

**EXPLANATORY MEMORANDUM TO THE
COMPANIES ACT 1985 (POWER TO ENTER AND REMAIN ON
PREMISES; PROCEDURAL) REGULATIONS 2005**

2005 No. 684

- 1.** This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments and the House of Lords Select Committee on the Merits of Statutory Instruments.

- 2. Description**

2.1 The instrument comprises the regulations required by section 453B(4) and (7) of the Companies Act 1985 (“CA 1985”) (as amended by the Companies (Audit, Investigations and Community Enterprise) Act 2004) (“CAICE”).

2.2 The regulations prescribe the content of both the statement of powers, rights and obligations to be given to appropriate recipients under section 453B(4) of CA 1985 and of the company visit record which certain people may request under section 453B(6) of CA 1985.

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

3.1 None

- 4. Legislative Background**

4.1 Part 1 of CAICE amends (inter alia) Part 14 of CA 1985 and introduces (in section 453A(2)) the power for inspectors and investigators who are duly authorised by the Secretary of State to enter premises used by a company and remain there for as long as is necessary in order to exercise their statutory functions.

4.2 Section 453(B)(4) and (6) of CA 1985 (as amended) provide that (i) as soon as practicable after exercising the power to enter and remain on premises “appropriate recipients” are to be given a statement of powers, rights and obligations (“the statement”); and (ii) as soon as reasonably practicable after the exercise of the power a written record of the visit (“the record”) is to be sent to anyone entitled to request a copy who asks for it. By virtue of section 453B(4) and (7) of CA 1985 the content of the statement and the record are to be prescribed by regulations. This instrument sets out those regulations; with paragraph 2 dealing with the statement and paragraph 3 with the record.

4.3 The amendments to CA 1985 effected by CAICE come into force on 6 April 2005 and it is intended that the regulations do likewise.

5. Extent

This instrument applies to Great Britain.

6. European Convention on Human Rights

Not applicable.

7. Policy background

7.1 The policy objective for amending CA 1985 is to improve the effectiveness and efficiency of the company investigations regime. New section 453A is one of the changes designed to better equip company inspectors and investigators to uncover malpractice by giving them the power to enter and remain on premises used for the business of the company under investigation. It will also enable some investigations to be concluded more quickly and so free up company inspectors and investigators to move to other investigations more quickly. These benefits will contribute to engendering confidence in the UK corporate framework.

7.2 It is essential that, when this power is exercised, its use is compatible with privacy rights under Article 8 of the European Convention on Human Rights (ECHR). For that reason a number of safeguards have been provided by new section 453B. These include the provision of a written statement of powers, rights and obligations and the drawing up of a written record following a visit to premises. New section 453B provides that the content of both this statement and the visit record be prescribed by regulations.

7.3 Around 250 complaints about companies' activities were accepted for investigation in 2002/03. The absence of a legal right of access to premises, other than by use of a search warrant under section 448 of CA 1985, increases the possibility of delay and obstruction by companies under investigation. The capacity to gain access to and remain on company premises in the course of an investigation carries with it great practical benefits. In particular, it enables company inspectors or investigators to exercise more effectively their statutory powers to require the production of documents and the provision of information. More generally, it offers company inspectors and investigators the opportunity to see the company's operations in practice.

Broad proposals for modernisation of the investigations regime were set out in a public consultation document entitled *Company Investigations: Powers for the 21st Century* published in October 2001. 113 copies of the consultation paper were sent out to industry groups, including small business groups, legal bodies, accountancy bodies, those with banking or insolvency interests, other interest groups and individual companies. Only 4 responses were received on the then proposal to provide a power to enter and remain on premises. One supported the proposal, providing a balance was struck between the purposes

of the investigation and company rights. The other 3 respondents believed that a judicial warrant should be obtained as its absence might infringe the human rights of occupiers of premises under the ECHR.

A further public consultation document *Company investigations: Draft regulations and plans for commencement* was issued in August 2004. Around 200 copies of the consultation document were sent to the same groups identified for the earlier consultation and only 12 responses were received. They were largely supportive and included comments on the content of the written statement of powers, rights and obligations and the written record of a visit. These comments have been accommodated in the regulations.

The instrument is legally important as the regulations prescribe the content of two safeguards inserted in CA 1985 to safeguard privacy rights under Article 8 of the ECHR.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 The impact on the public sector has been considered and the Regulations do not meet the Public Services Threshold criteria.

9. Contact

Mr. Colin Evans of the Companies Investigation Branch of the Department of Trade and Industry, telephone number 020 7215 3088 or e-mail colin.evans@dti.gsi.gov.uk can answer any queries regarding the instrument.

COMPANIES ACT 1985 (POWER TO ENTER AND REMAIN ON PREMISES: PROCEDURAL) REGULATIONS 2005

REGULATORY IMPACT ASSESSMENT

Proposal

1 Draft regulations relating to the power to enter and remain on premises contained in the Companies (Audit, Investigations and Community Enterprise) Act 2004 (CAICE Act).

