EXPLANATORY MEMORANDUM TO

THE COMPANIES ACT 2006 (PART 35) (CONSEQUENTIAL AMENDMENTS, TRANSITIONAL PROVISIONS AND SAVINGS) ORDER 2009

2009 No.

1. 1.1 This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order makes consequential amendments to Part 35 of the Companies Act 2006 ("the 2006 Act") and amends the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (S.I. 2008/2860 (C. 126)) ("the 8th Commencement Order"). Part 35 of the 2006 Act deals with the functions of the registrar of companies and with material delivered to, and registered by, the registrar. Part 35 is brought fully into force, by the 8th Commencement Order, on 1 October 2009 and the amendments made by this Order take effect on that date. The draft Order has three purposes: (a) to extend certain provisions of Part 35 so that they apply (or apply more clearly) to functions of the registrar of companies in relation to bodies other than companies and overseas companies or to material relating to such bodies; (b) to make to certain provisions of Part 35 dealing with overseas companies and with material on the companies register which is not available for public inspection amendments which are necessitated by other provisions made by or under the 2006 Act; and (c) to replace transitional provisions and savings relating to Part 35 in the 8th Commencement Order.

2.2 The draft Order has been drafted by Parliamentary Counsel.

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

3.1 Among other things, the Order amends certain provisions of Part 35 of the 2006 Act so that they apply generally (and not just in relation to companies and overseas companies, or material relating to companies and overseas companies). It does so in reliance on the power in section 1294 of the 2006 Act to make amendments to legislation which the Secretary of State considers to be necessary or expedient in consequence of any provision made by the 2006 Act. As permitted by section 1294 the Order amends Part 35 itself instead of making amendments to various pieces of legislation which contain functions of the registrar in relation to bodies other than companies.

4. Legislative Background

4.1 The Companies Act 2006 received Royal Assent in November 2006 and is being implemented in stages.

4.2 The remaining provisions of the 2006 Act will come into force on 1 October 2009. The main purpose of this Order is to make consequential amendments to Part 35 of the 2006 Act using the power in section 1294 of the Act. Part 35 of the Act deals with the functions of the registrar of companies and with material delivered to, and registered by, the registrar. The effect of a number of the amendments made by this Order is to extend certain administrative and procedural provisions of Part 35 so that they also apply in relation to bodies other than companies or overseas companies or, as appropriate, so that they also apply to documents relating to bodies other than companies or overseas companies.

4.3 Consequential amendments are also made to sections 1067 and 1087 of the 2006 Act; and the Schedule to the Order also replaces the transitional provisions and savings relating to Part 35 in the 8th Commencement Order.

5. Territorial Extent and Application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

Ian Pearson, Economic and Business Minister, has made the following statement regarding Human Rights:

> "In my view the provisions of the draft Companies Act 2006 (Part 35) (Consequential Amendments, Transitional Provisions and Savings) Order 2009 are compatible with the Convention rights."

7. Policy background

7.1 Part 35 of the 2006 Act is concerned with the registrar of companies, with material delivered to the registrar and with documents issued by the registrar. It deals with the mechanics of delivering documents to the registrar, forms, fee-setting, registration and record-keeping by the registrar, correcting material delivered to the registrar, removing material from the register, public inspection of registered material and publication of notices by the registrar. Companies legislation requires the delivery of material to the registrar and the registration of material by him in various circumstances. But similar requirements are also contained in various pieces of legislation concerned with bodies other than companies, such as limited partnerships, limited liability partnerships and European Economic Interest Groupings.

7.2 Some of the provisions in Part 35 apply generally to companies and other bodies and to material delivered to the registrar under any enactment. However, other provisions in Part 35 only apply to companies and company documents.

