

*These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006*

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 18: Acquisition by Limited Company of Its Own Shares

980. This Part replaces various provisions in Chapters 6 and 7 of Part 5 of the 1985 Act and makes substantive changes to some of those provisions. Sections 658 to 659, 662, 666 to 677, 680 to 683, 687, 691, 693, 695 to 701, 704 to 706, 710 to 713, 716 to 719, 721 to 726, 728 to 729, 731 and 733 to 736 restate various provisions in the 1985 Act but do not make any changes to those provisions.

Chapter 1: General Provisions

Sections 660 and 661: Shares held by company's nominee

981. These sections restate sections 144 and 145(1) and (2) of the 1985 Act, but with the clarification that they apply to shares taken by a subscriber to the memorandum as nominee of the company.

Section 663: Notice of cancellation of shares

982. This section restates section 122(1)(f) and (2) of the 1985 Act and Schedule 24 to that Act. *Subsections (2) and (3)* update the current notice requirements to require a company that has cancelled shares in order to comply with section 662 to provide the registrar with a statement of capital (see note on section 619) at the time of giving notice of the cancellation.

Section 664: Re-registration as private company in consequence of cancellation

983. This section replaces section 147(2) and (3) of the 1985 Act. These provisions have been updated to reflect the fact that in future it will not be possible to alter the memorandum and that key information of a type which was previously in the memorandum will now be in the articles (see note on section 8). The resolution to re-register as a private company in consequence of a duty to cancel shares will however still need to be filed with the registrar under Chapter 3 of Part 3 of the Act.

984. There is also a new requirement, in *subsection (3)*, for the application for re-registration to be accompanied by a statement of the company's proposed name on re-registration, *Subsections (5) and (6)* are also new. Consistent with the approach taken where a company is formed as a private company under the Act (see section 9), where a public company applies to re-register as private under this section the application for re-registration must be accompanied by a statement of compliance (see note on section 13).

Section 665: Issue of certificate of incorporation on re-registration

985. This section replaces section 147(4)(a) of the 1985 Act and restates section 147(4) and (4)(b) of that Act. As with the previous section, the provision has been updated to reflect the fact that in future companies will not be capable of, and will not need to, alter

their memoranda. *Subsection (3)* is new. Consistent with the approach taken in Part 7 of the Act, a certificate of incorporation issued on the re-registration of a company under section 664 will need to specify that it is being issued on the re-registration of the company and the date on which it is issued.

Chapter 2: Financial Assistance for Purchase of Own Shares

986. The following sections replace Chapter 6 of Part 5 of the 1985 Act which contains a prohibition on the giving of financial assistance (broadly defined) by a company or any of its subsidiaries for the purpose of the acquisition of shares in itself. There are exceptions which apply to all companies, contained in section 153 of the 1985 Act, and a relaxation of the general rule for private companies in sections 155 to 158 of that Act.
987. As recommended by the CLR (Final Report, paragraph 10.6), the Act abolishes the prohibition on private companies giving financial assistance for a purchase of own shares and, as a consequence, the relaxation for private companies (sometimes referred to as the “whitewash” procedure) is no longer required. The provisions in sections 155 to 158 have therefore been repealed and are not carried forward in the Act.

