

**TREASURY SHARES: CHANGES TO THE DRAFT REGULATIONS INCLUDED
IN THE CONSULTATIVE DOCUMENT URN 01/500 OF SEPTEMBER 2001**

The revised regulations that the Government proposes to lay before Parliament are at Annex A to this document below. It is intended that the regulations be laid before Parliament in Spring 2003 and will come into force later in the year on the same day that Finance Bill legislation making consequential changes to tax law comes into force.

Annex A to the September 2001 consultative document set out a series of questions. These are reproduced below together with a commentary by DTI on whether, and if so how, the draft regulations included with that consultative document have been amended. Various other drafting amendments to the regulations, which do not affect their substance, have been made.

Q1 Have you any comments on the draft Regulatory Impact Assessment (RIA) at Annex E? In particular, what are your estimates of the savings or other benefits (or any costs) that would be expected to result from the proposed regulations? Paragraph 6 of the RIA sets out the comments that were previously received on savings. Comments are also sought on the regulatory impact of the proposed tax treatment. (Paragraph 1.7 of the consultative document.)

Figures provided by consultees will be referred to in the revised Regulatory Impact Assessment to be laid before Parliament at the same time as the regulations.

Q2 Do you consider that there is likely to be any demand to finance the purchase of shares for holding in treasury from the proceeds of a fresh issue of shares and, if so, should this option be included in the regulations? If yes, what are your views on the treatment of the proceeds of a sale of any treasury shares financed from the proceeds of a fresh issue of shares and on the additional requirements identified in i) - iii) of paragraph 2.5. Under the draft regulations, a purchase of shares for holding in treasury could be financed only out of distributable profits. Shares which are purchased for immediate cancellation could continue to be financed out of the proceeds of a fresh issue of shares. (Paragraph 2.5.)

The revised regulations provide that a purchase of shares for holding in treasury may be financed only from distributable profits (section 162A(1) of the Companies Act 1985 inserted by Regulation 3). Shares which are purchased for immediate cancellation can continue to be financed out of the proceeds of a fresh issue of shares.

Q3 What are your views on the proposal that investment companies should be prevented from holding treasury shares? (Paragraph 2.7.)

The prohibition in the previous draft of the regulations on investment companies holding treasury shares has been removed. Investment companies will therefore be able to purchase shares for holding in treasury as long as the shares are “qualifying shares” as defined in section 162(4) inserted by Regulation 2(4). The requirement for the shares to be “qualifying shares” applies to all companies, not just investment companies.

Q4 What are your views on including a requirement in the regulations that treasury shares may not be included as an asset in the balance sheet? (Paragraph 2.23.)

No such requirement has been included in the regulations. Since treasury shares can only be financed from distributable profits (that is charged to distributable profits) they could only be shown as an asset if they were to be recognised subsequently in the balance sheet. The Department believes that this is a matter for the Accounting Standards Board. In such a situation the Accounting Standards Board would be highly likely to follow the interpretation issued by the International Accounting Standards Board. That interpretation requires treasury shares to be deducted from capital and reserves.

Q5 The draft regulations provide that the consideration received on a sale of treasury shares shall be treated as a profit (although the regulations do not specify whether such profit would be realised or unrealised or a combination of both). What are your views on the regulations providing instead that only the proceeds from a sale of treasury shares up to the amount charged on purchase would be realised, with any excess (profit) being unrealised? Should any unrealised profit be required to be transferred to a designated reserve such as the Share Premium Account? (Paragraph 3.1.)

The treatment of the proceeds of a sale of treasury shares is dealt with in section 162F inserted by Regulation 3. The regulations have been revised to provide that only the proceeds of a sale of treasury shares up to the amount of the original purchase price would be treated as a realised profit with any excess being transferred to the Share Premium Account. Accordingly, the excess would be unrealised.

Q6 What are your views on the proposed requirements concerning the recording of treasury shares in companies' own registers? (Paragraph 3.2.)

No changes of substance have been made to the regulations. However, since it will not be permitted for treasury shares to be held by nominees (see Q10 below), the name of the company will have to be recorded in the register of members in respect of any treasury shares that it holds. This has been effected by section 162A(2) inserted by Regulation 3.

