

DRAFT COMPANIES (REDEMPTION, AND FINANCIAL ASSISTANCE) (JERSEY) REGULATIONS 200-

**Lodged au Greffe on 9th July 2002
by the Finance and Economics Committee**



STATES OF JERSEY

STATES GREFFE

150

2002

P.122

Price code: B

REPORT

Background

Companies (Amendment No. 6) (Jersey) Law 2002, (“**Amendment 6**”), was approved by the States of Jersey on 17th July 2001, sanctioned by Order of Her Majesty in Council on 12th February 2002 and registered in the Royal Court on 8th March 2002. Subject to the approval by the States of an Appointed Day Act, it is to come into force on 1st September 2002.

Article 59 of the Companies (Jersey) Law 1991 (the “**1991 Law**”) provides that the States may, by Regulations, extend or modify the provisions of Articles 55, 57 and 58. Pursuant to this power, it is proposed to modify particular paragraphs of Articles 55 and 58.

Notwithstanding the extensive consultation over several years before Amendment 6 was presented to the States last July, since January of this year concern has been expressed over the implications of certain changes to Articles 55 and 58. In order to be able to derive the correct solution to these issues, it will be necessary to fully consider them and to undertake further consultation. The draft Regulations are proposed as an interim solution, which will avert the anticipated difficulties whilst avoiding any further delay to the introduction of Amendment 6.

Payments of Premium on Redemption of Shares - Article 55(3)

The change made by Amendment 6 to sub-paragraph (3)(b)(i) of Article 55 restricted the use of share premium accounts in relation to the payments of premium when redeeming shares. No such restriction existed prior to Amendment 6, even if the company chose to establish more than one such account. There is no evidence that the change was made to address any particular mischief and it is most probably a consequence of the introduction of the new types of companies that Amendment 6 introduces.

The change being made by the Regulations is to restore the wording of sub-paragraph (3)(b)(i) to that which existed prior to Amendment 6, so that, when redeeming shares, payments of premium may be made from any share premium account. Any redemption of shares must still be subject to the requirement for the conditions of both a cash flow test and a balance sheet test to be met.

Qualifying Conditions for Redemption of Shares - Article 55(3B)

Under Article 55(3B) of the 1991 Law, as amended by Amendment 6, any limited company (other than an open-ended investment company, which is subject to separate provisions) is permitted to redeem its shares, only if the directors reasonably believe that immediately afterwards, not only will the company be able to discharge its liabilities as they fall due (the “solvency test”), but the realisable value of its assets will not be less than the aggregate of its liabilities and its capital accounts (the “net asset test”). The same requirement applies, by reference, to the repurchase of shares under Article 57.

Until Amendment 6 comes into force, these tests are only required where payments on redemption are to be made out of share premium or unrealized profits. Furthermore, in the case of payments from share premium, the net asset test does not involve the capital accounts (i.e. the realisable assets are compared only with the liabilities).

The consequences of the new provisions are that a number of existing companies will be prevented from redeeming shares in circumstances that are presently permissible (i.e. when the value of the net assets has fallen below cost; and they will unnecessarily constrain the use of limited companies (including the new “no par value” company), in future.

The change being made by the Regulation will restore requirements equivalent to those of the 1991 Law prior to Amendment 6 in respect of the net asset test, such that it will not apply except -

- in the case of any payment from share premium account (for a par value company) or stated capital (for a no par value company), when the directors must reasonably believe that the realisable assets will not be less than the aggregate of the liabilities; and
- in the case of any payment from unrealised capital or revenue profits, when the directors must reasonably believe that the realisable value of the assets will not be less than the aggregate of the liabilities and the amounts standing to the credit of the capital accounts.

There is to be no change to the wider scope of the solvency test, introduced by Amendment 6, which will now to be applied to every redemption or repurchase of shares.

Financial Assistance - Article 58

The need for corrective action in respect of Article 58 of the 1991 Law stems from an attempt in Amendment 6 to remove the uncertainty associated with the term “value of the assets”, in the net asset test. To achieve this, the term was altered to read “realisable value of the assets”.

Because the net asset test must often be valid with effect from a point *immediately* after the event being governed, the unintentional effect of the change made by Amendment 6 is to require that the realisable value might have to be determined on a forced sale basis. In practice, this could frustrate compliance with the test, whereas the use of a continuing value for the assets might allow the test criterion to be met.

