

*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 32: Company Investigations: Amendments

Powers to appoint inspectors

1286. The 1985 Act gives the Secretary of State the power to appoint competent inspectors to carry out inspections, and report the result to him, in a number of circumstances. There are three categories of inspections at present:
- investigations into the affairs of companies;
 - investigations into the membership or control of companies; and
 - investigations of dealings in share options by company directors and their families and failure to disclose interests in shares.
1287. Investigations by inspectors into the affairs of companies and certain other bodies corporate can be initiated under sections 431 and 432. Such inspections can be launched on the application of a company or a proportion of its members, or on the Secretary of State's own initiative, and must be carried out where the court orders it.
1288. Investigations by inspectors into the membership or control of companies can be initiated under section 442. The Secretary of State can launch such an inspection on his own initiative under section 442(1), and is obliged to do so where the requisite number of members of a company apply.
1289. Inspections in the third category, under section 446, relate to suspected contraventions of certain provisions of Part 10 of the 1985 Act. The 2006 Act repeals the relevant provisions of Part 10 (see section 1177) and section 446 is repealed in consequence.
1290. Two inspectors are generally appointed to carry out an inspection – usually a QC and a partner in one of the leading accountancy firms.
1291. Inspectors are appointed to investigate and to report the results of their investigations to the Secretary of State. At the end of an inspection, the inspectors generally have a duty to make a final report to the Secretary of State. The inspectors may also make interim reports during the course of the inspection, and the Secretary of State can direct them to do so.
1292. Unless the appointment was made under section 432 of the 1985 Act on terms that any report is not for publication (section 432(2A)) interim and final reports are publishable; the Secretary of State has discretion to publish an interim or final report under section 437(3). The availability of a published report is a crucial aspect of the inspection system.

Changes brought in by the 2006 Act

1293. The 2006 Act confers new powers on the Secretary of State to bring to an end an investigation when it is no longer in the public interest to continue with it, to revoke the appointment of an inspector and to issue directions about the scope of an investigation, its duration and certain other matters.
1294. The main purpose of these sections is to give the Secretary of State power to take appropriate action where an investigation appears to be taking too long. The sections also provide for situations not currently explicitly provided for, such as the resignation or death of inspectors, and the ability to appoint replacement inspectors.
1295. The details of these changes and the circumstances in which the changes will apply are set out below.

Section 1035: Powers of Secretary of State to give directions to inspectors

1296. *Subsection (1)* inserts new sections 446A and 446B into the 1985 Act, which provide new powers for the Secretary of State to give directions to inspectors with which they are obliged to comply (new sections 446A(1) and 446B(5)).
1297. The power in new section 446A(2) is exercisable by the Secretary of State in relation to inspectors appointed under sections 431, 432(2) and 442(1). Directions under new section 446A(2) can either relate to the investigation itself or the inspectors' reports of the results of their investigations. Regarding the former, such directions can take two forms:
- a direction as to the subject matter of an investigation (whether by reference to a specified area of a company's operation, a specified transaction, a period of time or otherwise); or
 - a direction which requires an inspector to take or not to take a specified step in his investigation.
1298. As regards inspectors' reports the Secretary of State will have a power to secure that any report (new section 446A(3)):
- includes the inspector's views on a specified matter;
 - does not include any reference to a specified matter;
 - is made in a specified form or manner; or
 - is made by a specified date.
1299. New section 446A(4) enables directions by the Secretary of State to be capable of being given on an inspector's appointment. It also provides that directions may vary or revoke a direction previously given and may be given at the request of an inspector.
1300. New section 446A(5) confirms that the scope of the term "investigation" will include any investigation undertaken under section 433(1) into the affairs of the company's holding company or subsidiary (or a subsidiary of its holding company or a holding company of its subsidiary).
1301. New section 446B(1) will give the Secretary of State power to direct an inspector to take no further steps in an investigation, and the inspector shall comply with any direction given to him under this section (new section 446B(5)). However, if the appointment of inspectors is one that the Secretary of State is obliged to make (either because a court orders that a company's affairs ought to be so investigated or because the requisite number of its members has applied for an investigation into its ownership), such a direction can only be given if matters have come to light in the course of the investigation which suggest that a criminal offence has been committed

and those matters have been referred to the appropriate prosecuting authority (new section 446B(2)).