7.3 The Order extends certain provisions of Part 35 so that they apply to all bodies and to material relating to all bodies. The provisions in question are concerned with administrative and procedural matters connected with the exercise of the registrar's functions, such as the authentication of material delivered to the registrar, the correction or replacement of documents delivered to the registrar, the way records are kept by the registrar, the electronic delivery of documents, electronic communications by the

registrar and publication of notices by the registrar. These provisions do not confer new obligations to deliver documents to the registrar or new registration requirements, and operate only where such requirements exist. The registrar has existing functions in relation to other bodies and receives and registers documents relating to such bodies, and charges fees, under various pieces of legislation. It is highly desirable that the administrative and procedural provisions in Part 35 should also apply in relation to these other existing functions. This will create a coherent and consistent registration system in these areas.. The Order makes amendments to the relevant provisions of Part 35 to achieve this. This approach is more efficient than amending each piece of legislation to achieve the same result..

7.4 Article 3 adds to Part 35 a new section 1059A indicating how Part 35 applies as amended by the draft Order.

7.5 Article 4 amends section 1061 so that, instead of providing that the registrar is to continue to perform functions under "the Companies Acts" (as defined in section 2) and under other enactments which are expressly listed, it provides that the registrar is to continue to perform the functions which are conferred on him by or under the Companies Acts or any other enactment. As it stands, section 1061 does not list all the legislation under which the registrar has functions. This was not deliberate. The effect of the amendment will also be to make clear that the registrar will have an official seal for the authentication of documents in connection with the performance of his functions under the enactments not currently listed (see section 1062) and to enable regulations about fees to be made under section 1063 in relation to the performance of those functions.

7.6 Article 6 amends section 1068(3)(c) so that rules made by the registrar under that section about the authentication of documents delivered to the registrar by bodies other than companies or overseas companies may require documents to contain or be accompanied by the name and/or registered number of the body to which they relate.

7.7 Article 7 extends section 1070 to provide that the registrar may also agree with bodies other than companies or overseas companies that documents will be delivered to the registrar electronically.

7.8 Article 8 amends section 1075 so as to enable the registrar to correct documents delivered to him by bodies other than companies or overseas companies where the document is incomplete or internally inconsistent. The procedure will work in the same way as for companies and will (for example) only enable a correction to be made on instructions given to the registrar with the consent of the body in question.

7.9 Article 9 amends section 1076 to make clear that it applies not only to documents relating to companies and overseas companies but also to documents relating to other bodies. Section 1076 allows the registrar to accept a replacement for a document previously delivered but which did not satisfy formal requirements or contained unnecessary material.

7.10 Article 10 amends section 1080(1) so that it requires the registrar to keep a record of certificates issued by him under any enactment rather than just certain specified certificates issued by him. The registrar issues certificates under a number of provisions. Article 10 also amends section 1080(5) so as to require the registrar to keep records about

bodies other than companies and overseas companies in such a way as to enable all material relating to a body to be retrieved. Section 1080(5) as it stands applies only to records relating to companies and overseas companies.

7.11 Article 11 amends section 1083(1) so as to enable the registrar to destroy an original of a hard copy document relating to a body other than a company or overseas company after three years if he has recorded the information contained in the document. Section 1083(2) is also amended so that the registrar is under no obligation to retain documents delivered to him electronically relating to such bodies if he has recorded the information contained in them. These provisions currently apply only to documents relating to companies and overseas companies.

7.12 Article 13 amends section 1109 to enable bodies other than companies or overseas companies to deliver to the registrar a voluntary transliteration of a name or address which was delivered (in a document) to the registrar in a permitted form using other than Roman characters. This provision currently only applies to companies and overseas companies.

7.13 Article 14 amends section 1115(1), which as it stands enables the registrar to make rules requiring a company or overseas company to give any necessary consents to the use of electronic communications by the registrar to the company as a condition of the company making use of a facility to deliver material to the registrar electronically. The amendments extend this provision to bodies other than companies or overseas companies.

