

In this issue we bring to your attention the following articles:

Charitable Companies - the impact of the Companies Act 2006

Public Benefit – draft supplementary guidance

Payment of Trustees

Charities Act 2006 implementation

Statutory Instrument 2008/629 - new accounting and reporting regulations

Charitable Companies: the impact of the Companies Act 2006

From 6 April 2008

Accounting and reporting: Charitable companies and their trading subsidiaries will be obliged by the Companies Act 2006, for accounting years commencing on or after 6 April 2008, to file accounts with Companies House within nine months from the end of their financial year (previously ten months). As a result, charitable companies and their trading subsidiaries must be aware of this new time limit.

Company secretary: Where charitable companies and their trading subsidiaries are incorporated as private limited companies they may choose not to have a company secretary. Many charitable companies are required to have a company secretary in their Articles of Association, however, it might not be expedient for charitable companies to dispense with the role of company secretary. There are high governance standards to comply with and certain reporting obligations to be complied with. The role of company secretary is important in making sure that these accounting and reporting requirements are complied with within the laid down time periods. If a charitable company does wish to dispense with their company secretary it should make sure that someone else is made responsible for the accounting and reporting requirements and the filing of documents with the Charity Commission and Companies House.

From 1 October 2008

Constitutional matters: New companies will not have separate Memorandum and Articles of Association, but one document detailing all the powers and procedures of the company. The Memorandum of Association will become a much shorter document, merely detailing the names of the first subscribers of the company. The Companies Act 2006 will also introduce new “model” Articles for private companies, but the proposed new model Articles for companies limited by guarantee will not be suitable for charitable companies. It is important to note that existing charitable companies will not be forced to amend their existing Memorandum and Articles of Association as a result of this, but the provisions currently in the Memorandum, regarding the powers of the company et cetera will be deemed to be in the Articles. It is unlikely that charitable companies will wish to make use of the new model Articles, because they will wish to have Articles tailored to their particular requirements. However, new trading subsidiary companies might wish to take advantage of these.

Directors (e.g. charity trustees): A company has to have at least one director who is a natural person. As a result, a charitable company will not be able to have a corporate director without a natural person being appointed alongside that corporate director. This is more likely to be relevant in the case of charity mergers.

Conclusion

Like the Charities Act 2006, the Companies Act 2006 is far reaching and charitable companies might notice more impact upon their day to day activities than that felt with the new Charities Act. Some charitable companies might wish to consider converting to the Charitable Incorporated Organisation (“CIO”) when it becomes available (expected later in 2008), not least to escape the myriad of potentially conflicting duties. However, as yet, the CIO is an untested structure. In the meantime, directors of charitable companies and their trading subsidiaries should familiarise themselves with the new provisions and consider the impact upon the day to day administration of their organisation.

Public Benefit – draft supplementary guidance

The Charity Commission has published its draft supplementary guidance in respect of the Public Benefit requirement for four specific types of charity. Needless to say, some charities may find need to refer to more than one of these specific documents in addition to the main ‘Charities and Public Benefit’ guidance.

The supplementary guidance documents reiterate the message of the general guidance that doing nothing in respect of Public Benefit is not an option but that the Commission does not expect changes to be made overnight and that it will take ‘reasonable account’ of the time and resources that a charity has available to meet the requirement. The supplementary guidance, like the general guidance, also emphasises that the requirement to report on Public Benefit is to demonstrate that the charity is **aiming** to provide Public Benefit, and it is therefore an extension of the activity-based reporting under SORP 2005 rather than an additional raft of narrative reporting requirements.

1. Fee-charging charities

The guidance for fee-charging charities provides considerable detail regarding factors which the Commission will take into account in assessing the effect of fees on the public benefit aims of the charity and also factors which charity trustees should consider in setting fee levels. The guidance also considers a number of ways in which access could potentially be widened to ensure that people who are unable to afford the full fees are not denied the **opportunity** to benefit from the activities of the charity.

The guidance states that all primary purpose trading is within its scope, as well as other costs which a beneficiary might need to incur in order to benefit from the charity’s activities – for example, purchasing specialist equipment. Fundraising activity and non-charitable trading are excluded from consideration as well as charges made to people who are not the beneficiaries of the charity, as these do not affect the ability of potential beneficiaries to access the benefits provided by the charity.

2. Charities for the advancement of education, the advancement of religion and the prevention or relief of poverty

Whereas the guidance for fee-charging charities is primarily concerned with access to benefit by a ‘sufficient’ section of the public, the three supplementary guidance documents, for charities that will no longer be able to rely on the old charity law presumption of public benefit under the 2006 Act, are concerned with explaining the characteristics of those three classes of purpose and the practical

issues arising for demonstrating the public benefit to be provided by a charity in the context of such purposes. The guidance documents follow similar formats, defining the meaning of the generic charitable purpose (e.g. what the identifying characteristics of a religion are, as opposed to any other group of beliefs) and then showing how each of the fundamental principles of the public benefit requirement in the context of that purpose are to be applied.

The guidance for educational charities also includes an example annex which applies specifically to schools. This annex illustrates the importance of the specific wording of a charity's Objects in determining which of its activities will be relevant in determining whether it is 'for the public benefit'. In particular, a charity whose Objects are for the provision of a school, as opposed to the advancement of education generally, or which specify a particular age-range for beneficiaries, will face greater limitations on which ancillary activities can be included in their public benefit assessment. Such limitations on the eligibility of ancillary benefits will mean that unless the declared Objects can be widened accordingly (with the help of the Commission, if necessary) a greater emphasis on the provision of bursaries or other financial assistance is likely to be necessary in order to demonstrate public benefit.

