

**EXPLANATORY MEMORANDUM TO
THE COMPANIES ACT 2006 (COMMENCEMENT NO.5, TRANSITIONAL
PROVISIONS AND SAVINGS) ORDER 2007**

2007 No. 3495 (C.150)

1. 1.1 This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 The Companies Act 2006 is being commenced progressively in tranches between Royal Assent in November 2006 and October 2009. The present order will:

(a) bring into force provisions of the Companies Act 2006 with effect from 6 April 2008 about the following:-

- execution of documents
- register of members: removal of entries and time limit for claims
- company secretaries (in part)
- accounts and reports (in part)
- audit (in part)
- transferability of shares
- debentures
- private and public companies
- certification and transfer of securities
- exercise of right to inspect register of interests disclosed
- distributions
- arrangements and reconstructions
- mergers and divisions of public companies
- consents required for certain prosecutions
- interpretation of the Act (in part)
- statutory auditors
- payment of expenses of winding up
- registrar's rules (in part so far as necessary to enable rules to be made before they have to come into force and to enable the duty to publicise and make available copies of rules to apply).

(b) bring into force provisions of the Companies Act 2006 with effect from 29 June 2008 about the duties of third country auditors;

(c) bring into force provisions of the Companies Act 2006 with effect from 1 October 2008 about the following:-

- objections to company names
- trading disclosures
- company directors (in part)
- power of court to grant relief in certain cases
- information as to exercise of voting rights by institutional investors

(d) bring some of the repeals in the Act into force, especially where provisions in the old law are being replaced by the provisions of the Act being brought into force on 6 April 2008 and 1 October 2008;

(e) make transitional provisions, savings and repeals.

2.2 The draft Order has been drafted by Parliamentary Counsel.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Department regrets that one provision – paragraph 2(6) of Schedule 5 to these Regulations (see article 2(6)(a)) – comes into force less than 21 days after the order is laid, on 31 December 2007. This is necessary because the purpose of that provision is to ensure that private companies that had elected under the Companies Act 1985 not to have Annual General Meetings, without having removed from their articles a requirement to hold one, are not required to hold one in calendar year 2007. On one (disputed) interpretation of a transitional provision in the commencement order which came into force on 1st October 2007, an unintended consequence is that such companies are required to hold an AGM in 2007. This would be wholly contrary to one of the most important changes to company law in the 2006 Act, which is to abolish the requirement for private companies to hold AGMs (or, indeed, any meetings).

3.2 In order to accommodate the different commencement dates of articles 3 to 12, no commencement date is expressed for the formal provisions in articles 1 and 2, which therefore come into force upon making. They have no effect on their own.

4. Legislative Background

4.1 The Companies Act 2006 was given Royal Assent on 8 November 2006. It started its passage through Parliament in November 2005, as the Company Law Reform Bill, after the “Company Law Reform” White Paper was published in March 2005. Its name was then changed to the Companies Bill as a result of an amendment made during Commons committee proceedings. The Companies Act 2006 has substantially rewritten company law to make it easier to understand and more flexible, especially for small businesses. The Act partly restates some of the previous Companies Acts 1985 and 1989; partly rewrites some of the previous Companies Acts 1985 and 1989 to make the provisions simpler and easier to understand; and partly introduces new provisions.

Other Issues

4.2 The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007 brings only some of the provisions of the Companies Act 2006 into force. Some of the provisions brought into force refer to provisions, expressions and concepts provided for in parts of the Act not yet brought into force. This has resulted in the need for the transitional adaptations contained in Schedule 1 to the Order and the provision about definitions in article 7. Most of the adaptations take the approach of applying provisions, expressions and concepts provided for in the Companies Act 1985 and the Companies (Northern Ireland) Order 1986 to the provisions of the 2006 act brought into force.

4.3 The Order also includes transitional provisions and savings in article 9 and Schedule 4.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Stephen Timms MP, Minister of State at the Department for Business, Enterprise and Regulatory Reform, has made the following statement regarding Human Rights:

“In my view the provisions of The Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007 are compatible with the Convention rights.”

7. Policy background

7.1 As explained above, this draft Order brings into effect certain provisions of the Companies Act 2006, with appropriate transitional provisions and savings.

