

**THE REGULATORY REFORM (EXECUTION OF DEEDS AND DOCUMENTS)
ORDER 2005**

**STATEMENT BY THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS ('THE
DEPARTMENT')**

INTRODUCTION

This statement is laid before Parliament in accordance with section 8(5) of the Regulatory Reform Act 2001 ("the 2001 Act") together with the draft of the Regulatory Reform (Execution of Deeds and Documents) Order 2005 ("the draft Order") for approval by each House under section 4(2) of the 2001 Act.

PROPOSAL

1. The purpose of the draft Order is to simplify and clarify the law relating to the execution of deeds and documents by and on behalf of bodies corporate. The draft Order will amend overlapping provisions of section 74 of the Law of Property Act 1925, section 36A of the Companies Act 1985 and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. This will remove restrictions on corporations and companies and promote consistency between the Acts, reducing uncertainty in the law. The proposals will also trigger a range of minor and consequential amendments, which will affect, among others, the above-mentioned Acts and the Powers of Attorney Act 1971. The proposals implement recommendations made by the Law Commission in its report, 'The Execution of Documents and Documents by and on behalf of bodies Corporate (Law Com No 253).

BACKGROUND

2. In accordance with section 6 of the 2001 Act a document was laid before Parliament on 21 July 2004 in the form of a draft Order and an explanatory document. Reports were subsequently made to Parliament by the Regulatory Reform Committee of the House of Commons (Fourteenth Report of Session 2003-04) and the Select Committee on Delegated Powers and Regulatory Reform of the House of Lords (Thirty-fourth Report of Session 2003-2004).

BURDENS TO BE REMOVED OR REDUCED

Execution of deeds by corporations

3. Section 74(1) of the Law of Property Act 1925 provides that in favour of a purchaser a deed is presumed to be validly executed by a corporation if the affixing of its seal is attested by a director and the company secretary or similar officer. By contrast, section 36A(4) of the Companies Act 1985, which deals with the signature of company documents, permits the alternative of signature by two directors. The requirement that the secretary must attest is a restriction on corporations in carrying on their business. Section 74(1) is further restricted, and inconsistent with section 36A(4), in that the latter applies to any document, whether or not it is a deed, whereas the presumption in favour of purchasers in section 74(1) is expressly restricted to deeds. Further, section 74(1) and 36A(4) appear to envisage that the officers of a company will be natural persons. This imposes a restriction where the officers are bodies corporate.

4. Article 3 of the draft Order will remove the restriction requiring attestation by the secretary by amending section 74(1) of the Law of Property Act 1925, thus allowing the attestation of a seal by two directors, in addition to the present arrangement of a single director and secretary. Paragraphs 2 and 11 of the Schedule to the draft Order will remove the restriction relating to corporate directors and secretaries by allowing an authorised individual to sign on their behalf. The article also removes the restriction on the presumption in favour of purchasers in that it applies to all documents. The effect of the proposals will remove burdens under section 1(1)(a) of the 2001 Act.

Irrebuttable presumption of delivery

5. Section 36A(6) of the Companies Act 1985 provides that, in favour of a purchaser, a document, which has been duly executed by a company, is presumed to have been delivered on its being executed. The presumption cannot be rebutted. This presumption imposes a restriction on companies, preventing them from delaying delivery where this is appropriate. Moreover, it is inconsistent with the scheme of delayed delivery introduced by the Law of Property (Miscellaneous Provisions) Act 1989. Nor is there any comparable presumption contained in section 74(1) of the Law of Property Act 1925. Article 5 of the draft Order will remove this restriction by amending section 36A(6) of the Companies Act 1985, thereby removing the irrebuttable presumption of delivery. This is the removal of a burden under section 1(1)(a) of the 2001 Act. The proposal does not re-enact or create any new burdens.

Execution on behalf of another person

6. Section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 requires a deed to be validly executed as a deed by the person making it or the parties to it. However, it makes no reference to a deed being executed on behalf of such a person or parties. This appears to impose a restriction on a person who wishes to make a deed, or the parties to the deed, in that it prevents them from delegating the task of execution
7. Section 7(1) of the Powers of Attorney Act 1971 deals with the execution of instruments by someone who has been given a power of attorney to act for a person. However, it refers to the signature of the person giving the power. This is not appropriate where that person is a corporation, which does not execute instruments through its own signature. Although ignored in practice, this imposes a restriction on corporations granting powers of attorney. Section 7(3) gives rise to a further restriction of this nature in the specific case of conveyances.
8. Article 7(3) of, and paragraphs 6 to 8 of Schedule 1 to, the draft Order will remedy these difficulties firstly, by amending section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989, to provide that an instrument may be a deed if validly executed in the name or on behalf of the person making it or the parties to it; and secondly, by amending section 7 of the Power of Attorney Act 1971, so as to make more appropriate provision for execution by an individual attorney on behalf of a corporate donor. Section 7(3) is repealed This is the removal of a burden under section 1(1)(a) of the 2001 Act.

Execution under seal not evidence of intention to create a deed

9. Section 1(2)(a) of the Law Reform (Miscellaneous Provisions) Act 1989 imposes a requirement that, in order to be a deed, an instrument must make clear on its face that it is intended to be a deed. It is not clear whether the mere use of a seal in executing a document indicates such an intention. It is undesirable that whenever a corporation executes a document under seal it should have a particular significance and be treated as a deed. It is not thought that the Act was intended to have that result. Article 8 of the draft Order will remedy this situation by amending section 1(2) of the 1989 Act. The amendment will provide that an instrument shall not be taken to have made clear on its face that it is intended to be a deed simply by virtue of its having been executed under seal. The requirement for the valid execution of a deed is unaffected by the amendment. No new burden is created. The Regulatory Reform Committee of the House of Commons did, however, state that the proposal was more akin to a supplemental measure than the removal or reduction of a burden.