7.14 Article 15 amends section 1116. Section 1116 applies where the registrar has an obligation to publish a notice in the Gazette. As it stands it enables regulations to allow alternate means of publication, but only applies to notices relating to companies or overseas companies. The amendment extends the provision to apply to notices relating to other bodies.

7.15 Article 16 repeals section 1120 (the provision which currently provides that Part 35 applies to overseas companies), but the substance is preserved in new section 1059A(5).

7.16 These amendments to Part 35 will, for example, facilitate the application of Part 35 to limited liability partnerships by the prospective Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009.

7.17 In respect of overseas companies, the Order also makes consequential amendments to section 1067, which provides that the registrar must allocate a registered number to each branch of an overseas company. The amendment replaces the references to a “branch” of an overseas company with references to a “UK establishment” of an overseas company. This is necessary because the prospective Overseas Company Regulations 2009, due to come into effect on 1 October 2009, will require the registration of certain particulars when an overseas company opens a “UK establishment”, irrespective of whether the establishment is a “branch” within the meaning of the Eleventh Company Law Directive (89/666/EEC) or some other place of business in the UK.

7.18 The Order also makes amendments to section 1087, which provides that certain material on the register at Companies House must not be made available by the registrar for public inspection. To ensure the regime on protection of directors' residential addresses in Chapter 8 of Part 10 of the 2006 is not undermined, section 1087(1)(b) exempts "protected information" within section 242(1) of the 2006 Act or any corresponding provisions of the regulations about overseas companies. The reference in section 1087 to such information is not wide enough to cover residential address information included in representations received by the registrar in response to a notice given under section 245(2), which the registrar is directed to take account of and which must be placed on the register. The Order makes an amendment to remedy this. The amendment makes corresponding provision for overseas companies; this is because the prospective Overseas Companies Regulations 2009 will make provision corresponding to section 245.

7.19 The second amendment to section 1087 relates to charge instruments, which Under section 1087(1), the contents of certain charge instruments must be not be made available for public inspection. However, this section omits to cover copies of other charge instruments delivered to the registrar under Part 25 (company charges) and under regulations about overseas companies. The Order therefore amends section 1087 so that no charge instrument, and no certified or verified copies of charge instruments, delivered to the registrar under these provisions are made available for public inspection.

7.20 In view of the consequential amendments to Part 35, as described above, Schedule 2 of the Order also makes amendments to the transitional provisions and savings contained in Schedule 2 to the 8th Commencement Order. In addition, amendments to the transitional provisions and savings have been made so that they now take account of the fact that certain provisions of Part 35 are either not limited to documents relating to companies or are not limited to documents delivered under the provisions of the Companies Act 1985, the Companies (Northern Ireland) Order 1986 or the 2006 Act. The effect of certain of the transitional provisions and savings is also changed as they relate to documents delivered under those pieces of legislation.

7.21 As Schedule 2 of the Order makes correcting amendments to Schedule 2 to the 8th Commencement Order, this draft Order will be made available free to all known recipients of the 8th Commencement Order.

8. Consultation

8.1 The Department for Business, Enterprise and Regulatory Reform has not carried out a public consultation on the draft Order because it does not confer new obligations to deliver documents to the registrar or new registration requirements, and operates only where such requirements exist.

9. Guidance

9.1 Companies House will be publishing detailed guidance on matters relating to the exercise of its functions under the 2006 Act.

10. Impact

10.1 An impact assessment has not been produced for this instrument because no impact on the private or voluntary sector is foreseen.

11. Regulating small business

11.1 The legislation applies to small business, but does not impose new requirements on small businesses.

12. Monitoring and review

12.1 This instrument will be reviewed, from 2011, as part of the Companies Act 2006 evaluation.

13. Contact

13.1 Alicia Law at the Department for Business, Enterprise and Regulatory Reform (telephone: 0207 215 5387 or e-mail:Alicia.law@berr.gsi.gov.uk) can answer any queries regarding the instrument.