Purpose and intended effect

Objective

2 The Companies (Audit, Investigations and Community Enterprise) Act 2004 amends the Companies Act 1985 by, among other things, inserting new section 453 which gives company inspectors and investigators a power to enter and remain on premises used for the business of the company under investigation, subject to certain safeguards. The insertion of new section 453 necessitate the making of regulations which prescribe:

- the content of a written statement of powers, rights and obligations to be given when premises are visited; and
- the content of a written record of a visit to premises.

The objective is to ensure that necessary safeguards attach to the use of the power.

3 *Devolution.* The draft regulations will extend to England, Scotland and Wales; the regulation of business associations is a reserved matter under the Scotland Act 1998 and no relevant functions have been transferred in Wales. The regulation of companies is a transferred matter under the Northern Ireland Act 1998.

Background

4 The CAICE Act 2004 includes a set of targeted measures to improve the effectiveness of the company investigations regime. One of those measures is a new power for company inspectors and investigators to require access to, and remain on, premises which are used for the business of the company under investigation. There is a Regulatory Impact Assessment (RIA) accompanying the Act which sets out the impact of that power (and all the other measures in the Act).¹ Separately, this RIA is concerned with regulations which would be made relating to the exercise of that power.

5 It is essential that, when the power to enter and remain on premises is exercised, its use is compatible with privacy rights under Article 8 of the European Convention on Human Rights (ECHR). For that reason a number of safeguards attach

¹ A copy of the RIA can be found on the DTI website at: www.dti.gov.uk/cld/companies_audit_etc_bill/index.htm

to use of the power. Provision of a written statement of powers, rights and obligations and the drawing up of a written record of a visit to premises are two of those safeguards.

6 The content of those documents also needs to be designed to contribute to ensuring compatibility with ECHR privacy rights. For example, we are proposing that the statement of powers, rights and obligations should record the fact that entry to premises can be refused if an inspector or investigator cannot produce evidence of their appointment or authorisation by the Secretary of State. We are also proposing that the visit record should be required to state the name of the individual to whom the inspector or investigator provided their evidence of appointment or authorisation or, if the person's name is not known, an account of how the evidence was provided. It will, therefore, be possible to determine from the visit record how evidence of appointment or authorisation was given.

Risk assessment

7 The two documents will provide the recipient with clarity about the exercise of the power and a record that the safeguards relating to the exercise of the power have been complied with. Without a requirement to provide a written statement of powers, rights and obligations and a requirement to draw up a visit record with (in each case) mandatory contents laid down in legislation, we consider it unlikely, on balance, that the exercise of the power to enter and remain on premises could be compatible with ECHR privacy rights.

Options

8 It would not be possible to bring the power to enter and remain on premises into force without the necessary accompanying regulations. The options, therefore, are:

- *Option 1:* Not to bring the power into force.
- *Option 2:* Bring the power into force with regulations which prescribe the contents of the two documents so as to contribute to ensuring compatibility with ECHR privacy rights.
- *Option 3:* Bring the power into force with regulations which prescribe the minimal contents for the two documents.
- *Option 4:* Bring the power into force with regulations which prescribe very extensive contents for the two documents.

Benefits

9 The benefits for each option are as follows:

- *Option 1:* There are no benefits to be gained from option 1. It would mean not implementing, in April 2005, one of the key amendments to the existing company investigations regime intended to increase the effectiveness of the regime in uncovering malpractice. In practice, this is not a viable option. It would be indefensible to have power to deal more effectively with allegations of misconduct by companies and not to implement it.

- *Option 2:* The benefits to be gained by introducing a power to enter and remain on premises is dealt with in the RIA accompanying the Act. By ensuring that the regulations prescribe contents for the two documents that take account of the need to protect ECHR privacy rights, we will be minimising the risk that use of the power could breach those rights. In particular, the statement of powers, rights and obligations will provide clarity about the way the power can be exercised and the visit record will show how the necessary safeguards have been complied with.
- *Option 3:* New section 453 of the Act gives no indication of what the visit record should contain. Superficially, therefore, it allows for the possibility of prescribing a bare minimum by way of contents - requiring something less than is planned in option 2. However, this would mean bringing the power into force without all the requirements we believe are necessary to adequately protect ECHR privacy rights. This is not, therefore, a viable option.
- *Option 4:* The regulations could prescribe greater detail for the contents of the two documents than would be required for option 2. However, visits to premises using the new power will not have so precise an objective that we can be prescriptive for every case.

Business sectors affected

10 Around 250 investigations are carried out every year. Of these, we anticipate that the new powers may be used in around 20% of cases. However, it is not possible to be precise because use of the power will need to be justified on a case-by-case basis, taking account of the circumstances of the individual investigation.