Section 678: Assistance for acquisition of shares in public company

988. This section replaces section 151(1) and (2) of the 1985 Act and restates section 153(1) and (2) of that Act. The key change is that the prohibition on private companies providing financial assistance for a purchase of own shares is not carried forward.
989. The general prohibition on the giving of financial assistance by a public company is required by the Second Company Law Directive (77/91/EEC) and this prohibition is retained in *subsection (1)*. As under the current law, the prohibition extends to post-acquisition assistance (see *subsection (3)*).
990. The prohibition on the giving of post-acquisition assistance only applies if the company in which the shares were acquired is a public company at the time that the assistance is given (see *subsection (3)*). It follows that where a company has re-registered as a private company since the shares were acquired and is a private company at the time the post-acquisition assistance is given, the prohibition in this section will not apply. However, if at the time the shares were acquired the company was a private company, but at the time the post-acquisition assistance is given it has re-registered as a public company, the prohibition will apply.
991. The provisions of section 153(1) and (2) of the 1985 Act are retained in *subsections (2) and (4)* which carry forward the current exemption from the prohibition on the giving of financial assistance: namely, that such assistance is not prohibited if the principal purpose of the assistance is not to give it for the purpose of an acquisition of shares, or where this assistance is incidental to some other larger purpose of the company and (in either case) where the assistance is given in good faith in the interests of the company. As now, in these circumstances no offence is committed by the company or its officers (see section 680). The changes introduced by section 678 also give statutory effect to the decision in *Arab Bank plc v. Mercantile Holdings Ltd* [1994] 2 All ER 74: namely, that the statutory prohibition on a company giving financial assistance for the purpose of acquiring its own shares or shares in its holding company does not apply to the giving of assistance by a subsidiary incorporated in an overseas jurisdiction.
992. In the *Arab Bank* case, Millett J considered the geographical scope of section 151 of the 1985 Act and concluded that this had inadvertently been altered during the consolidation of UK companies legislation in 1985. In particular, the 1985 Act appears to go further than the 1980 Act and, in interpreting the current provision, Millett J applied the presumption that, in the absence of a contrary intention, section 151 could not have extra-territorial effect. The difficulty with the 1985 Act provision arises as a result of how the prohibition is framed: in particular, the prohibition applies “to the company or any of its subsidiaries” and “subsidiary”, as defined in section 736 of the

1985 Act, includes foreign companies. The prohibition in the Act is restricted to UK public companies and their UK subsidiaries as a result of the definition of “company” in section 1. Subsection (1) of that section makes it clear that, unless the context otherwise requires, “company” means a company which is formed and registered under the Act or a former UK Companies Act.

Section 679: Assistance by public company for acquisition of shares in its private holding company

993. This section replaces sections 151(1) and (2) and 153(1) and (2) of the 1985 Act.
994. Like section 678 this section does not carry forward the prohibition on private companies providing financial assistance for a purchase of own shares, but the current prohibition on the giving of financial assistance by a public company subsidiary for the purpose of an acquisition of shares in its private holding company is retained. Section 679 also retains the prohibition on the giving of post-acquisition assistance by a public company subsidiary.

Chapter 3: Redeemable Shares

995. Under section 159 of the 1985 Act a company that is limited by shares, or limited by guarantee and having a share capital, may, if authorised to do so by its articles, issue shares which may be redeemed at a future point in time at the option of the company or the shareholder. The provisions of section 159 are carried forward in the following sections but there are changes to the ways in which companies may issue redeemable shares and redeem such shares (see below).

Section 684: Power of limited company to issue redeemable shares

996. This section replaces section 159(1) of the 1985 Act and restates section 159(2) of that Act.
997. For private companies only, it removes the requirement for prior authorisation in the company’s articles for a proposed allotment of redeemable shares. If they wish, the members may, however, restrict or prohibit the authority given to a company by this section, by including a provision to this effect in the company’s articles (see *subsection (2)*).

Section 685: Terms and manner of redemption

998. This replaces section 160(3) of the 1985 Act (which provides that the terms and manner of redemption must be set out in the company’s articles) and existing section 159A (also entitled “terms and manner of redemption”), which was inserted into the 1985 Act by section 133 of the Companies Act 1989 and remains uncommenced.
999. As recommended by the CLR (Final Report, paragraph 4.5), this section enables the directors of both private and public companies alike to determine the terms, conditions and manner of a redemption of redeemable shares. The power conferred on the directors by this section requires prior authorisation by the company’s members, either by resolution of the company or through the articles (see *subsection (1)*). As recommended by the CLR (Final Report, paragraph 7.30) the terms and conditions of redemption will have to be stated in the statement of capital required to be filed under section 555. If the directors are not authorised to set the terms of the redemption, then they must be set out in the company’s articles (see *subsection (4)*).
1000. Where the directors exercise this power they must do so before the shares in question are allotted (see *subsection (3)*).

