

# COMPANIES ACT 2006

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## EXPLANATORY NOTES

### TERRITORIAL EXTENT AND DEVOLUTION

#### **Part 7: Re-Registration as a Means of Altering a Company's Status**

194. This Part of the Act is about the re-registration of companies. It replaces equivalent provisions in Part 2 of the 1985 Act. There are some substantive changes as well as amendments reflecting the new provisions of the Act about registration which are carried through to the re-registration provisions.

#### **Introductory**

##### *Section 89: Alteration of status by re-registration*

195. This section provides for various ways under the Act by which a company may alter its status. As recommended by the CLR (Final Report, paragraph 11.6) it retains the current possibilities for re-registration, but there is one significant change to the 1985 Act regime: in line with the recommendations of the CLR (Final Report, paragraph 11.11), in future a public company will be able to re-register as an unlimited private company without first having to re-register as private limited – see section 109.

#### **Private company becoming public**

##### *Section 90: Re-registration of private company as public*

196. This section restates section 43(1) and (2), and section 48 of the 1985 Act. It enables a private company (whether limited or unlimited) to re-register as a public company providing that certain conditions are met. These conditions are set out in *subsections (2) to (4)*. They include a requirement for the company to make such alterations to its name and articles of association (“articles”) as are necessary to reflect the fact that the company will be a public company. This will be particularly important for private companies formed under the Act who are using the model articles: in particular, the new model articles for private companies limited by shares formed under the Act will be written with such companies in mind and are unlikely to be suitable for use by a newly re-registered public company – see notes on sections 19 and 20.
197. As now (see section 48 of the 1985 Act), an unlimited private company with a share capital will be able to re-register as a public company and this is reflected in *subsection (4)* of this section.
198. *Subsection (2)(e)* retains the requirement that a private company may not re-register as a public company if it has previously re-registered as an unlimited company. The intention behind this provision is that a company should not be able to enjoy the benefits of limited liability or avoid the obligations that are attached to this, for example, the increased reporting requirements, by continually swapping from limited to unlimited status.

***Section 91: Requirements as to share capital***

199. This section restates sections 45, 47(3) and 48(5) to (7) of the 1985 Act. It sets out the requirements as to share capital of a company that it is proposing to re-register as a public company. These requirements carry forward the provisions of current companies legislation, for example, the company's share capital must not be less than the authorised minimum (defined in section 763) and each of the company's allotted shares must be paid up at least as to a quarter of the nominal value of that share and the whole of any premium on it.
200. *Subsection (5)* of this section replaces section 47(3) of the 1985 Act. It provides that the registrar must not issue a new certificate of incorporation on re-registration if the court has made an order confirming a reduction of capital which has the effect of bringing the company's allotted share capital below the authorised minimum (which remains at £50,000 but may be satisfied in sterling or euros – see section 763) or if the company has reduced its capital via the new solvency statement procedure for capital reductions (see section 642) or in connection with a redenomination of share capital (see section 626).

***Section 92: Requirements as to net assets***

201. This section restates section 43(3)(b), (c) and (e), and (4), and section 46 of the 1985 Act. The requirements as to net assets for a public company remain unchanged (as now, these are determined by reference to the company's most recent balance sheet).

***Section 93: Recent allotment of shares for non-cash consideration***

202. This section restates section 44 of the 1985 Act. As now, where there has been an allotment of shares for non-cash consideration between the date of the balance sheet required under section 92 and the date that the company passed the resolution to re-register as a public company, the registrar will not entertain an application for re-registration unless the consideration for the allotment has been valued in accordance with section 596.

***Section 94: Application and accompanying documents***

203. This section restates sections 43(3)(a) to (e) and 47(2) of the 1985 Act. It prescribes the contents of the application for re-registration where a private company is proposing to re-register as public. There is one important change, which is required as a result of the abolition of the current requirement for private companies to have a company secretary – see section 270. In future, where a private company is proposing to re-register as a public company the application for re-registration must include a statement of the company's proposed secretary where the company does not already have a secretary. The contents of this statement are prescribed in section 95.
204. The application for re-registration must be accompanied by a statement of compliance – see section 90(1)(c)(ii) – which replaces the present requirement for a statutory declaration (or its electronic equivalent), contained in subsections 43(3)(e) and (3A) of the 1985 Act, with a requirement to make this statement (see note on section 13).

***Section 95: Statement of proposed secretary***

205. This section is a new provision, which is required as a result of the abolition of the requirement for private companies to have a company secretary – see section 270. Where a private company is proposing to re-register as a public company and the company does not already have a company secretary, the application for re-registration must include details of the person or persons who will act as company secretary or joint secretaries on re-registration. The statement of proposed secretary must also contain a consent, given by the person or each of the persons named in the statement, to act as company secretary or joint secretaries. If all the partners in a firm are to be joint

secretaries, one partner in the firm may give consent to act on behalf of all of the partners.