Extension of presumption of authority to deliver

10. Section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 creates an irrebuttable presumption of authority to deliver an instrument as a deed. It provides that where, in a transaction involving land, a person, such as a solicitor or a licensed conveyancer, purports to deliver an instrument as a deed on behalf of a party to the instrument, the person is authorised to deliver it. However, this presumption is restricted to transactions involving the creation or disposal of an interest in land and does not apply to other transactions. Section 1(5) therefore imposes a burden by restricting the scope of their authority. Article 9 of the draft order will lift this restriction by removing the reference in section 1(5) of the 1989 Act to transactions “involving the disposition or creation of an interest in land”. This is the removal of a burden under section 1(1)(a) of the 2001 Act. The proposal does not re-enact or create any new burdens.

NEW BURDENS TO BE IMPOSED

Signature of directors and secretaries representing more than one company

11. Section 36A(4) of the 1985 Act appears to allow the director or secretary of more than one company to sign once for all of the companies which are parties to the deed. Paragraph 10 of Schedule 1 imposes a new burden by requiring a director or secretary of more than one company to sign separately for each company, which is a party to a deed.

PARLIAMENTARY REPORTS (Section 8(5)(a) of the 2001 Act)

12. The Regulatory Reform Committee of the House of Commons reported on 16 November (Fourteenth Report of Session 2003-04). The Committee concluded that the proposal was appropriate for delegated legislation and involved the removal of burdens within the terms of the 2001 Act. The Committee confirmed that the Department had correctly described four of the five burdens that will be removed by the draft Order. The provision relating to the “face value requirement” was, however, viewed by the Committee as utilising the power under section

1(6)(c) of the 2001 Act rather than the power regulating the removal of a burden. They also confirmed that anomalies in current legislation were correctly described and that the proposal would remove them. The Committee concluded unanimously that a draft Order in the form of the proposal should be laid before the House.

13. The Committee was satisfied that the Department had consulted adequately on the proposal. They also concluded that the proposal was compatible with obligations resulting from membership of the European Union. The Committee was satisfied that the draft Order, if enacted, would not prevent the exercise of any right or freedom, which a person might reasonably expect to continue to exercise. The Committee was also satisfied that the Department had taken proper account of the financial implications of the proposal and any other benefits, which may result from its implementation.
14. The Committee did however, question the categorisation of the clarification of the removal of the “face-value requirement” (paragraph 9 above refers) as the removal of a burden, and whether this element of the proposal uses the power in section 1(1)(a) of the 2001 Act. They considered that it might be better regarded as using the power in section 1(6)(c) of the 2001 Act to make incidental or supplemental provision.

Departmental Response

15. The Department agrees that clarification of an uncertainty is not a typical example of removing a burden.

The House of Lords’ Select Committee on Delegated Powers and Regulatory Reform

16. The Delegated Powers and Regulatory Reform Committee of the House of Lords reported on 12 November (Thirty Fourth Report of Session 2003-04). The Committee concluded that the proposal is an appropriate use of the 2001 Act and meets its requirements.
17. The Committee agreed that burdens imposed under section 74(1) of the 1925 Act and section 36A of the 1985 Act in relation to the execution of deeds by corporations and the irrebuttable presumption of delivery will be removed by the draft Order. They also agreed there was no loss of necessary protection arising from these amendments.
18. The Committee was also satisfied that burdens imposed by section 7 of the 1971 Act and section 1 of the 1989 Act in relation to execution on behalf of another person will be removed by the draft Order. They also agreed that necessary protection would be maintained, in the case of section 1, and increased, in the case of section 7, under these proposals. The Committee agreed that, although not typical, the removal of the face-value requirement in section 1 of the 1989 Act might be regarded as the removal of a burden, and that its removal would increase necessary protection.
19. The Committee also agreed that the removal of the restriction on the presumption of authority to deliver in section 1 of the 1989 Act will increase necessary protection.

20. The Committee noted the imposition of a new burden requiring a director or secretary of more than one company to sign separately for each. They agreed that the new burden would enhance protection. Although the Committee considered that the Department should have applied the fair balance test by considering the effect of the whole order rather than only the effect of the new burden, they agreed that the new burden meets the tests of proportionality, fair balance and desirability.
21. The Committee agreed that the removal of various inconsistencies between the main Acts would increase necessary protection.
22. The Committee also agreed that the draft Order would not prevent the exercise of any rights or freedoms, but would also, in some instances, encourage greater freedom. They were also satisfied that the Department had consulted adequately.
23. The Committee asked the Department to provide an account of why it thought the proposed Order was compatible with EU obligations. The Committee were satisfied with the Department's response.

REPRESENTATIONS MADE DURING THE PERIOD OF PARLIAMENTARY CONSIDERATION (Section 8(5)(a) of the 2001 Act)

24. No representations were received by the Department concerning the proposal during the period of Parliamentary consideration.

CHANGES MADE TO THE DRAFT ORDER (Section 8(5)(b) of the 2001 Act)

25. The Department's legal adviser has amended recital (d) of the draft Order to indicate the representations made to the House of Commons Regulatory Reform and the House of Lords Delegated Powers and Regulatory Reform Committees. The draft Order has also been amended to confirm that it will be laid before Parliament under section 4(2) of the 2001 Act.

PUBLICITY STRATEGY

26. If the draft Order is approved by both Houses of Parliament the Department proposes to issue a press release as soon as the Order is made, to ensure the implications of the Order are widely known. The Department will also write to the individuals and organisations that responded to the consultation paper affected by the proposal, to confirm the Order coming into force.

Department for Constitutional Affairs

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