

2003 No. 3031

COMPANIES

**The Companies (Acquisition of Own Shares)
(Treasury Shares) No. 2 Regulations 2003**

Made - - - - - 25th November 2003
Laid before Parliament 26th November 2003
Coming into force - - 18th December 2003

The Secretary of State, being a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to measures relating to the acquisition by companies of their own shares, and to distributions to their shareholders, in exercise of the powers conferred on her by section 2(2) of that Act and of all other powers enabling her in that behalf, hereby makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Companies (Acquisition of Own Shares) (Treasury Shares) No. 2 Regulations 2003 and shall come into force on 18th December 2003.

(2) In these Regulations, “the 1985 Act” means the Companies Act 1985^(c).

Amendment and operation of section 89

2.—(1) In section 89 of the 1985 Act (offers to shareholders to be on a pre-emptive basis^(d), for section 89(6) substitute—

“(6) Where a company holds relevant shares as treasury shares—

(a) for the purposes of subsections (1) and (2), the company is not a “person who holds relevant shares”; and

(b) for the purposes of subsection (1), the shares held as treasury shares do not form part of “the aggregate of relevant shares and relevant employee shares”.”.

(2) Where—

(a) a company holds relevant shares as treasury shares, and

(b) immediately before these regulations came into force, its memorandum or articles included a provision that met the requirements of subsection (2) of section 89 of the 1985 Act,

that provision shall have effect as if it had been modified so as to comply with the requirements of that subsection as it has effect after these Regulations came into force.

(a) S.I. 1999/654.

(b) 1972 c. 68: as amended by the European Economic Area Act 1993 (c. 51).

(c) 1985 c. 6.

(d) Section 89(6) was inserted by paragraph 4 of the Schedule to the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 (S.I. 2003/1116).

Amendment of section 169

3.—(1) Paragraph 12(4) of the Schedule to the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 is revoked and the words inserted in section 169(3) of the 1985 Act by that sub-paragraph are repealed.

(2) In section 169(3) of the 1985 Act (disclosure by company of purchase of own shares) after “single return” insert “under either subsection (1) or (1B)”.

Amendment of section 323

4. In section 323 of the 1985 Act (prohibition on directors dealing in share options) after subsection (5) insert—

“(6) This section is not to be taken as penalising a director of a company who buys a right to call for delivery at a specified price within a specified time of a specified number of shares held as treasury shares by the company or by a relevant company which is that company’s subsidiary or holding company or a subsidiary of that company’s holding company.

(7) For the purposes of subsection (6)—

- (a) “relevant company” means a company listed in Article 1 of Council Directive 77/91/EEC(a); and
- (b) shares of a relevant company (other than a company within the meaning of section 735(1)) are held as treasury shares if—
 - (i) they fall within section 162(4)(a) to (d) (qualifying shares); and
 - (ii) they are held by the relevant company in accordance with provisions of the law of a member State implementing Articles 19 to 22 of that Directive.”.

Amendment of section 428

5. For section 428(2) of the 1985 Act (takeover offers)(b) substitute—

“(2) In subsection (1) “shares” means shares (other than relevant treasury shares) which have been allotted on the date of the offer, but a takeover offer may include among the shares to which it relates—

- (a) all or any shares that are allotted after the date of the offer but before a specified date;
- (b) all or any relevant treasury shares that cease to be held as treasury shares before a specified date;
- (c) all or any other relevant treasury shares.

(2A) In this section—

“relevant treasury shares” means shares which—

- (a) are held by the company as treasury shares on the date of the offer; or
- (b) become shares held by the company as treasury shares after that date but before a specified date;

“specified date” means a date specified in or determined in accordance with the terms of the offer.”.

Amendment of section 429

6. In section 429 of the 1985 Act(c) (right of offeror to buy out minority shareholders)—

- (a) in subsection (1) delete “(excluding any shares in the company held as treasury shares)”; and
- (b) in subsection (2) delete “(excluding any shares in the company held as treasury shares)”.

(a) OJ L 26/77 with amendments 291/79, 345/80, 302/85, 347/92.

(b) Section 428 was substituted by section 172 of, and Schedule 12 to, the Financial Services Act 1986 (c. 60).

(c) The words in section 429 deleted by this provision were inserted by paragraph 26 of the Schedule to the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003.

Amendment of section 430A

7.—(1) In section 430A of the 1985 Act (right of minority shareholder to be bought out by offerer)^(a)—

(a) at the end of subsection 1(b) delete “(excluding any shares in the company held as treasury shares)”; and

(b) at the end of subsection (2)(b) delete “(excluding any shares in the company held as treasury shares)”.

(2) Insert after subsection (1)—

“(1A) For the purposes of subsection (1), a takeover offer relates to all the shares in a company if it is an offer to acquire all the shares in the company within the meaning of section 428.”.

(3) Insert after subsection (2)—

“(2A) For the purposes of subsections (1) and (2), in calculating nine-tenths of the value of all the shares in the company, or all the shares of any class or classes of shares of the company, any shares held by the company as treasury shares shall be treated as having been acquired by the offeror.”.

Jacqui Smith,
Minister of State for Industry and the Regions
and Deputy Minister for Women and Equality,
Department of Trade and Industry

25th November 2003

^(a) The words in section 430A deleted by this provision were inserted by paragraph 27 of the Schedule to the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations further implement Council Directive 77/91/EEC (OJ No. L26, 31.1.77, p.1) as amended by 92/101/EEC (OJ No. L347, 28.11.92, p.64) on co-ordination of safeguards which, for the protection of members and others, are required by member states of companies in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. The Regulations supplement Regulations made earlier this year—The Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 (S.I. 2003/1116)—by making further amendments to the Companies Act 1985 (c. 6) (“the 1985 Act”). The earlier Regulations amended the 1985 Act to permit certain public companies to hold shares in treasury following a purchase of own shares as an alternative to cancelling such shares on purchase.

Regulation 2 replaces section 89(6) of the 1985 Act (inserted by the earlier Regulations) with a new subsection (6) which seeks to ensure that when a company holding treasury shares allots new securities all those securities must be offered to existing shareholders (other than the company itself) in proportion to their existing shareholding. Regulation 3 revokes paragraph 12(4) of the Schedule to S.I. 2003/1116 and amends section 169(3) of the 1985 Act to clarify the change to section 169(3) made by the revoked provision. Regulation 4 amends section 323 of the 1985 Act by allowing a director to buy a right to call for the delivery of shares held as treasury shares. Regulation 5 amends the definition of “shares” in section 428(2) of the 1985 Act to provide that treasury shares may either be included in, or excluded from, a takeover offer as defined in section 428(1). Regulations 6 and 7 delete the provisions made by the earlier Regulations in respect of sections 429 and 430A of the 1985 Act to take account of the changes made to section 428(2) and make provision for the circumstances in which the right of the minority shareholder to be bought out by an offeror under section 430A can be exercised where treasury shares are held by the company in respect of whose shares the offer is made.

A Regulatory Impact Assessment of these Regulations is available from the Department of Trade and Industry, Corporate Law and Governance Directorate, Room 507, 1 Victoria Street, London SW1H 0ET. A copy has also been placed in the libraries of both Houses of Parliament. Transposition Notes for S.I. 2003/1116 setting out how those Regulations further implemented Council Directive 77/91/EEC were placed in the libraries of both Houses of Parliament and are also available from the above address. The notes are unaffected by these Regulations.

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