1302. Under new section 446B(3), any direction given to the inspector under section 437(1) to produce an interim report, and any direction under new section 446A(3) in relation such a report, shall cease to have effect.
1303. If the Secretary of State directs an inspector to take no further steps in an investigation then the inspector shall not make a final report to him unless:
- the requisite number of a company's members has applied for an investigation into its ownership, matters have come to light in the course of the investigation which suggest that a criminal offence has been committed, those matters have been referred to the appropriate prosecuting authority and the Secretary of State directs the inspectors to make a final report; or
 - the inspector was appointed following a court order that a company's affairs ought to be investigated (new section 446B(4)).
1304. New section 446B(6) confirms that the scope of the term "investigation" will include any investigation undertaken under section 433(1) into the affairs of the company's holding company or subsidiary (or a subsidiary of its holding company or a holding company of its subsidiary).
1305. *Subsections (2) to (5)* concern consequential changes to other sections within the 1985 Act.

Section 1036: Resignation, removal and replacement of inspectors

1306. This section inserts new sections 446C and 446D which provide for the resignation or revocation of an inspector's appointment and the provision to replace an inspector.
1307. New section 446C(1) and (2) provides not only that an inspector may resign but also that the Secretary of State has the power to revoke his appointment.
1308. New section 446D(1) provides that, if an inspector resigns, dies or has his appointment revoked, the Secretary of State has the power to appoint a replacement inspector to continue the investigation. Any appointment which takes place under new *subsection (1)* will be treated as though it were made under the provision under which the former inspector were appointed (new section 446D(2)).
1309. The Secretary of State is obliged to ensure that at least one inspector continues the investigation (new section 446D(3)) unless such a step would be pointless because he could direct the termination of the investigation in circumstances which would result in a final report not being made (new section 446D(4)).
1310. New section 446D(5) confirms that the scope of the term "investigation" will include any investigation undertaken under section 433(1) into the affairs of the company's holding company or subsidiary (or a subsidiary of its holding company or a holding company of its subsidiary).

Section 1037: Power to obtain information from former inspectors etc

1311. *Subsection (1)* inserts new section 446E into the 1985 Act.
1312. New section 446E(1) provides that, where an inspector resigns or has his appointment revoked or is given a direction under section 446B (termination of an investigation) (new section 446E(2)), the Secretary of State can direct him to hand over documents that he has obtained or generated during the course of his investigation, either to the Secretary of State or to another inspector appointed under this Part (new section 446E(3)).

1313. A requirement under new *subsection (3)* includes the power to ensure that the production of a copy of the document is made in hard copy or in a form from which a hard copy can be obtained (new section 446E(4)). A document includes information recorded in any form (new section 446E(7)(b)). New section 446E(5) enables the Secretary of State to direct any person to whom this section applies to inform him of any matters that came to that person's attention as a result of the investigation. New section 446E(6) confirms that a person shall comply with any direction given to him under this section.
1314. New section 446E(7)(a) confirms that the scope of the term "investigation" will include any investigation undertaken under section 433(1) into the affairs of the company's holding company or subsidiary (or a subsidiary of its holding company or a holding company of its subsidiary).
1315. *Subsections (2) and (3)* concern consequential changes to other sections within the 1985 Act.

Section 1038: Power to require production of documents

1316. The 2006 Act introduces a new definition for documents in hard copy form, (see section 1135). This section ensures that there is a consistent approach in existing investigation provisions where there is a requirement to produce documents.

Section 1039: Disqualification orders: consequential amendments

1317. *Subsections (a) and (b)* extend the Company Directors Disqualification Act 1986 so that decisions on whether to take action to disqualify directors can be taken on the basis of information that was obtained or generated by an inspector (or came to his knowledge) as a result of his investigation, notwithstanding whether such information is or will be included in any formal report. In some cases this may speed up the ability to seek to disqualify directors.