Section 686: Payment for redeemable shares

1001. This section replaces section 159(3) of the 1985 Act (which requires that where a company issues redeemable shares, the terms of redemption must provide for payment on redemption). It removes the current requirement, in section 159(3), that the terms of redemption must provide for payment on redemption. This means that the terms of redemption may provide for the company and the holder of the shares to agree that payment may be made on a date later than the redemption date.

Section 688: Redeemed shares treated as cancelled

1002. This section restates section 160(4) of the 1985 Act but with the exception of the reference to the impact of the redemption on the authorised share capital of the company – the concept of which is not replicated under the Act.

Section 689: Notice to registrar of redemption

1003. This section restates section 122(1)(e) and 122(2) of the 1985 Act and Schedule 24 to that Act but there is a new requirement for a statement of capital where a company gives notice to the registrar of a redemption of redeemable shares (see *subsections (2) and (3)* and the note on section 619).

Chapter 4: Purchase of Own Shares

1004. Section 162 of the 1985 Act enables a company limited by shares or limited by guarantee and having a share capital to purchase its own shares, provided it is authorised to do so by the articles. It is common for the members to give authority for such a purchase of own shares through the articles, see, for example, regulation 35 of the Companies Act 1985, Table A.

Section 690: Power of limited company to purchase own shares

1005. This section replaces section 162(1) of the 1985 Act and restates section 162(3) of that Act.

1006. In line with the recommendations of the CLR (Completing the Structure, paragraph 2.15), section 690 removes the requirement for prior authorisation in a company's articles for a purchase of own shares (including any redeemable shares) by the company but makes it clear that, if they wish, the members may restrict or prohibit a purchase of own shares by including a provision to this effect in the company's articles.

Section 692: Financing of purchase of own shares

1007. This section restates, the provisions of section 160(1) and (2) and 162(2) of the 1985 Act on a redemption of own shares which are applicable to a purchase of own shares, and makes such adaptations to those provisions as are necessary to ensure that the restated provisions work in this context.

Section 694: Authority for off-market purchase

1008. This section replaces sections 164(2) and 165(2) of the 1985 Act and restates sections 164(1), (3) and (4) and 165(1) of that Act.

1009. Under the 1985 Act a company may only enter into a contract for an off-market purchase of shares if the shareholders approve the contract by special resolution before the contract is entered into. An off-market purchase of shares is a purchase that is not conducted through a recognised investment exchange (for example, the London Stock Market).

1010. [Section 694](#) enables a company to enter into a contract for an off-market purchase of its own shares conditional on the contract being approved by the shareholders. This

will save companies valuable time as it will be possible for the directors to negotiate and agree the terms of a contract for an off-market purchase of shares ahead of seeking shareholder approval. If, however, the shareholders do not subsequently pass a special resolution approving the contract, the company may not purchase the shares in question and the contract will lapse.

Section 702: Copy of contract or memorandum to be available for inspection

1011. This section replaces section 169(4) and (9) of the 1985 Act. Under the 1985 Act, where a company enters into a contract for a purchase of own shares it must make available for inspection a copy of the relevant contract or a memorandum of its terms at the company's registered office for a period of 10 years. *Subsection (4)* alters the current requirements by providing that the contract may, alternatively, be kept available for inspection at a place specified in regulations made under section 1136. If the company is a private company, the contract must be available for inspection by any of its members; otherwise it must be open to inspection by anyone. If default is made an offence is committed by the company and every officer in default.
1012. *Subsection (5)* is a new provision which requires companies to give notice to the registrar of the place where the contract is kept available for inspection. This is consequential on the choice conferred on companies under subsection (4) as to where such documents are kept.