Q7 What are your views on the proposed modifications to section 169 notices for companies notifying Companies House of purchases of their own shares, the holding of such shares in treasury and their subsequent sale or cancellation? (Paragraphs 3.3 - 3.6.)

No changes of substance have been made to the regulations.

Q8 Do you have any comments on the proposed treatment of bonus shares? (Paragraphs 3.7 - 3.9.)

No changes of substance have been made to the regulations in respect of the treatment of bonus shares and their recording in companies' own registers and notification to Companies House. However, bonus shares are now specifically referred to in section 162F(5) inserted by Regulation 3 dealing with the proceeds of sales of treasury shares.

Q9 What are your views on the proposed changes to the compulsory purchase provisions in Part XIII A of the 1985 Act in respect of takeovers? (Paragraphs 3.10 - 3.11.)

No changes of substance have been made to the regulations.

Q10 Do you have any comments on whether or not it should be permitted for companies' treasury shares to be held by nominees? (Paragraphs 4.1 - 4.2.)

The regulations now provide - by section 162A(2) inserted by Regulation 3 - that the holding of treasury shares by nominees is not permitted.

Q11 Do you have any comments on the fact that, because a company holding treasury shares will be regarded as a member of itself, the regulations include no references to the transfer of title to treasury shares? (Paragraphs 4.3 - 4.5.)

No such references have been included in the regulations.

Q12 What are your views on including a provision prohibiting treasury shares being sold at a discount to their nominal, or par, value? (Paragraph 4.6.)

No such provision has been included in the regulations.

Q13 Do you have any comments on the proposal that sales of treasury shares should not be restricted to sales for cash? (Paragraph 4.7.)

Section 162D(1)(a) inserted by Regulation 3 provides that treasury shares may only be sold for cash. Section 162D(2) sets out a definition of cash. Section 162D(1)(b) provides an exception to the above rule so that treasury shares may be transferred (ie either with or without money changing hands) for the purposes of, or pursuant to, an employees' shares scheme. Section 162D(1)(c) provides that treasury shares may be cancelled.

Q14 Do you have any comments on whether it should be prohibited to hold redeemable shares in treasury? It would not be permitted to hold redeemable shares in treasury past their date of redemption. (Paragraph 4.8.)

No such prohibition has been included in the regulations.

Q15 Do you consider that companies should be entitled to grant a charge, either fixed or floating, over treasury shares or should this be prohibited? Alternatively, in the absence of a prohibition, should a requirement be introduced for a company to offer to sell its treasury shares to shareholders before a charge could be granted? (Paragraphs 4.9 - 4.11.)

No provisions relating to charges have been included in the regulations. However, since the regulations (section 162A(1)) prescribe what a company may do with treasury shares and permit a company either to "hold" the shares (and be registered as a member in respect of them) or to "deal" with them in accordance with section 162D (ie sell, transfer for the purposes of an employee share scheme or cancel), they impliedly exclude the possibility of a company creating a charge over its treasury shares.

Q16 Do you agree with the Department's analysis that no amendments to Part VI of the 1985 Act dealing with disclosure of interest in shares need to be made? (Paragraph 4.12.)

No amendments to Part VI have been included in the regulations.

Q17 Do you agree with the Department's analysis that no amendments to Part XIII of the 1985 Act dealing with arrangements and reconstructions need to be made? (Paragraphs 4.13 - 4.15.)

No amendments to Part XIII have been included in the regulations. However, section 162C(3) inserted by Regulation 3 states, explicitly, that the prohibition on companies exercising any rights includes any right to attend or vote at meetings, including meetings held pursuant to section 425, as a result of holding treasury shares.

Q18 Do you have any comments on treasury shares being used for employee share schemes or being held in order to satisfy share options or share awards? In particular, do you consider that any provisions need to be introduced or restrictions lifted to facilitate the use of treasury shares in this way? (Paragraphs 4.16 - 4.17.)

Section 162D(1)(b) permits treasury shares to be transferred for the purposes of, or pursuant to, an employees' share scheme.

Q19 Do you agree with the Department's analysis that no amendments to section 364A of the 1985 Act dealing with the annual return filed at Companies House need to be made? (Paragraph 4.18.)