The net asset test is a feature of several provisions of the 1991 Law. One of these is in Article 58(3), where the test is one of the criteria to be met by a company for it not to act illegally by giving financial assistance for the purchase of its shares. On advice, this is the only case where the change made by Amendment 6 is likely to cause difficulties to both existing and new financial arrangements of such proportions and on such a scale as to potentially damage the Island’s reputation.

The change being made by the Regulations is to restore the wording of paragraph (3) of Article 58 to that which existed prior to Amendment 6. There is no change to the other criteria to be met under that paragraph, which are -

- that the company is able to discharge its liabilities as they fall due; and
- that the giving of financial assistance is sanctioned by a prior special resolution of the company.

These draft Regulations have no implications for the financial or manpower resources of the States.

Explanatory Note

These Regulations would modify Part XI of the Companies (Jersey) Law 1991 in the following ways:

- (a) They would permit a par value company to redeem its limited shares, in the case of a payment of a premium on a redemption, out of any share premium account.
- (b) They would modify the financial requirements for redemption, in the case of companies that are not open-ended investment companies, in the following way -
 - (i) in the case of a payment from a share premium account or a stated capital account, the directors must hold a reasonable belief that the realisable value of the company's assets will not be less than its liabilities, and
 - (ii) in the case of a payment out of unrealised capital or revenue, they must hold a reasonable belief that the company's assets will not be less than the aggregate of the amounts standing to the credit of its capital accounts.

In every case, the directors must also believe reasonably that the company will be able to meet its liabilities as they fall due.

- (c) They would permit a company to give financial assistance for the purchase of its own shares if the directors are reasonably satisfied that the value (as opposed to the "realisable" value) of its assets will remain not less than the aggregate of its liabilities and the amounts standing to the credit of its capital accounts.

The Regulations would come into force on the same day as the Companies (Amendment No. 6) (Jersey) Law 2002 (i.e. 1st September 2002).

Companies (Jersey) Law 1991

COMPANIES (REDEMPTION, AND FINANCIAL ASSISTANCE) (JERSEY) REGULATIONS 200-

(Promulgated on the _____ day of _____ 200-)

STATES OF JERSEY

The _____ day of _____ 200-

THE STATES, in pursuance of Article 59 of the Companies (Jersey) Law 1991,^[1] as amended,^[2] have made the following Regulations -

Interpretation

1. In these Regulations, “the Law” means the Companies (Jersey) Law 1991,^[3] as amended.^[4]

Power to issue redeemable shares

2.-(1) In Article 55(3)(b)(i) of the Law,^[5] for the words “the share premium account for shares of the class concerned” there shall be substituted the words “any share premium account”.

- (2) In Article 55(3B)^[6] of the Law, for sub-paragraph (b) there shall be substituted the following sub-paragraphs -

“(b) in the case of a payment from a share premium account or a stated capital account, the realisable value of the company’s assets will not be less than the amount of its liabilities; and

(c) in the case of a payment out of unrealised capital or revenue profits, the realisable value of the company’s assets will not be less than the aggregate of its liabilities and the amounts standing to the credit of its capital accounts.”.

Financial assistance by company for purchase of its shares

3. In Article 58(3)(b)^[7] of the Law, for the words “realisable value” there shall be substituted the word “value”.

Citation and commencement

4. These Regulations may be cited as the Companies (Redemption, and Financial Assistance) (Jersey) Regulations 200- and shall come into force on 1st September 2002.

^[1] Recueil des Lois, Volume 1990-1991, page 937.

^[2] Recueil des Lois, Volume 2002, page 235.

^[3] Recueil des Lois, Volume 1990-1991, page 875.

^[4] Recueil des Lois, Volume 1992-1993, page 63, Volume 1994-1995, page 351, Volume 1996-1997, pages 552 and 683, Volume 1998, pages 499 and 594, Volume 1999, pages 107 and 525, Volume 2000, page 746, Volume 2002, page 177 and Nos. 8326 and 8941.

^[5] Recueil des Lois, Volume 1990-1991, page 932 and Volume 2002, page 229.

^[6] Recueil des Lois, Volume 1990-1991, page 932 and Volume 2002, page 230.

^[7] Recueil des Lois, Volume 1990-1991, page 936 and Volume 2002, page 235.