

2009 No. 2561

COMPANIES

The Companies Act 2006 (Allotment of Shares and Right of Pre-emption) (Amendment) Regulations 2009

<i>Made</i>	- - - -	<i>21st September 2009</i>
<i>Laid before Parliament</i>		<i>23rd September 2009</i>
<i>Coming into force</i>	- -	<i>1st October 2009</i>

The Secretary of State is a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to the creation, operation, regulation or dissolution of companies and other forms of business organisation.

In exercise of the powers conferred by that section, the Secretary of State makes the following Regulations.

Citation and commencement

1.—(1) These Regulations may be cited as the Companies Act 2006 (Allotment of Shares and Right of Pre-emption) (Amendment) Regulations 2009.

(2) These Regulations come into force on 1st October 2009.

Amendments of the Companies Act 2006

2.—(1) In section 549 of the Companies Act 2006(c) (exercise by directors of powers to allot shares etc), for subsection (3) substitute—

“(3) Subsection (1) does not apply to the allotment of shares pursuant to a right to subscribe for, or to convert any security into, shares in the company.”.

(2) In section 560 of that Act (meaning of “equity securities” and related expressions), for subsection (2) substitute—

“(2) References in this Chapter to the allotment of equity securities—

(a) include the grant of a right to subscribe for, or to convert any securities into, ordinary shares in the company, and

(b) do not include the allotment of shares pursuant to such a right.

(3) References in this Chapter to the allotment of equity securities include the sale of ordinary shares in the company that immediately before the sale were held by the company as treasury shares.”.

(a) S.I. 2007/193.

(b) 1972 c. 68. The enabling powers of section 2(2) were extended by virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c. 51).

(c) 2006 c. 46.

(3) In section 561 of that Act (existing shareholders' right of pre-emption), omit subsection (3).

(4) For section 566 of that Act (exception to pre-emption right: securities held under employees' share scheme) substitute—

“Exceptions to pre-emption right: employees' share schemes

566. Section 561 (existing shareholders' right of pre-emption) does not apply to the allotment of equity securities that would, apart from any renunciation or assignment of the right to their allotment, be held under or allotted or transferred pursuant to an employees' share scheme.”

(5) In section 573(1) of that Act (disapplication of pre-emption rights: sale of treasury shares), for “section 560(2)(b)” substitute “section 560(3)”.

(6) In Schedule 8 to that Act (index of defined expressions), in the second column of the entry relating to the expression “allotment of equity securities (in Chapter 3 of Part 17)”, for “section 560(2)” substitute “section 560(2) and (3)”.

21st September 2009

Ian Lucas
Minister for Business and Regulatory Reform,
Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend provisions of the Companies Act 2006 (“the Act”) relating to the exercise by the directors of a company of the company’s power to allot shares and to the qualified right of pre-emption which the existing shareholders of a company have when the company allots equity securities.

Regulation 2(1) amends section 549. Section 549 imposes conditions on the exercise by directors of a company’s power to allot shares. As it relates to public companies, section 549 forms part of the implementation of Article 25 of Council Directive 77/91/EEC (OJ L26, 31.1.1977, p.1) (“the Directive”). In exercise of the power to derogate in Article 41 of the Directive, the conditions are not intended to apply in any circumstances to the allotment of shares in pursuance of an employees’ share scheme or to the grant of a right to subscribe for, or to convert any security into, shares allotted in pursuance of such a scheme. However the drafting of section 549 does not make it clear that the conditions do not apply in any circumstances to allotments made pursuant to a right to subscribe for shares or a right to convert any security into shares. Regulation 2(1) therefore replaces section 549(3) in order to make this clear.

Regulation 2(2) to (5) amends Chapter 3 of Part 17 of the Act, which deals with the right of pre-emption of existing shareholders of a company which arises where the company allots equity securities. As it relates to public companies, that Chapter implements Article 29 of the Directive, exercising the power to derogate in Article 41. Regulation 2(2) amends section 560(2), which is concerned with what is meant by the allotment of equity securities. Because of Article 29(6) of the Directive, the right of pre-emption is not intended to arise in any circumstances where shares are allotted in pursuance of a right to subscribe for shares or to convert securities into shares. However, section 561(3) provides that such allotments are only exempt where the grant of the right to subscribe or convert itself triggered the application of the right of pre-emption. This is corrected by regulation 2(2), which qualifies what is meant by the allotment of equity securities, and by regulation 2(3) which repeals section 561(3).

Regulation 2(5) and (6) makes consequential amendments.

Regulation 2(4) replaces section 566. Section 566 exempts from the existing shareholders’ right of pre-emption the allotment of securities that would (apart from any renunciation or assignment of the right to their allotment) be held under an employees’ share scheme. This is intended to exercise the power to derogate in Article 41 of the Directive. However, section 566 as enacted does not exempt allotments which are to be made pursuant to an employees’ share scheme or transfers of treasury shares pursuant to such a scheme. It is also not clear whether section 566 exempts the grant of an option to subscribe for shares pursuant to an employees’ share scheme. Regulation 2(4) corrects these defects.

These Regulations amend the provisions of the Act as they apply to both public and private companies.

The amendments made by these Regulations mean that the relevant provisions of the Act have the same effect as the corresponding provisions of the Companies Act 1985 and the Companies (Northern Ireland) Order 1986 (S.I. 1986/1032 (N.I. 6)) which they replace. Therefore no impact assessment has been prepared.

STATUTORY INSTRUMENTS

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£4.00