No amendments to section 364A been included in the regulations.

Q20 Do you have any comments on any of the minor proposed consequential changes to company law dealing with:-

- i) alteration of a company's objects (paragraph 5.1);**
- ii) minimum membership for carrying on business (paragraph 5.2);**
- iii) variation of class rights (paragraphs 5.3 - 5.6);**
- iv) merger relief and merger accounting (paragraphs 5.7 - 5.8);**
- v) capital redemption reserve (paragraph 5.9);**
- vi) definition of connected persons etc (paragraph 5.10);**
- vii) investigation of a company (paragraph 5.11);**
- viii) index of defined expressions (paragraph 5.12);**
- ix) form and content of company accounts (paragraph 5.13);**
- x) form and content of group accounts (paragraph 5.14).**

Further minor, consequential amendments to the Companies Act 1985 have been included in the schedule to the regulations as follows:-

- i) section 54 (litigated objections to a resolution under section 53 for a public company to be registered as a private company);
- ii) section 127 (shareholders' right to object to the variation of class rights);
- iii) section 143 (general rule against a company acquiring its own shares);
- iv) section 368 (extraordinary general meetings convened as a result of a members' requisition); and
- v) section 380 (registration of resolutions and agreements).

In addition, section 133(4) of the Companies Act 1989 - which prospectively amended section 162(2) of the 1985 Act but has not been brought into force - is to be repealed. The amendment to Schedule 4 to the Companies Act 1985

concerning the form and content of company accounts previously proposed has been removed from the regulations.

Q21 Do you have any comments on any other company law issue raised in the consultative document? Do you have any comments on any company law issue not covered in the consultative document? Do you have any comments on the draft regulations?

No further substantive amendments to the regulations have been made other than in respect of sections 162B(3) and 162E(1). The previous provision that treasury shares which exceeded the 10% limit would be cancelled automatically has been replaced by a provision, in line with the requirements of the Second Company Law Directive, that the company must either dispose of or cancel the treasury shares in excess of the 10% limit within 12 months. However, as provided for by section 162G inserted by Regulation 3, where companies breach the 10% limit every officer of the company may be liable to a fine. The previous requirement that companies' treasury shares be cancelled automatically where the treasury shares ceased to be qualifying shares (principally where a company was no longer listed or the shares of which were no longer traded on AIM) has been replaced by a requirement that the company must, forthwith, cancel the treasury shares. Failure to do so will also constitute an offence on the part of the company's officers.

Department of Trade and Industry
7 February 2003

FINAL DRAFT - 7 FEBRUARY 2003

STATUTORY INSTRUMENTS

2003 No.

COMPANIES

The Companies (Acquisition of Own Shares)
(Treasury Shares) Regulations 2003

Made.....2003

Laid Before Parliament.....2003

Coming into force.....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) Regulations 2003 and shall come into force on [].

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

Amendment of section 162

2.-(1) Amend section 162 of the 1985 Act (power of company to purchase own shares)(d) as follows.

(2) For subsection (2) substitute -

(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 162 was amended from a day to be appointed by section 133(4) of the Companies Act 1989 (c.40).

“(2) Sections 159 to 161 apply to the purchase by a company under this section of its own shares as they apply to the redemption of redeemable shares.

This is subject to subsections (2A) and (2B).

(2A) The terms and manner of a purchase under this section need not be determined by the articles as required by section 160(3).

(2B) Where a company makes a purchase of qualifying shares out of distributable profits under this section, section 162A applies to the shares purchased; and accordingly section 160(4) does not apply to those shares.”.

(3) At the end of subsection (3) insert “or shares held as treasury shares”.

(4) After subsection (3) insert the following subsection –

“(4) For the purposes of this Chapter “qualifying shares” are shares which–

(a) are included in the official list in accordance with the provisions of Part 6 of the Financial Services and Markets Act 2000^(a),

(b) are traded on the market known as the Alternative Investment Market established under the rules of London Stock Exchange plc,

(c) are officially listed in an EEA State, or

(d) are traded on a market established in an EEA State which is a regulated market for the purposes of Article 16 of Council Directive 93/22/EEC on investment services in the securities field^(b)

and in paragraph (a) “the official list” has the meaning given in section 103(1) of the Financial Services and Markets Act 2000.”.

