# EXPLANATORY MEMORANDUM TO

# THE COMPANIES (COMPANIES AUTHORISED TO REGISTER) REGULATIONS 2009

## 2009 No. 2437

**1.** This Explanatory Memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

## 2. Purpose of the instrument

2.1 These Regulations make provision to enable companies that were not formed under the Companies Acts to apply for registration as a company under section 1040 of the Companies Act 2006 ("the 2006 Act"). They provide that, once registered, any such company will be treated for the purposes of the application of the Companies Acts in the same way as a company formed and registered under the Companies Acts.

## 3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Under the Companies Act 1985 ("the 1985 Act), companies incorporated in Great Britain but not formed under that Act (or earlier Companies Acts) may apply to register under the 1985 Act. The relevant provisions, including the procedure and conditions for registration, and the consequences of registration, are contained in sections 681 to 690 together with Schedule 21 to the 1985 Act. For Northern Ireland, there are similar provisions in Articles 629-639 and Schedule 20 of the Companies (Northern Ireland) Order 1986 (S.I. 1986/1032 (NI6)) ("the 1986 Order").

3.2 In accordance with paragraph 6(1) of Schedule 21 to the 1985 Act, once a company has completed the registration process all the provisions of that Act apply as if the company had been formed and registered under that Act. It is for this reason that Schedule 21 does not specify any particular sections of the 1985 Act which are to apply, nor does it list any secondary legislation which is to apply (see to the contrary, Schedule 22 of that Act, for unregistered companies). The general application of the provisions of the 1985 Act is subject only to minor savings in paragraph 6(2) to (5) of Schedule 21 related to certain aspects of a company's existing constitution. Schedule 21 also contains necessary adaptations and modifications.

3.3 Sections 1040 and 1041 of the 2006 Act replace sections 680 and 683 of the 1985 Act (and the equivalent provisions in the 1986 Order). All the other provisions are effectively replaced by section 1042 of the 2006 Act which provides that the Secretary of State, may, by regulations, make provision for and in connection with registration under section 1040, and, under section 1042(1)(b), "as to the application to companies so registered of the provisions of the Companies Acts".

3.4 The power in section 1042(1)(b) is a general power to make provision as to the application of the Companies Acts to companies not formed under the Companies Acts. It is clearly intended that the effect of Schedule 21 to the 1985 Act should be replicated in these Regulations (see section 1042(2)). This includes the provision that once registered such companies are to be subject to all provisions of companies legislation, as if they had been formed and registered under the Act. Under section 1040 the whole corpus of the Companies Acts legislation applies, including secondary legislation. Any necessary adaptations, or any exclusions of otherwise applicable provisions, are made under the power in section 1042(1)(b).

3.5 The Companies (Cross-Border Mergers) Regulations 2007 (S.I. 2007/2974), made under section 2(2) of the European Communities Act 1972, are not included in the definition of "Companies Acts" in section 2 of the 2006 Act. The power in section 1042(1)(b) does not therefore extend to those Regulations. In order that those Regulations should apply to companies which have registered under section 1040, it is necessary to make separate provision using the power in section 2(2).

## 4. Legislative Context

4.1 Sections 681, 682 and 684 to 690 and Schedule 21 of the 1985 Act (and Articles 630, 631 and 633 to 639 and Schedule 20 to the 1986 Order) provide that a company not formed under the Companies Acts may apply to be registered under the Act (or Order) with the effect that it is treated in the same way as a company that has been formed and registered under the Act (or Order).

4.2 Section 1042 of the 2006 Act provides power to make Regulations both in connection with the registration under that Act of companies not formed under the Companies Acts and also for the application of the requirements of the Companies Acts to companies so registered.

4.3 The Companies (Cross-Border Mergers) Regulations 2007 implement Directive 2005/56/EC on cross-border mergers of limited liability companies. They provide a framework whereby a company formed and registered in the United Kingdom may merge with a company formed and registered in any other EEA State.

## 5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

## 6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

- ***What is being done and why***

7.1 The instrument makes similar provision in respect of an application under the 2006 Act as is made under the 1985 Act (and 1986 Order) as regards provision that any company not formed under the Companies Acts may, if its members so agree, apply to be registered under the 2006 Act and to be treated as if it had been formed under that Act. It also ensures that once registered the company is also included within the scope of the Companies (Cross-Border Mergers) Regulations 2007.

7.2 The exact number of incorporated companies not formed under the Companies Acts is not known. It is believed that most were formed by Royal Charter: over 900 such companies have been formed since the 13th Century but many are now defunct. About 400 are still actively within the purview of the Privy Council. By comparison, there are nearly 2.5 million active companies formed under the Companies Acts. Applications to register are not frequent (not even one a year).

## 8. Consultation outcome

8.1 Draft Regulations were published on the Department's website in July 2007. An email was sent to all those who asked to be kept informed. No comments were received by the Department on the draft.

8.2 The Regulations were substantially revised in form after consultation. The only substantive change was the inclusion of the reference to the Companies (Cross-Border Mergers) Regulations 2007.

## 9. Guidance

9.1 Companies House will provide advice as and when required.

## 10. Impact

10.1 The impact on business, charities or voluntary bodies is limited to those that are companies not formed under the Companies Acts. It provides any such company with a means of being treated the same as a company formed under a Companies Act for the purposes of company law.

10.2 The impact on the public sector is minimal. The Registrar of Companies will continue to provide the means for such companies to be registered.

10.3 An Impact Assessment has not been prepared for this instrument as it does not create any burden on business.

## 11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is the same regardless of the numbers employed.

11.3 The basis for the final decision on what action to take to assist small business is the expectation that none will wish to register.

## 12. Monitoring & review

12.1 Any use of the option provided by this instrument will be monitored.

## 13. Contact

13.1 Anne Scrope at the Department for Business, Innovations and Skills, Tel: 0207 215 2914 or email: anne.scrope@bis.gsi.gov.uk, can answer any queries regarding the instrument.