The closing dates for responses to the consultations are 30 June 2008 (Poverty and Religion) and 11 July 2008 (Education and Fee-charging).

The draft supplementary guidance documents can be obtained from the Commission's website at: <http://www.charitycommission.gov.uk/publicbenefit>

Payment of trustees

The Charity Commission has published an Operational Guidance document in respect of the Charities Act 2006 power to pay Trustees for services provided to their charity, over and above carrying out their duties as a trustee. The document sets out, in the form of questions and answers, the circumstances under which the new power can be applied along with any additional procedures that the other trustees of the charity will need to carry out in order to apply the new power.

In particular, the payment of a trustee for services, rather than an outside contractor, must be in the best interests of the charity and there must always be a majority of trustees who are not receiving such payments. The guidance also states that where a charity's governing document contains an express prohibition against trustees being paid in this way the new power does not apply, but where the Charity Commission's permission is required to allow a payment to a trustee the new power overrides the governing document.

The full guidance is available from the Charity Commission's website at: <http://www.charitycommission.gov.uk/supportingcharities/ogs/g092d002.asp>

Charities Act 2006 implementation

Following quickly on from the Third Commencement Order of 18 March 2008 was the Fourth Commencement Order, which takes effect from 1 April 2008. The key provisions of the Charities Act 2006 included in the Order are those relating to the new definition of charity, the public benefit requirement (including the removal of the old charity law presumption of public benefit) and the duty to consider the Charity Commission's guidance on the subject, statutory group consolidated accounts for 'auditable' non-company parent charities and provisions to establish a 'level playing field' for the whistle-blowing duties of auditors and independent examiners across the sector.

Further information on this and previous Commencement Orders can be found at:

http://www.cabinetoffice.gov.uk/third_sector/law_and_regulation/implementation/commencement_orders.aspx

New accounting and reporting regulations

The statutory underpinning for SORP 2005 in England & Wales has been updated by new Regulations made by the Office for the Third Sector under Part VI of the Charities Act 1993. Statutory Instrument S.I. 2008/629 replaces the SORP's 2005 regulations for all financial years starting from 1 April 2008, but can also be adopted for the previous year at the trustees' option.

For **non-company charities** preparing accruals-based annual accounts, the 2008 Regulations continue to make the SOFA and Balance Sheet requirements of SORP 2005 **mandatory**, together with many of the SORP's recommended Accounts Notes. The new regulations go beyond the SORP in one respect by requiring **all** Annual Reports (i) to include explicit confirmation that in administering their charity the trustees have given due consideration to the Charity Commission's published guidance on meeting the Public Benefit test and (ii) to report on the charity's activities and achievements to further its Objects 'for the public benefit'.

Charitable companies have to comply not only with the accounting and reporting provisions of the Companies Act 2006, but also with the SORP's related regulations prescribing the content of the Trustees' Annual Report – normally combined with the Directors' Report required by the Companies Act. If claiming exemption from audit or group-accounting under the *Companies Act* provisions for 'small' companies/groups, they must now comply with the SORP's new regulations stipulating a *Charities Act* accounts scrutiny (audit if exceeding £500,000 gross income or independent examination if exceeding £10,000 gross income – subject to the outcome of the recent public consultation on Government proposals for further increases in the regulatory thresholds) or group consolidation (respectively).

For ease of reference, the relationship between the 2005 and 2008 Regulations is shown in the following table:

The Charity Accounting/Reporting Regulations 2005 and 2008

2005	2008	Regulation/Schedule topic
1/2	1/2	citation, commencement, definitions
3	3	accounts form/content for most charities (4: common investment funds)
5	5	accounts form/content – ‘special’ cases
6	6	changes to the charity's financial year-end
-	7 - 9	group accounts – threshold; form and content; exceptions
-	10	audit threshold for group accounts
7	11	auditor's report/duties
8	12/13	independent examiner's report/duties (13: NHS charities)
9	14	auditor's/examiner's access rights
10	15	audit/examination dispensations
11	16	trustees' annual report contents (17: common investment funds)
-	18	trustees' annual report – extra disclosures for group accounts
Sch1	Sch1	Accounts notes

(Note: Sch. 2 contains the detailed specification for the accounts of FSA-regulated common investment funds (CIFs), which are the major investment-pooling charities catering for charities administered by *nonidentical* trustee-bodies, and which follow the IMA SORP rather than the Charities SORP.)

By simply cross-referring to the 2005 Charities SORP, its related Regulations therefore give it a kind of **rebuttable statutory presumption of applicability** for the SOFA and Balance Sheet in the case of (i) a *non-company* charity and its group and (ii) any auditable* ‘small’ group headed by a charitable company claiming the Companies Act exemptions and now having to prepare consolidated accounts under the new Schedule 5A to the 1993 Act (*i.e., above the £500,000 audit threshold).

For any queries, comments, suggestions for future articles, or if you would like to receive this newsletter via email please send an email to Robert Woolley at robert.woolley@hphonline.co.uk

This guidance is published without responsibility on the part of HPH, Chartered Accountants for loss occasioned to any person acting or refraining from action as a result of any information contained therein.
© HPH, Chartered Accountants (May 2008)