Insertion of sections 162A, 162B, 162C, 162D, 162E, 162F and 162G

3. After section 162 of the 1985 Act insert the following sections -

“162A. Treasury shares

(1) Where qualifying shares are purchased by a company out of distributable profits in accordance with section 162, the company may -

(a) hold the shares (or any of them), or

(b) deal with any of them, at any time, in accordance with section 162D.

(a) 2000 c.8.

(b) OJ 141, 11.6.93, p.27.

(2) Where shares are held under subsection (1)(a) then, for the purposes of section 352, the company must be entered in the register as the member holding those shares.

(3) In this Act, references to a company holding shares as treasury shares are references to the company holding shares which -

(a) were (or are treated as having been) purchased by it in circumstances in which this section applies, and

(b) have been held by the company continuously since they were so purchased.

162B. Treasury shares: maximum holdings

(1) Where a company has shares of only one class, the aggregate nominal value of shares held as treasury shares must not at any time exceed 10 per cent. of the nominal value of the issued share capital of the company at that time.

(2) Where the share capital of a company is divided into shares of different classes, the aggregate nominal value of the shares of any class held as treasury shares must not at any time exceed 10 per cent. of the nominal value of the issued share capital of the shares in that class at that time.

(3) Where subsection (1) or (2) is contravened by a company, the company must dispose of or cancel the excess shares, in accordance with section 162D, before the end of the period of 12 months beginning with the day on which that contravention occurs.

For this purpose “the excess shares” means such number of the shares, held by the company as treasury shares at the time in question, as resulted in the limit being exceeded.

162C. Treasury shares: voting and other rights

(1) This section applies to shares which are held by a company as treasury shares (“the treasury shares”).

(2) The company must not exercise any right in respect of the treasury shares, and any purported exercise of such a right is void.

(3) The rights to which subsection (2) applies include any right to attend or vote at meetings (including meetings under section 425).

(4) No dividend may be paid, and no other distribution (whether in cash or otherwise) of the company’s assets (including any distribution of assets to members on a winding up) may be made, to the company in respect of the treasury shares.

(5) But the restriction in subsection (4) does not prevent -

(a) a distribution by way of an allotment of shares as fully paid bonus shares in respect of the treasury shares, or

(b) the payment of any amount payable on the redemption of the treasury shares (if they are redeemable shares).

(6) Any shares allotted as fully paid bonus shares in respect of the treasury shares shall be treated for the purposes of this Act as if they were purchased by the company at the time they were allotted, in circumstances in which section 162A(1) applied.

162D. Treasury shares: disposal and cancellation

(1) Where shares are held as treasury shares, a company may at any time -

(a) sell the shares (or any of them) for cash,

(b) transfer the shares (or any of them) for the purposes of or pursuant to an employees' share scheme, or

(c) cancel the shares (or any of them).

(2) For the purposes of subsection (1)(a), "cash", in relation to a sale of shares by a company, means -

(a) cash (including foreign currency) received by the company, or

(b) a cheque received by the company in good faith which the directors have no reason for suspecting will not be paid, or

(c) an undertaking to pay cash to the company on or before a date not more than 90 days after the date on which the company agrees to sell the shares.

(3) But if the company receives a notice under section 429 (right of offeror to buy out minority shareholders) that a person desires to acquire any of the shares, the company must not, under subsection (1), sell or transfer the shares to which the notice relates except to that person.

(4) If under subsection (1) the company cancels shares held as treasury shares, the company must diminish the amount of the issued share capital by the nominal value of the shares cancelled; but the cancellation is not to be taken as reducing the amount of the company's authorised share capital.

(5) The directors may take such steps as are requisite to enable the company to cancel its shares under subsection (1) without complying with sections 135 and 136 (resolution to reduce issued share capital; application to court for approval).

162E. Treasury shares: mandatory cancellation

(1) If shares held as treasury shares cease to be qualifying shares, the company must forthwith cancel the shares in accordance with section 162D.