### ***Section 96: Issue of certificate of incorporation on re-registration***

206. This section replaces section 47 of the 1985 Act. As now, where the registrar is satisfied that a company is entitled to be re-registered as a public company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section: the company becomes a public company; the change to its name and any amendments that were made to the company's articles take effect; and the person (or persons) named as secretary (or joint secretaries) in the statement of proposed secretary (see section 95) is deemed to have been appointed as such.
207. As now, the certificate of incorporation on re-registration is conclusive evidence that the company is now a public company and that the requirements of the Act as regards re-registration have been met.

### **Public company becoming private**

#### ***Section 97: Re-registration of public company as private limited company***

208. This section replaces section 53 of the 1985 Act. It enables a public company to re-register as a private limited company if the conditions specified in *subsection (2)* are met. The conditions are the same as those which are presently set out in section 53 but there are two important changes:
- Consistent with the approach taken elsewhere in the Act, for example the sections on the re-registration of a private company as public, *subsection (1)(c)(ii)* of this section introduces a new requirement for a statement of compliance (see note on section 13).
  - *Subsection (2)* introduces new provisions which enable the registrar to process an application for the re-registration of a company from public to private limited within the 28-day period during which dissenting members may apply to the court, under section 98, for an order cancelling the resolution for re-registration, providing that she is satisfied that such an application cannot be made. This change reflects the registrar's current practice.
209. As now, the company must make such changes to its name and articles as are necessary in connection with it becoming a private company limited by shares or, as the case may be, a private company limited by guarantee.

#### ***Section 98: Application to court to cancel resolution***

210. This section restates section 54(1) to (3) and (5) to (6) of the 1985 Act. As now, where a public company has passed a special resolution to re-register as a private limited company, the requisite majority of the company's members (see *subsection (1)*) may apply to the court for the cancellation of this resolution. Such an application to the court must be made within 28 days of the resolution to re-register being passed and on hearing the application the court may confirm or cancel the resolution or make such other order as it thinks fit.

#### ***Section 99: Notice to registrar of court application or order***

211. This section replaces section 54(4) (7) and (10) of the 1985 Act. It makes it clear that, as now, where an application is made to the court under section 98 (that is, to cancel a resolution for re-registration as a private limited company), the company must immediately give notice to the registrar. Similarly, where the court has made an order in connection with such an application, the company must deliver a copy of that order

to the registrar within 15 days of the order being made (or such longer time as the court may direct).

212. *Subsection (1)* of this section is a new provision which requires the dissenting members, on making an application to court seeking to cancel the resolution for re-registration from public to private, to give notice direct to the registrar. This ensures that the registrar is aware of any applications which have been made under section 98 and therefore will enable the registrar to process the application for re-registration without further delay where she is satisfied that no application to court may be made – see note on section 97.
213. *Subsection (4)* carries forward the offence in section 54(10) of the 1985 Act. Where the company fails to give notice to the registrar or fails to deliver a copy of the order made by the court under section 98 within the prescribed time limits (see *subsections (2) and (3)*), the company and every officer of the company who is in default commits an offence. The penalty for this offence is set out in *subsection (5)*.

### ***Section 100: Application and accompanying documents***

214. This section replaces section 53(1)(b) of the 1985 Act and contains new provisions. It prescribes the documents/information that must accompany the application for re-registration where a company is proposing to re-register from public to private limited. Consistent with the approach taken in the Act with other forms of re-registration, in future the application for re-registration as a private limited company must be accompanied by a statement of compliance – see note on section 13. (There is currently no requirement for a statutory declaration (or electronic equivalent) where a public company re-registers as a private limited company).

### ***Section 101: Issue of certificate of incorporation on re-registration***

215. This section restates section 55 of the 1985 Act. As now, where the registrar is satisfied that a company is entitled to be re-registered as a private limited company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section, the company becomes a private limited company and the change to its name and any amendments that were required to be made to the articles take effect.
216. As now, the certificate of incorporation on re-registration issued under this section is conclusive evidence that the company is now a private limited company and that the requirements of the Act as regards re-registration have been met.

### **Private limited company becoming unlimited**

#### ***Section 102: Re-registration of private limited company as unlimited***

217. This section replaces section 49, of the 1985 Act. As now, this section permits a private company that is limited by shares or, as the case may be, by guarantee, to re-register as an unlimited private company, providing that certain conditions are met (see *subsection (2)*) and all of the members have given their assent to the company being so re-registered. In the case of a deceased member, assent may be given by the personal representative of the deceased member's estate. Where a member is bankrupt, assent may be given by his trustee in bankruptcy (to the exclusion of the member in question).
218. An “unlimited company” is a company not having any limit on the liability of its members.
219. As now, a company may not re-register as an unlimited company, if it has previously been re-registered as limited (having previously been unlimited) or as unlimited (having previously been limited).
220. The application for re-registration as an unlimited company must be accompanied by a statement of compliance (see note on section 13).