Section 703: Enforcement of right to inspect copy or memorandum

1013. This section replaces section 169(7) of the 1985 Act and Schedule 24 to that Act. It retains the existing offences for failing to keep available/allow inspection of the contract/memorandum as required under section 702, but with the addition of a new offence for failure to notify the registrar of the place where such documentation is kept. It also restates section 169(8) of the 1985 Act.

Section 707: Return to registrar of purchase of own shares

1014. This section replaces section 169(1), (1A) and (1B) and restates section 169(2), (3) and (6) of the 1985 Act and Schedule 24 to that Act. It requires a company to make a return to the registrar within 28 days of a purchase of own shares stating, amongst other things, the number and nominal value of the shares purchased. The return must indicate whether the shares are of a type which could be held in treasury (see section 724), and, if so, whether the shares were cancelled forthwith or whether they are being held in treasury.

Section 708: Notice to registrar of cancellation of shares

1015. This section replaces sections 169(1), (1A) and (1B) and restates 169(6) of the 1985 Act and Schedule 24 to that Act. It updates the notice requirements so as to require that where shares are cancelled forthwith following a purchase (either in circumstances where the shares are treated as automatically cancelled or where treasury shares are cancelled) the company has to notify the registrar of such cancellation and provide the registrar with a statement of capital (see note on section 619).
1016. As now, where a company fails to comply with the procedural requirements as to notice, the company, and every officer of the company who is in default, commits an offence (see *subsection (4)*).

Chapter 5: Redemption Or Purchase by Private Company Out of Capital

1017. Sections 171 to 177 of the 1985 Act provide a statutory scheme for the redemption or purchase of own shares out of capital. This scheme is available to private companies only and the facility to redeem or purchase shares out of capital is carried forward in the following sections.

Section 709: Power of private limited company to redeem or purchase own shares out of capital

1018. This section replaces section 171(1) of the 1985 Act and restates section 171(2) of that Act. It removes the current requirement for prior authorisation in the articles where a private company makes a payment out of capital in respect of a redemption or purchase of its own shares. If they wish, the members may, however, restrict or prohibit such a payment by including a provision to this effect in the company's articles.

Section 714: Directors' statement and auditor's report

1019. This section replaces section 173(3) to (5) of the 1985 Act.

1020. Currently, before a private company may make a payment out of capital in respect of a purchase of own shares, the directors must have made a full enquiry into the affairs and prospects of the company and are required, under section 173, to make a statutory declaration confirming that: as regards the company's situation immediately after the date on which the payment out of capital is made, there will be no grounds on which the company could then be found unable to pay its debts; and as regards the company's prospects for the year immediately following that date, the company will be able to continue to carry on business as a going concern and be able to pay its debts as they fall due in the year immediately following the date on which the payment out of capital is made. In forming their opinion on the company's solvency and prospects, the directors must take into account the same liabilities (including contingent and prospective liabilities) as would be relevant under section 122 of the Insolvency Act 1986 (winding up by the court) to the question whether a company is unable to pay its debts.

1021. Consistent with the approach taken in respect of reductions of capital using the new solvency statement procedure (see sections 642 and 643 and in particular subsection (2) of section 643), this section requires a private company limited by shares that wishes to use this statutory scheme for a purchase or redemption of shares to take account of all contingent and prospective liabilities, not just those that are relevant for the purposes of section 122 of the Insolvency Act 1986 (see *subsection (4)*).

1022. Again, to achieve consistency with the approach taken elsewhere in the Act, the current requirement for a statutory declaration is replaced with a requirement for a simple statement. In contrast to a statutory declaration, the directors' statement does not need to be sworn before a solicitor or Commissioner of Oaths.