(2) For the purposes of subsection (1), shares are not to be regarded as ceasing to be qualifying shares by virtue only of -

- (a) the suspension of their listing in accordance with the applicable rules in the EEA State in which the shares are officially listed, or
- (b) the suspension of their trading in accordance with -
 - (i) in the case of shares traded on the market known as the Alternative Investment Market, the rules of London Stock Exchange plc, and
 - (ii) in any other case, the rules of the regulated market on which they are traded.

(3) For the purposes of this section “regulated market” means a market which is a regulated market for the purposes of Article 16 of Council Directive 93/22/EEC on investment services in the securities field.

162F. Treasury shares: proceeds of sale

(1) Where shares held as treasury shares are sold, the proceeds of sale shall be dealt with in accordance with this section.

(2) Where the proceeds of sale are equal to or less than the purchase price paid by the company for the shares, the proceeds shall be treated for the purposes of Part 8 as a realised profit of the company.

(3) Where the proceeds of sale exceed the purchase price paid by the company for the shares-

- (a) that part of the proceeds of sale that is equal to the purchase price paid shall be treated for the purposes of Part 8 as a realised profit of the company, and
- (b) a sum equal to the excess shall be transferred to the company’s share premium account.

(4) The purchase price paid by the company for the shares shall be determined by the application of a weighted average price method.

(5) Where the shares were allotted to the company as fully paid bonus shares, the purchase price paid for them shall, for the purposes of subsection (4), be treated as being nil.

162G. Treasury shares: penalty for contravention

If a company contravenes any provision of sections 162A to 162F every officer of it who is in default is liable to a fine.”.

Consequential amendments

4. The Schedule to these Regulations (which contains consequential amendments) has effect.

2003

Melanie J Johnson,
Parliamentary Under Secretary
of State for Competition, Consumers and Markets,
Department of Trade and Industry

SCHEDULE

Amendment of section 5 of the 1985 Act

1. In section 5 of the 1985 Act (procedure for objecting to alteration of company's objects) after subsection (7) insert –

“(7A) For the purposes of subsection (2)(a), any of the company's issued share capital held as treasury shares must be disregarded.”.

Amendment of section 24 of the 1985 Act

2. In section 24 of the 1985 Act (minimum membership for carrying on business)(a), the existing provision becomes subsection (1) of that section, and at the end insert –

“(2) For the purposes of this section references to a member of a company do not include the company itself where it is such a member only by virtue of its holding shares as treasury shares.”.

Amendment of section 54 of the 1985 Act

3. In section 54 of the 1985 Act (litigated objection to resolution under section 53) after subsection (2) insert -

“(2A) For the purposes of subsection (2)(a), any of the company's issued share capital held as treasury shares must be disregarded.”.

Amendment of section 89 of the 1985 Act

4. In section 89 of the 1985 Act (offers to shareholders to be on pre-emptive basis) after subsection (5) insert -

“(6) For the purposes of subsections (1) and (2), shares held by a company as treasury shares are not “relevant shares”.”.

Amendment of section 94 of the 1985 Act

5.-(1) Amend section 94 of the 1985 Act (definitions for sections 89-96) as follows.

(2) At the end of subsection (5)(b) insert “or, in the case of shares held by the company as treasury shares, are to be transferred in pursuance of such a scheme”.

(3) After subsection (3) insert -

(a) Section 24 was amended by paragraph 2 of the Schedule to the Companies (Single Member Private Limited Companies) Regulations 1992 (S.I. 1992/1669).

“(3A) A reference to the allotment of equity securities or of equity securities consisting of relevant shares of a particular class also includes the sale of any relevant shares in the company or (as the case may be) relevant shares of a particular class if, immediately before the sale, the shares were held by the company as treasury shares.”.

Amendment of section 125 of the 1985 Act

6.-(1) Amend section 125 of the 1985 Act (variation of class rights) as follows.

(2) In subsection (2)(a) after the word “class” insert the words “(excluding any shares of that class held as treasury shares)”.

(3) In subsection (5) after the word “company” insert the words “(excluding any member holding shares as treasury shares)”.

(4) In subsection (6)(a) after the word “question” where it first appears insert the words “(excluding any shares of that class held as treasury shares)”.