11 The power will also be available to inspectors, appointed by the Secretary of State in specified circumstances to investigate and report. Such appointments are now rare and there are currently no ongoing inspections.

Issues of equity and fairness

12 Companies and their directors have obligations under company law. The Act does not change the scope of the existing company investigations regime. Investigations will only be initiated where it is appropriate to do so.

Costs

13 The regulations do not set out compliance requirements for business - they prescribe the contents of documents that investigators and inspectors must provide. The documents will provide clarity and certainty and so should assist business in avoiding additional cost. The documents will be provided free of charge. As a result, we see no compliance cost for business.

Consultation with small business: Small Firms' Impact Test

14 A consultation document was published on 26 August 2004, *Company investigations: Draft regulations and plans for commencement*. It was sent out to industry groups, including small industry groups, interest groups and individual companies. The consultation document was also made available on the DTI website. Annex C of the consultation document set out a draft partial RIA. Only 6 responses were received on the draft partial RIA. None of the responses were from small firms. (For more information on the public consultation, see 19 below).

Competition Assessment

15 There are no competition consequences as the regulations apply to inspectors and investigators, not to business.

Enforcement and sanctions

16 None. The regulations do not contain enforcement or sanctions provisions. (Sanctions relating to the exercise of the power are contained in the Act. Details can be found in the RIA on the Act.)

Monitoring and review

17 The Companies Act 1985 requires the Secretary of State to prepare and lay before Parliament a general annual report. This includes a report on the activities of Companies Investigations Branch.

Consultation

(i) Within Government

18 The proposals for new section 453, including the exercise of its powers, have been given policy clearance within Government. In particular, there has been consultation with the Home Office, the department for Constitutional Affairs and with the Small Business Service.

(ii) Public consultation

19 A consultation document was published on 26 August 2004, *Company investigations: Draft regulations and plans for commencement*. This set out the draft regulations and the draft partial RIA. The consultation ended on 26 November 2004. Around 200 copies of the consultation document were sent out to industry groups, including small business groups, legal bodies, accountancy bodies, those with banking or insolvency interests, other interest groups and individual companies. The consultation document was also made available on the DTI website. Only 12 written responses were received from external consultees, out of which 6 commented on the draft partial RIA. The respondents represented two large-sized enterprises, one medium-sized enterprise, two professional associations and one rural enterprise agency.

20 A summary of the responses we received is available from the DTI website. The responses on the draft partial RIA concerned compliance and additional costs

associated with the investigations provisions of the CAICE Act and not from the written statement and visit record which will be provided free of charge. The associated costs concerned the provision of facilities for inspectors and investigators, cost of management and other personnel time. Costs associated with the disruption of business, the loss of business opportunities, document and information retrieval costs and copying costs were also mentioned.

Summary and recommendation

21 The table below shows a summary of the costs and benefits of the proposal.

<i>Description</i>	<i>Costs</i>	<i>Benefits</i>
1. Not to bring the power into force.	No additional costs.	No benefits to be gained.
2. Bring the power into force with regulations which prescribe the contents of the two documents so as to contribute to ensuring compatibility with ECHR privacy rights.	No additional costs.	Benefits to be gained are covered by the RIA accompanying the CAICE Act. By ensuring that the regulations prescribe contents for the two documents that take account of the need to protect ECHR privacy rights, we will be minimising the risk that use of the power could breach those rights.
3. Bring the power into force with regulations which prescribe the minimal contents for the two documents.	No additional costs.	No benefits to be gained. New section 453 gives no indication of what the visit record should contain. There is therefore the possibility of prescribing the minimal contents for the two documents than would be required for option 2. However, this would mean bringing the power into force without all the requirements we believe are necessary to adequately protect ECHR privacy rights.
4. Bring the power into force with regulations which prescribe very extensive contents for the two documents.	No additional costs	No benefits to be gained. The regulations could prescribe greater detail for the contents of the two documents than would be required for option 2. However, visits to premises using the new power will not have so precise an objective that we can be prescriptive for every case.

22 Regulations to prescribe the content of the statement of powers, rights and obligations and the visit record are necessary if use of the power to enter and remain on premises is to be compatible with ECHR privacy rights. As a result, the power can only be brought into force with the accompanying regulations. While it might appear that there are a number of different options with regard to the content of the two documents, in practice the content, too, must meet the need to ensure compatibility

with ECHR privacy rights. It is also necessary to avoid over-prescription. We therefore recommend option 2.

23 Declaration

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed: *Jacqui Smith*

Date: 9th March 2005

**Jacqui Smith MP, Minister of State for Industry and the Regions
Department of Trade and Industry**

Contact Details

Colin Evans
Companies Investigation Branch
Department of Trade and Industry
Room 603
10 Victoria Street
London SW1H 0NN
Email: Colin.Evans@dti.gov.uk