Section 715: Directors' statement: offence if no reasonable grounds for opinion

1023. This section restates section 173(6) of the 1985 Act and Schedule 24 to that Act (but substitutes the reference to "declaration" with "statement"). The offence that is currently contained in subsection (6) of section 173 (offence of making declaration without reasonable grounds) is replaced with an offence of making a statement under section 714 without having reasonable grounds for the opinion expressed in it. As now, the offence is committed by every director of the company who is in default.

Section 720: Directors' statement and auditor's report to be available for inspection

1024. This section replaces section 175(6)(a) and (7) and restates section 175(4), (6)(b), and (8) of the 1985 Act and Schedule 24 to that Act. *Subsection (2)* alters the current requirement, contained in section 175(6)(a), by providing that the directors' statement and auditor's report may, alternatively, be kept available for inspection at a place specified in regulations made under section 1136. There is a new requirement (in *subsection (3)*) for the company to give notice to the registrar of the place where the statement and report are kept available for inspection and of any change to that place. This change is consequential on the change introduced by subsection (2).

1025. *Subsection (5)* provides that if the company fails to give such notice to the registrar within 14 days or an inspection of the statement and report are refused, the company and every officer in default commit an offence.

Chapter 6: Treasury Shares

1026. Where a company buys back its own shares, it is normally required to cancel those shares. Certain companies (principally those which are listed or those which are traded on the Alternative Investment Market and equivalent companies in the EEA) may elect not to cancel shares which have been bought back but may hold the shares “in treasury”. A share which is held in treasury may be sold at a future point in time and this facility enables such companies to raise capital more quickly than they would otherwise be able to, as the directors do not have to obtain prior authority from the company’s members before selling treasury shares.

Section 727: Treasury shares: disposal

1027. This section replaces section 162D(2) of the 1985 Act and restates section 162D(1)(a) and (b) and 162D(3) of that Act. It defines (*in subsection (2)*) what is meant by “cash consideration” where treasury shares are sold and this mirrors, in part, the definition in section 583 (which restates section 738(2) to (4) of the 1985 Act and defines when a share is deemed to be paid up or allotted for cash).
1028. *Subsections (2)(e), (3) and (5)* are new. They enable the Secretary of State to specify, by order, what, in addition to the items specifically referred to in *subsection (2)*, constitutes “cash consideration” for the purposes of *subsection (1)(a)*.
1029. The power to make further provision in respect of what constitutes “cash consideration” for the purposes of a sale of treasury shares (that is, in addition to those already specified in *subsection (2)*) is intended to remove uncertainties surrounding other methods of settlement, for example, the CREST settlement system (see note on section 583) and will also act as a future proofing mechanism in the event that new methods of settlement are developed or identified.

Section 730: Treasury shares: notice of cancellation

1030. This section restates sections 169A(1)(b)(i), (2) to (4) of the 1985 Act and Schedule 24 to that Act. As now, where a company cancels shares which it has held in treasury it is required to give notice of this to the registrar within 28 days of the cancellation. The provision has, however, been updated to require companies to file a statement of capital in these circumstances (see note on section 619).

Section 732: Treasury shares: offences

1031. This section replaces section 162G of the 1985 Act. It renders both the company and every officer in default liable to an offence for any contravention of the provisions of this Chapter.

Section 737: General power to make further provision by regulations

1032. This section is a new provision which enables the Secretary of State, by regulations, to modify the provisions of Part 18 (see *subsection (1)*).
1033. Regulations made under this section may amend or repeal any of the provisions in this Part or make such other provision as appears to the Secretary of State appropriate in place of those provisions.
1034. The power to make regulations in this section will enable the Secretary of State to “future-proof” the provisions in Part 18 – which are primarily concerned with the maintenance of capital. This is desirable as many of these provisions are derived from EU law and may require amendment in the relatively near future (subject in part to

*These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006*

the outcome of a fundamental study into alternatives to the current capital maintenance regime which is being carried out at EU level).

1035. Regulations made pursuant to the power in this section are subject to the affirmative resolution procedure, which means that they must be approved by both Houses of Parliament.