Amendment of section 127 of the 1985 Act

7. In section 127 of the 1985 Act (shareholders’ right to object to variation) after subsection (2) insert -

“(2A) For the purposes of subsection (2), any of the company’s issued share capital held as treasury shares must be disregarded.”.

Amendment of section 131 of the 1985 Act

8. In section 131 of the 1985 Act (merger relief)(a), at the end of subsection (4) insert “(excluding any shares in that company held as treasury shares)”.

Amendment of section 143 of the 1985 Act

9. In section 143 of the 1985 Act (general rule against company acquiring own shares) –

(a) in subsection (2), after second “and” insert “, subject to subsection (2A),” and

(b) after that subsection insert -

“(2A) Where a company purchases qualifying shares out of distributable profits under section 162, any contravention by the company of any provision of section 162B(1) or (2) shall not render the acquisition void under subsection (2) above.”.

(a) Section 131 was amended by section 439(1) of, and Schedule 13 to, the Insolvency Act 1986 (c.45) and section 145 of, and Schedule 19 to, the Companies Act 1989 (c.40).

Amendment of section 169 of the 1985 Act

10.-(1) Amend section 169 of the 1985 Act (disclosure by company of purchase of own shares)(a) as follows.

(2) After subsection (1) insert the following subsections-

“(1A) But in the case of a company which has purchased its own shares in circumstances in which section 162A applies, the requirement to deliver a return under subsection (1) shall apply only where some or all of the shares have been cancelled forthwith after the date of their delivery in accordance with section 162D(1) and in those circumstances the particulars required by that subsection to be stated with respect to the shares purchased shall apply only to such of the shares as have been so cancelled.

(1B) Where a company has purchased its own shares in circumstances in which section 162A applies, the company shall within the period of 28 days beginning with the date on which such shares are delivered to it (except where all of the shares have been cancelled forthwith after the date of their delivery in the circumstances referred to in subsection (1A)) deliver to the registrar of companies for registration a return in the prescribed form stating with respect to shares of each class purchased (other than any shares which have been cancelled in the circumstances referred to in subsection (1A)) the number and nominal value of each of those shares which are held as treasury shares and the date on which they were delivered to the company.”.

(3) In subsection (2) for “the return” substitute “any return under subsection (1) or (1B)”.

(4) In subsection (3) after “return” insert “under either subsection (1) or (1B)”.

Insertion of section 169A of the 1985 Act

11. After section 169 of the 1985 Act insert the following section -

“169A. Disclosure by company of cancellation or disposal of treasury shares

(1) Subsection (2) applies in relation to any shares held by a company as treasury shares if-

(a) the company is or was required to make a return under section 169(1B) in relation to the shares, and

(b) the shares have -

(i) been cancelled in accordance with section 162D(1), or

(ii) been sold or transferred for the purposes of or pursuant to an employees' share scheme under section 162D(1).

(a) Section 169 was amended by sections 143(2) and 212 of, and Schedule 24 to, the Companies Act 1989.

(2) Within the period of 28 days beginning with the date on which such shares are cancelled or disposed of, the company shall deliver to the registrar of companies for registration a return in the prescribed form stating with respect to shares of each class cancelled or disposed of -

(a) the number and nominal value of those shares, and

(b) the date on which they were cancelled or disposed of.

(3) Particulars of shares cancelled or disposed of on different dates may be included in a single return to the registrar.

(4) If default is made in delivering to the registrar any return required by this section, every officer of the company who is in default is liable to a fine and, for continued contravention, to a daily default fine.”.

Amendment of section 170 of the 1985 Act

12. In section 170(1) of the 1985 Act (the capital redemption reserve) before the words “shall be transferred” insert “, or in accordance with section 162D(4) on cancellation of shares held as treasury shares,”.

Amendment of section 346 of the 1985 Act

13. In section 346 of the 1985 Act (“connected persons”, etc) -

(a) at the end of subsection (4)(a) insert “(excluding any shares in the company held as treasury shares)”, and

(b) in subsection (5)(b) after “that share capital” insert “(excluding any shares in the company held as treasury shares)”.

