



THE INSTITUTE
OF CHARTERED
ACCOUNTANTS
IN ENGLAND AND WALES

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Our ref: ICAEW Rep 96/08

Your ref:

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By email to companiesact2006_consultation@berr.gsi.gov.uk

Dear Adam

THE COMPANIES ACT 2006 (COMMENCEMENT NO. 8, TRANSITIONAL PROVISIONS AND SAVINGS) ORDER 2008

The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the draft *Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008* published by BERR in June 2008.

The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.

The Institute has reviewed the capital maintenance aspects of the draft Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (sections 540 to 737 of the Companies act 2006 (CA06), which correspond to Articles 38 to 79 of the draft Order) and have the following comments.

Comments on the draft Articles

Article 63

We query the need for Article 63, sub-clause (1)(b) of which would require that (where the company's articles do not prohibit a reduction of share capital) the company must pass two separate special resolutions in order to reduce its share capital by the court-sanctioned route under section 641(1)(b) CA06.

We note that, for example, Article 72 provides that an equivalent special resolution is required to authorise the purchase of own shares under section 690 CA06. However, this requirement for a special resolution provides transitional protection because section 690 CA06 only requires an ordinary resolution for such purchase.

Given a 75% majority is already needed to pass the special resolution to reduce share capital under section 641(1)(b) CA06, we believe there is no need for protection in the form of a requirement for this to be preceded by a separate additional special resolution to authorise the company to reduce its share capital. We believe this will lead to unnecessary additional bureaucracy and therefore we consider that article 63 should be deleted.

We note that, if Article 63(1) is to be retained, Article 63(3) needs to be clarified as to which special resolution in Article 63(1)(b) must to be passed prior to 1 October 2009 - the resolution to authorise the reduction, or the resolution to reduce the capital.

Article 66

In sub-clause 66(1) there is reference to an “event” mentioned in section 668 CA06. We query whether this is intended to include the re-registration of the company as a public company, in addition to the events in 668(a) to (d). We believe this transitional provision should cover situations where an event in (a) to (d) has occurred prior to 1 October 2009, and the company subsequently re-registers as a public company on or after that date, and therefore we consider that this Article should be clarified to expressly provide that an “event” mentioned in section 668 includes the re-registration of the company as a public company.

Suggested additional transitional measures

Unless the following measures are covered by the general ‘continuation of law’ provisions in section 1297 of the Act, we believe transitional provisions are or may be needed in respect of certain sections of CA06, and savings are or may be needed in respect of the predecessor provisions for certain sections of CA06, as explained below.

Sections 588, 589, 605 and 606

We believe a saving is needed in respect of the predecessor provisions from the Companies Act 1985 (1985 Act) (ie sections 112 and 113 of the 1985 Act) in order for subsequent holders of shares issued in contravention of the 1985 Act to be held liable going forward. Alternatively, a transitional provision could be included such that sections 588, 589 605 and 606 CA06 cover contraventions of ss112 and 113 of the 1985 Act.

Section 593

There can be a six month period between valuation of the non-cash consideration and the allotment of the shares. We believe a saving may be needed in respect of the 1985 Act valuation provision (section 103 of the 1985 Act), to cover situations where the valuation occurs under the 1985 Act, but the allotment occurs on or after 1 October 2009 under the 2006 Act. Alternatively, a transitional provision could be included for section 593 CA06, so that this includes valuations under s103 of the 1985 Act.

Section 598

The “initial period” can be up to two years and may straddle 1 October 2009. We believe a saving may be needed to preserve the equivalent requirements of the 1985 Act for transfer of non-cash assets (section 104 of the 1985 Act) in relation to the portion of the “initial period” that falls before 1 October 2009.

Section 612

We query what constitutes the trigger event that determines whether transactions falls under the merger relief provisions of the 1985 Act or the CA06; the issue or the allotment of the relevant shares? The section addresses the treatment of premiums on issue but is also phrased with reference to allotment. We believe that a transitional provision is needed to clarify this.

Section 726

We query why there is no transitional provision in respect of the exercise of rights of treasury shares (under section 726 CA06). We note that there are transitional provisions in relation to disposal of treasury shares under s727 (Article 78) and their cancellation under section 730 CA06 (Article 79), and we believe there should be a transitional provision clarifying that s726 CA06 applies to the exercise of rights on or after 1 October 2009.

Please contact me should you wish to discuss any of the points raised in this response.

Yours sincerely



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