

December 2007

## Companies House Newsletter

In this issue:

We look at subscriber shares

There is also some timely information on Annual Returns looking at:

- Annual Returns – a statutory form
- Annual Returns for funds
- Annual Returns for plcs

All references to the Act refer to the Companies Act unless otherwise stated.

### **Subscriber shares**

A recent case has highlighted a misunderstanding concerning the issue of subscriber shares on the incorporation of a Gibraltar Company.

When a company is incorporated the authorised share capital is stated in the Memorandum of Association. Typically a company is incorporated with an authorised share capital of £2,000 divided into 2,000 shares of £1 each.

Under section 3 of the Act there must be a minimum of 7 subscribers in the case of a public limited company and 1 in the case of a private limited company. The names of the subscribers appears in the Memorandum and the Articles of Association of the company.

Under section 4 (4) (b) and section 4 (4) (c) of the Act no subscriber may take less than 1 share and each subscriber must write opposite their name the number of shares taken.

Under section 39 of the Act the subscribers shall be deemed to have agreed to become members of the company and shall be entered in its register of members.



Please remember that shares issued to the subscribers are part of the issued share capital of the company and as such cannot be ignored notwithstanding that there is no need to file a Return of Allotments for such shares.

Assuming that a company has a share capital of £100 divided into 100 shares of £1 each and 2 shares are issued to the subscriber then the company only has 98 shares remaining which may be allotted to new shareholders.

In a number of cases we have seen that the subscriber shares are ignored and a subsequent Return of Allotments purports to allot 100 shares. This is not possible and therefore if such a Return of Allotments is filed an application will need to be made by the company to the Registrar to rectify the Return of Allotments to correct the position.

In straightforward cases Companies House should reject the Return of Allotments. However in cases where a company has a more sophisticated share structure the mistake is not always clear and only becomes obvious when later allotments of shares are made.

### **Annual Returns - a statutory form**

As you are all aware a company registered in Gibraltar to file an Annual Return on an annual basis.

The legal requirements are set out in sections 153 – 156 of the Companies Act. Section 153 (2) provides that the Annual Return shall be in the form prescribed in Schedule 5.

The Annual Return is therefore a statutory form and should contain the entire wording, which appears in Schedule 5 to the Companies Act without amendment or deletions.

In the case of a private company a director or the secretary of the company must sign the section 156 statements, which appear in the Annual Return. These statements are:

*I certify that the Company has not since the date of the last Annual Return, Incorporation issued any invitation to the public to subscribe for any Shares or Debenture of the Company*

*I certify that the excess of Members of the Company above fifty consists wholly of persons who are in the employment of the Company, and/or of persons who having been formerly in the employment of the Company were while in such employment and have continued after the determination of such employment to be members of the Company*



In some cases the section 156 statements have been deleted and do not appear in the Annual Return. If the wording has been omitted or if the Annual Return is not in the prescribed form it should be rejected by Companies House.

### **Annual Returns for funds**

In certain circumstances funds may be incorporated as private limited companies but are exempted from the restrictions, which are listed in section 40 of the Act. This means that some funds may now issue an invitation to the public to subscribe for shares in the scheme and may have more than 50 members pursuant to the Companies (Amendment) Act 2006. A change to the law to amend section 156 of the Act is required to exempt such companies from giving the required statutory certificates. This matter has been raised with the Gibraltar Government.

Until this issue has been resolved as an informal concession Companies House will accept Annual Returns for funds without the section 156 certificates being signed by a director or secretary on the terms outlined below if submitted together with a covering letter from the collective investment scheme/fund confirming the legal basis exempting the fund in question from giving the relevant certificates. We have therefore issued the following guidance, which applies to private limited companies.

### **Collective Investment Schemes**

We understand that a licensed collective investment scheme may have more than 50 members and may issue shares to the public provided it complies with all relevant regulatory rules. In such a case we will accept the Annual Returns without both section 156 certificates being signed by a director or secretary provided we are given confirmation that the fund is licensed and that it is exempted from the requirements of section 40 (1) and sections 52 to 59 subject to the regulatory requirements for such funds.

### **Experienced Investor Funds**

We understand that an experienced investor fund registered with the FSC may have more than 50 members but such schemes may only be promoted to experienced investors. It would seem to follow that this prohibits an invitation to the public. Consequently we will accept the Annual Return without the section 156 certificate on the number of members being signed by a director or secretary but will require the certificate confirming that no invitation has been made to the public. We will still require confirmation that the fund is registered with the FSC as an experienced investor



fund, which is exempted from the requirements of section 40 (1) and sections 52 to 59 subject to the regulatory requirements for such funds.

### **Private funds**

We understand that in the case of a collective investment scheme that has the characteristics of a private scheme section 6 of the Financial Services (Collective Investment Schemes) Regulations 2006 states that there must not be more than 50 participants and section 7 (1) of the same Regulations states that such funds may only be promoted by way of an offer addressed exclusively to a restricted category of persons. Consequently in such a case then both section 156 certificates should be signed by a director or secretary as the fund may not have more than 50 members and may not offer shares to the public.

### **Annual Returns for public limited companies**

Under section 155 (3) of the Act the Annual Return filed by a public limited company shall include the last audited balance sheet and auditor's report certified as a true copy by a director or the secretary.

There is no exemption from this under the Companies (Accounts) Act. If the company fails to comply with this requirement the company and every officer are guilty of an offence under section 155 (4).

However on the basis that a public limited company files accounts with Companies House on an annual basis as a matter of policy Annual Returns for public limited companies will not be rejected by Companies House if the last audited balance sheet and auditor's report are not attached.

**For more information please contact Jennifer Wiley or Chris Keightley-Pugh at Companies House.**

Companies House (Gibraltar) Limited. We cannot assume legal responsibility for the accuracy of any particular statement. In the case of a specific problem we recommend that you seek professional advice.