Amendment of section 352 of the 1985 Act

14. In section 352 of the 1985 Act (obligation to keep and enter up register of members) after subsection (3) insert –

“(3A) Where a company purchases one or more of its own shares in circumstances in which section 162A applies—

(a) the requirements of subsection (2) and (3) must be complied with unless the company cancels all of the shares forthwith after the purchase in accordance with section 162D(1), but

(b) any share which is so cancelled must be disregarded for the purposes of subsection (3).”.

Amendment of section 368 of the 1985 Act

15. In section 368 of the 1985 Act (extraordinary general meeting on members' requisition)(a) after subsection (2) insert –

“(2A) For the purposes of subsection (2)(a) any of the company’s paid up capital held as treasury shares must be disregarded.”.

Amendment of section 380 of the 1985 Act

16. In section 380 of the 1985 Act (registration etc of resolutions and agreements)(b) after subsection (4) insert –

“(4A) For the purposes of this section, references to a member of a company do not include the company itself where it is such a member by virtue only of its holding shares as treasury shares, and accordingly, in such circumstances, the company is not, for those purposes, to be treated as a member of any class of the company’s shareholders.”.

Amendment of section 429 of the 1985 Act

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

(a) in subsection (1) before “he may” insert “(excluding any shares in the company held as treasury shares)”, and

(b) in subsection (2) before “, he may” insert “(excluding any shares in the company held as treasury shares)”.

Amendment of section 430A of the 1985 Act

18. In section 430A of the 1985 Act (right of minority shareholder to be bought out by offeror)(d) -

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

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

(a) Section 368 has been amended in a manner not relevant to these Regulations.

(b) Section 380 was amended by section 116(3) of the Companies Act 1989, Schedule 11 to the Insolvency Act 1986 and paragraph 10 of Schedule 7 to the Uncertificated Securities Regulations 2001 (S.I. 2001/3755).

(c) Section 429 was substituted by section 172(1) of, and Schedule 12 to, the Financial Services Act 1986 (c.60).

(d) Section 430A was substituted by section 172(1) of, and Schedule 12 to, the Financial Services Act 1986.

Repeal of section 133(4) of the Companies Act 1989

23. Section 133(4) of the Companies Act 1989^(c), which substituted a new section 162(2) of the 1985 Act as from a day to be appointed, is repealed.

^(c) 1989 c.40.

EXPLANATORY NOTE
(This note is not part of the Regulations)

These Regulations further implement the 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 amend the Companies Act 1985 (c.6) (“the 1985 Act”) to permit certain companies to hold shares in treasury following a purchase of own shares as an alternative to cancelling such shares on purchase.

2. Regulation 2 defines “qualifying shares” which are the only shares that may be held as treasury shares.

3. Regulation 3 inserts new sections 162A, 162B, 162C, 162D, 162E, 162F and 162G in the 1985 Act which set out the principal provisions relating to treasury shares. Section 162A provides that where qualifying shares are purchased out of distributable profits they may be held in treasury; and that the holding of treasury shares by nominees is not permitted. Section 162B provides that the maximum holding of treasury shares is 10% of the nominal value of any class of share. If that limit is exceeded, the company must dispose of or cancel the excess shares within 12 months. Section 162C provides that the rights attached to treasury shares, including voting rights and rights to receive dividends, are suspended and that the purported exercise of such rights is void. Section 162D provides that treasury shares may only be sold for cash; or transferred for the purposes of, or pursuant to, an employees’ share scheme; or cancelled. Section 162E provides that if a company’s treasury shares cease to be qualifying shares they must be cancelled forthwith. Section 162F sets out the rules that apply in respect of the proceeds of a sale of treasury shares. Section 162G provides that if a company contravenes any provision of sections 162A to 162F every officer of it who is in default is liable to a fine.

4. Regulation 4 provides that the Schedule to the Regulations has effect. The Schedule sets out consequential amendments to the 1985 Act. Paragraphs 4 and 5 amend sections 89 and 94 respectively and provide that the pre-emption rights that apply to the allotment of new shares also apply to the sale of treasury shares. Paragraphs 10 and 11 amend section 169 and insert new section 169A respectively and set out the rules relating to the disclosure to the Registrar of Companies of purchases of treasury shares and their subsequent sale, transfer or cancellation.