

EXPLANATORY MEMORANDUM TO
THE COMPANIES ACT 2006 AND LIMITED LIABILITY PARTNERSHIPS
(TRANSITIONAL PROVISIONS AND SAVINGS) (AMENDMENT)
REGULATIONS 2009

2009 No. 2476

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

2.1 This instrument makes minor amendments to the Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (“the 2008 Order”) (S.I. 2008/2860 (C.126)) and to transitional provisions in the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (“the 2009 LLP Regulations”) (S.I. 2009/1804).

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

3.1 None

4. **Legislative Context**

4.1 The Regulations make amendments in three areas:

- in respect of property of a dissolved company or limited liability partnership;
- in respect of entrenched provisions of a company’s articles of association;
- in respect of company and business names suggesting a connection with the Welsh Assembly Government.

4.2 Section 1012 of the Companies Act 2006 (“the 2006 Act”) provides for the property of a dissolved company to vest in the Crown as if it were bona vacantia. Sections 1013 to 1022 provide for the disclaimer by the Crown of title to such property and the effects of disclaimer. Sections 1012 to 1022 re-enact, with modifications, corresponding provisions of the Companies Act 1985 and the Companies (Northern Ireland) Order 1986 (S.I. 1986/1032 (N.I. 6)). In particular, there are changes to the time periods within which the appropriate Crown representative must disclaim title to such property.

4.3 Transitional provisions in paragraph 88 of Schedule 2 to the 2008 Order provide for sections 1012 to 1022 of the 2006 Act to apply in relation to the property of a company dissolved on or after 1st October 2009, and for the

provisions replaced by those sections to continue to apply in relation to the property of a company dissolved before that date.

4.4 Sections 1012 to 1023 of the 2006 Act were applied to limited liability partnerships by regulations 52 to 55 of the 2009 LLP Regulations. Paragraph 22 of Schedule 1 to those Regulations provides for transitional provisions corresponding to those for company property.

4.5 The 2006 Act introduces new rules about entrenched provisions in company articles, including those that would have been in the memorandum of association under the Companies Act 1985. The 2008 Order commences those provisions on 1 October 2009.

4.6 Section 26(2)(a) of the Companies Act 1985 and Section 2(1)(a) of the Business Names Act 1985 require prior approval for names that suggest a connection with Her Majesty's Government or any local authority. These provisions were amended by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007 (S.I. 2007/1388), so that prior approval is also required for names that suggest a connection to the Welsh Assembly Government. The 2006 Act has not yet been similarly amended.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

Property of a dissolved company or limited liability partnership

7.1 Regulation 2(1) and (3) replaces the transitional provisions and savings relating to sections 1012 to 1023 of the 2006 Act which come into force on 1st October 2009. Regulation 2(1) and (3) changes the transitional provisions as they relate to the property of a company dissolved before 1st October 2009. The new law on disclaimer will apply in relation to such property if, at 1st October 2009, the appropriate Crown representative has neither had notice that the property has vested in the Crown, nor received an application to consider disclaimer nor waived the right to disclaim. The old law will continue to apply in cases where the new law does not apply.

7.2 The amendments reflect concerns that the approach in the 2008 Order might cause practical difficulties because of the way it continues to apply the old time limits for disclaimer to the property of all companies dissolved before the new law comes into force (on 1st October 2009). There can be a lengthy period of time between a company being dissolved and the relevant Crown

representative receiving notice of the existence of assets, or possible assets, of the company. This might have the practical effect of keeping the old law alive - in parallel with the new law - for potentially a very long time. This would affect Crown representatives, but might also cause uncertainty for solicitors dealing with bona vacantia and therefore additional expense for their clients.

7.3 Regulation 2(1) and (3) also replaces the transitional provision relating to section 1023, but the effect remains the same.

7.4 Regulation 3 makes corresponding changes for limited liability partnerships.

Entrenchment and class rights

7.5 Under the 2006 Act, if there are provisions in a company's articles that cannot be changed by a special resolution, then there is a provision for entrenchment. And under section 22(2) of the 2006 Act, provisions for entrenchment can only be introduced into articles either on formation or by unanimous agreement of all members of the company.

7.6 It has been suggested to the Department that the definition of "provision for entrenchment" might catch rules governing class rights that appear in articles, even though class rights are covered in Chapter 9 of Part 17 of the 2006 Act. This could have the unintended consequence of making it difficult to create or modify rules for classes of shares.

7.7 The Regulations therefore amend the 2008 Order so as to stop section 22(2) of the Companies Act 2006 ("the 2006 Act") from coming into force on 1st October 2009. The Department will consider and consult further about section 22(2).

Company and Business Names

7.8 Regulation 3(4) preserves the effect of amendments made under the Government of Wales Act 2006 so that prior approval of the Secretary of State is required for a company's registered name or the business name of any person, whether or not incorporated, if the name suggests a connection with the Welsh Assembly Government. This provision will apply only until an instrument under the Government of Wales Act 2006 amends the Companies Act 2006 so that the prior approval of the Secretary of State is required for such names. This is necessary to avoid a hiatus.

8. Consultation

8.1 The Department published a consultation paper inviting comments on its proposed changes to the transitional provisions in respect of property of a dissolved company or limited liability partnership. Four responses were received, all supporting the proposals.

8.2 The Department also sent a paper in respect of entrenched provisions of a company's articles of association to interested parties and to members of the Companies Act Implementation Advisory Group. Two responses were received, agreeing with the proposal to postpone commencement of section 22(2).

9. Guidance

9.1 Companies House publishes guidance on its website <http://www.companieshouse.gov.uk/> in respect of the areas covered by the Regulations. The guidance will be revised in line with this Instrument. The Department will in addition publish FAQs on its website.

10. Impact

10.1 The Regulatory Impact Assessment relating to the Companies Act 2006 (<http://www.berr.gov.uk/files/file29937.pdf>), provisions of which are commenced by this Order, is available on the Department's website <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/faq%20Act%202006/page38139.html> .

11. Regulating small business

11.1 The legislation applies to small business.

11.2 This order does not add any additional burdens to small business.

12. Monitoring & review

12.1 This Instrument will be reviewed, from 2011, as part of the Department's evaluation of the Companies Act 2006.

13. Contact

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