7.2 The purpose of the saving in paragraph 52 in Part 3 of Schedule 4 is to dispel doubts that have been expressed about whether the repeal of sections 151 to 153 and 155 to 158 of the Companies Act 1985 (and their Northern Ireland equivalents) in relation to the giving of financial assistance by a private company for the acquisition of shares in itself or another private company might fail to have its intended effect because of the application to transactions involving such financial assistance of the rule of law derived from the decision of the House of Lords in *Trevor v Whitworth*¹ and other cases.

7.3 In the Department’s view the effect of the saving is no more than the Department considered would be the consequence of the repeal in any event.

7.4 Abolition of the prohibition in section 151 renders redundant for private companies the exceptions contained in section 153 and the relaxation from the prohibition contained in sections 155 to 158 (known as the “whitewash” procedure).

7.5 In the Department's view, abolition of the prohibition will mean that a transaction which is currently prohibited by section 151 (but would otherwise be lawful) will not be prohibited by any statutory provision, or by reason of any rule of law relating to the giving of financial assistance by a private company for the purpose of the acquisition of shares in itself or another private company, irrespective of whether or not the transaction falls within section 153 or is capable of being subject to "whitewash".

7.6 In particular, the repeal will not lead to the revival, or the renewed application, of case law (or any rule of law derived from case law), so far as it relates to financial assistance for purchase of own shares, in any case to which the prohibition in section 151 would have applied, whether "whitewash" would have been available in that case or not. The enactment of the predecessors of sections 151 to 158² caused any previously applicable rule of law derived from case law to the effect that financial assistance by a company for acquisition of its own shares was unlawful to cease to have effect in respect of such assistance. This was in accordance with the general principle under which case law ceases to apply (unless Parliament decides otherwise) in cases falling within the scope of application of a statutory provision; and in accordance with section 16(1)(a) of the Interpretation Act 1978³, the repeal of those statutory provisions does not revive that case law.

7.7 The rule of law in question is said to have been derived from cases not directly concerned with financial assistance for purchase of own shares, such as *Trevor v Whitworth*, in which the House of Lords decided that a company might not (as the law then stood) purchase its own shares, on the ground that "neither the paid-up nor the nominal capital of the company shall be reduced otherwise than in the manner permitted by [Act of Parliament]"⁴.

7.8 The rule in *Trevor v Whitworth* is wider than the prohibition contained in section 151 and therefore may still, in some cases, be relevant to a transaction which would also previously have been prohibited by section 151. An example is where a company which has no (or insufficient) distributable reserves makes a gift of money to a shareholder with which to purchase further shares in the company. This transaction would still be prohibited, notwithstanding the repeal of section 151, because it would result in an unlawful reduction of capital by the company. Similarly, if a company with no (or insufficient) distributable reserves made a loan to a shareholder with a view to the shareholder purchasing further shares in the company and the company was aware when the loan was made that there was no reasonable prospect of the borrower being able to repay it, so that the company would be required to make an immediate provision in respect of the loan, this would similarly continue to be prohibited because it would give rise to an unlawful reduction of capital.

7.9 The saving does not affect the application of any statutory provision remaining in force or being, or to be, brought into force, including particularly Chapter 10 of Part 17 (reduction of share capital), Chapter 2 of Part 18 (financial assistance for purchase of shares in a public company) or Part 23 (distributions) of the Companies Act 2006.

² Section 151 was first enacted as section 16 of the Companies Act 1928; section 155 as section 43 of the Companies Act 1981.

³ "16.–(1) where an Act repeals an enactment, the repeal does not, unless the contrary indication appears, (a) revive anything not in force or existing at the time at which the repeal takes effect;".

⁴ Ld Watson at p 423.

8. Impact

8.1 The Regulatory Impact Assessment relating to the Companies Act 2006 (<http://www.berr.gov.uk/files/file29937.pdf>), provisions of which are commenced or applied by this Order, is available on the website of the Department for Business, Enterprise and Regulatory Reform.

9. Contact

9.1 Richard Grafen at the Department for Business, Enterprise and Regulatory Reform (telephone: 0207 215 5323 or e-mail: richard.grafen@berr.gsi.gov.uk) can answer any queries regarding the instrument.