6) of the 2008 Law.

Regulation 20 – Section 353 Striking defunct company off Register of Companies

Where the Greffier had served notice under section 76(2) of the 1994 law to strike off the company but the 2 month notice period had not expired before the commencement of the 2008 Law, this provision allowed the Registrar to strike the company off on the expiration of the 2 month period, or as soon as possible thereafter, and the provisions of the 2008 Law have effect in relation to that company accordingly.

Regulation 21 – Section 355 Striking defaulting companies off the Register of Companies

Where a company had not delivered a copy of its annual return (for the calendar year 2007) to the Greffier in compliance with section 28(1) of the 1994 law before the commencement of the 2008 Law, the company was deemed for the purposes of section 355 (1) (a) of the 2008 Law to have failed to deliver to the Registrar an annual validation in accordance with the relevant sections of the 2008 Law and the provisions of section 355 (striking off defaulting companies) applied in respect of the company accordingly.

Regulation 22 – Section 427 Disqualification orders

The 2008 Law repealed section 67A of the 1994 law. However this section continues to have effect in relation to any person whose relevant conduct occurred wholly before the date of the commencement of the 2008 Law.

An application for a disqualification order based on relevant conduct occurring wholly before the introduction of the 2008 Law may continue to be made, heard and determined under section 67A in all aspects as if the 1994 law were still in force.

Any disqualification order made under section 67A of the 1994 law is treated as if it were made under section 427 of the 2008 Law and registered accordingly.

Regulation 23 – Part VII Reduction of share capital

This provision allows an existing company that had passed a special resolution prior to the commencement of the 2008 Law under section 45 of the 1994 Law for a reduction of its share capital, to apply to the Court for an order confirming the reduction and the Court may hear and determine the reduction in all respects as if the 1994 law were still in force. The reduction in share capital and any order of the Court made in respect of it have effect as if the provisions of the 1994 Law and other relevant principles of law are still in force.

Transitional Provisions that have been extended until 31 December 2015:

Regulation 2(2) - Section 15 Memorandum of Incorporation

Where any provision of an existing company's memorandum was valid and enforceable under the provisions of the 1994 law, but is rendered invalid and unenforceable by any provision of the 2008 Law, then the relevant provision of the 2008 Law does not apply in relation to that provision of the company's memorandum until 1 January 2016.

In the interests of good corporate governance and practice, all companies should consider amending their memorandum of incorporation where an existing provision will be rendered invalid and unenforceable once the relevant transitional provision ceases to have effect. It may be that if they do nothing, such provisions will simply be invalid and unenforceable, notwithstanding that they still appear in the memorandum and articles. However, this is a

matter on which companies should take independent legal advice and it will be considered best practice to update the memorandum.

Regulation 3(2) – Section 16 Articles of incorporation

Where any provision of an existing company's articles was valid and enforceable under the provisions of the 1994 law, but is rendered invalid and unenforceable by any provision of the 2008 Law, then the provision of the 2008 Law does not apply in relation to that provision of the company's articles until 1 January 2016.

In the interests of good corporate governance and practice, all companies should consider amending their articles of incorporation where an existing provision will be rendered invalid and unenforceable once the relevant transitional provision ceases to have effect. It may be that if they do nothing, such provisions will simply be invalid and unenforceable, notwithstanding that they still appear in the memorandum and articles. However, this is a matter on which companies should take independent legal advice and it will be considered best practice to update the memorandum.

Regulation 6 - Section 132(3) shadow directors

Under section 132(3) of the 2008 Law, a shadow director is treated as a director for the purposes of section 160 and 162 to 166 of the Law. These provisions relate to the ratification of acts of directors and transactions involving self-interest

This section does not apply to a shadow director until 1 January 2016.

Regulation 12 - Section 171 Duties of secretaries

Section 171 requires that where a company has a secretary, and without prejudice to the responsibilities of any other person or to any other responsibilities he may hold, the secretary shall take reasonable steps to ensure that the company's registers and records are kept up to date.

This section does not apply in relation to the secretary of a company until 1 January 2016.

Regulation 17 - Section 283 No conversion into stock.

Section 283 provides that a company's shares may no longer be converted into stock.

This section does not apply to a company existing before the commencement of the 2008 Law until 1 January 2016.

Regulation 19 -Sections 291,292 and 293 Power of directors to issue shares

In relation to the powers of the directors of an existing company to issue shares, sections 291,292 and 293 of the 2008 Law do not apply, and the provisions of the 1994 law and the other relevant principles of law in force immediately prior to the commencement of the 2008 law, continue to apply until 1 January 2016.

Transitional Provisions that were time bound and that no longer have any effect, the relevant date or period having passed.

Regulation 7 - Section 138 Director's consent and declaration of eligibility

Under section 138(1) of the 2008 Law, a person must not be appointed a director unless he has declared that he is not ineligible under Section 137 and that he has consented to being a director.

This section did not apply to a person in respect of a directorship held by him prior to the date of the commencement of the 2008 law until 1 January 2009.

Regulation 8 - Section 143 Register of directors

Section 143 of the 2008 law requires a company to keep a register of directors at its registered office and section 143(8) makes it a criminal offence to fail to comply with this requirement

Section 143(8) did not apply to a company existing before the commencement of the 2008 Law until the 1 January 2009.

Regulation 9 - Section 145 Notification of change in directors

Section 145 requires a company to give notice to the Registrar of any change in directors or a change in the particulars contained in its register of directors within a period of 14 days of the date of the occurrence. Section 145(3) makes it a criminal offence to fail to comply with this requirement.

Section 145(8) did not apply to a company existing before the commencement of the 2008 Law until 1 January 2009.

Regulation 10 - Section 157 Exemption from liability and indemnification of directors

Section 157(1) and (2) of the 2008 Law did not apply until 1 January 2010 to an exemption from liability or indemnity provided before the commencement of the date of commencement of the 2008 Law.

This meant that the validity and enforceability of any exemption from liability or indemnity was governed by the provisions of the 1994 law and other relevant principles of law in force immediately prior to the date of commencement of the 2008 Law.

Any such exemption from liability or indemnity was deemed to be void with effect from 1 January 2010 only to the extent necessary to ensure compliance with Section 157 (1) and (2).

Regulation 13 – Section 173 Register of secretaries

Section 173 of the 2008 Law requires a company to keep a register of secretaries at its registered office. Section 173(7) makes it a criminal offence to fail to comply with the requirements of section 173.

Section 173(7) of the 2008 Law did not apply in relation to an existing company until 1 January 2009.

2. Companies (Transitional Provisions) (No. 2) Regulations, 2008

Transitional Provisions that were time bound and that no longer have any effect, the relevant date or period having passed.

Regulation 3 – Section 243 Individual accounts

Section 243 of the 2008 Law prescribes requirements for the preparation of individual accounts.

The requirements of section 243 did not apply in respect of individual accounts prepared in respect of an existing company's financial year which began before, and ended after, the commencement of the 2008 Law. Such

accounts could be prepared in compliance with the provisions of the 1994 Law and other relevant legal principles in force immediately prior to the commencement of the 2008 Law.

Regulation 4 – Section 244 Consolidated accounts

Section 244 of the 2008 Law prescribes requirements for the preparation of consolidated accounts.

The requirements of section 243 did not apply in respect of any consolidated accounts prepared in respect of an existing company's financial year which began before, and ended after, the commencement of the 2008 Law. Such accounts could be prepared in compliance with the provisions of the 1994 Law and other relevant legal principles in force immediately prior to the commencement of the 2008 Law.

Regulation 5 – Section 248, 249 and 250 Directors' reports

Sections 248, 249 and 250 of the 2008 Law prescribe requirements for the preparation of a directors' report.

The requirements of these sections did not apply in respect of a directors' report prepared in respect of an existing company's financial year which began before, and ended after, the commencement of the 2008 Law. Such accounts could be prepared in compliance with the provisions of the 1994 Law and other relevant legal principles in force immediately prior to the commencement of the 2008 Law.

Regulation 6 – Section 251 and 252 Delivery of accounts and reports to members and officers

Section 251 requires company accounts, directors' reports and auditors' reports to be delivered to the company's members and officers.

Section 252 requires the same documents to be laid before an annual general meeting.

The requirements of these sections did not apply in respect of accounts, directors' reports and/or auditors' reports prepared in respect of an existing company's financial year which began before, and ended after, the commencement of the 2008 Law. Such accounts could be prepared in

compliance with the provisions of the 1994 Law and other relevant legal principles in force immediately prior to the commencement of the 2008 Law.

Regulation 7 – Savings for accounts, etc, prepared before commencement of these regulations

This regulation provided for the avoidance of doubt that anything that could be validly done under regulations 1 – 6 above in respect of an existing company in its financial year which began before, and ended after, the commencement of the 2008 Law was deemed to have been validly done if done between the date of commencement of the 2008 Law and the date of commencement of the regulations.

Regulation 8 – Section 370 restoration to the register of companies

Section 370 of the 2008 Law provides for the restoration to the register of companies that have been struck off under Part XX of the Law.

This regulation made transitional provision for the restoration of companies that had been struck off before the commencement of the 2008 Law. It provided that an application could be made under section 370 where neither of the following periods had expired: (a) the period of twenty years referred to in section 77(1) of the 1994 Law and (b) a period of two years beginning on the date of commencement of the regulations (the date of commencement being 19 August 2008), without prejudice to the making of an application for restoration of such a company within ten years of the date on which the company was struck off.

3. Companies (Transitional Provisions) (No. 3) Regulations, 2008

Transitional Provisions that were time bound and that no longer have any effect, the relevant date or period having passed.

Regulation 3 – Power to pass waiver resolution for current financial year

This regulation provided that dormant and asset holding companies, within the meaning of paragraph 1 of Schedule 2 to the 1994 Law, whose current financial year (at the time of the commencement of the regulations) ended on or before the 31 December 2008 could at any time during that financial year pass a waiver resolution under section 256 of the 2008 Law exempting

them from the requirement under section 255 to have their accounts for that financial year audited.

Transitional Provisions that were not time bound and will therefore have effect unless and until they are repealed

Regulation 3 – Power to pass waiver resolution for current financial year

This regulation provides that companies which migrate to Guernsey pursuant to Part VII of the 2008 Law and which become registered as Guernsey companies within their current financial year can at any time during that financial year pass a waiver resolution under section 256 of the 2008 Law exempting them from the requirement under section 255 to have their accounts for that financial year audited.

Registrar of Companies
September 2013