### ***Section 103: Application and accompanying documents***

221. This section replaces section 49(8) and (8A) of the 1985 Act. It prescribes the contents of the application for re-registration where a company is proposing to re-register from private limited to unlimited and the documents/information that must accompany this application. The current requirement for a statutory declaration made by the directors on application for re-registration as an unlimited company is replaced by a requirement for a statement of compliance. Unlike other statements of compliance made under the Act (see, for example, section 13) the statement of compliance made on application for re-registration as an unlimited company must contain a statement made by the directors confirming that:
- the persons by whom or on whose behalf the form of assent is authenticated constitute the whole membership of the company; and
  - if any of the members have not authenticated that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who authenticated it on behalf of a member was lawfully empowered to do so.
222. The contents of the directors' statement carry forward the provisions of section 49(8) of the 1985 Act.

### ***Section 104: Issue of certificate of incorporation on re-registration***

223. This section restates section 50 of the 1985 Act. As now, where the registrar is satisfied that a company is entitled to be re-registered as an unlimited company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section, the company becomes an unlimited company and the change to its name and any amendments that were required to be made to the articles take effect.
224. As now, the certificate of incorporation on re-registration is conclusive evidence that the company is now an unlimited company and that the requirements of the Act as regards re-registration have been met.

## **Unlimited private company becoming limited**

### ***Section 105: Re-registration of unlimited company as limited***

225. This section replaces section 51(1) to (3) of the 1985 Act. As now, this section permits an unlimited company to re-register as a private limited company if certain conditions are met (see *subsection (2)*). As now, a re-registration from unlimited to limited requires a special resolution of the company's members, (which must specify whether the company is to be limited by shares or limited by guarantee). The company must also make such changes to its name and articles as are required to reflect the change in the company's status. As is the case under section 51(6) of the 1985 Act, this section does not permit the re-registration of an unlimited company as a public company (this section provides for the re-registration of an unlimited company as a *private* limited company). There is a new requirement for a statement of compliance (see note on section 13).

### ***Section 106: Application and accompanying documents***

226. This section replaces section 51(5) of the 1985 Act and contains new provisions. It prescribes the contents of the application for re-registration where an unlimited private company is proposing to re-register as private limited and the documents/information that must accompany this application. Where the company is to be limited by guarantee, *subsection (2)(b)* requires the application for re-registration to be accompanied by a "statement of guarantee" (see note on section 11). It should be noted that there is no requirement for a statement of capital and initial shareholdings where the company is to be limited by shares. This is unnecessary because the company will be required to



make a return of allotments to the registrar, under section 555 as soon as it allots shares subsequent to its registration and the return must be accompanied by a statement of capital.

***Section 107: Issue of certificate of incorporation on re-registration***

227. This section restates section 52 of the 1985 Act. As now, it provides that, where the registrar is satisfied that a company is entitled to be re-registered as a private company, she will issue a new certificate of incorporation (which must state that it is being issued on the re-registration of the company). On the issue of a new certificate of incorporation under this section, the company becomes a private limited company and the change to its name and any amendments that were required to be made to the articles take effect.
228. As now, the certificate of incorporation on re-registration issued under this section is conclusive evidence that the company is now a private limited company and that the requirements of the Act as regards re-registration have been met.

***Section 108: Statement of capital required where company already has share capital***

229. This section is a new provision which requires a company that has re-registered from unlimited having a share capital to private limited by shares to file a statement of capital with the registrar in certain circumstances. The statement must be delivered to the registrar within 15 days of the company's re-registration and, where the company fails to observe this requirement, the company and every officer of the company who is in default, commits an offence (see *subsection (4)*).
230. The provision is necessary because unlimited companies are required to provide a statement of capital to the registrar in a limited number of circumstances only: in particular, where the company has a share capital on formation (see section 10) or where an unlimited company having a share capital makes an annual return to the registrar under section 854. Consequently, where an unlimited company having a share capital re-registers as private limited by shares under section 107, in contrast to other companies that are limited by shares, the information on the public register pertaining to the company's subscribed capital may be out of date (in particular if the company has allotted further shares subsequent to its formation or, as the case may be, its last annual return).
231. The requirement for a statement of capital in this section puts companies which have re-registered as private limited by shares under section 107 on the same footing as other companies limited by shares on the register and ensures that the information on the public register is up-to-date. The company will, however, be exempted from the requirement to provide a statement of capital on re-registration where there has been no change to the company's total subscribed capital since it was first formed and registered or, as the case may be, since the company filed its most recent annual return (see *subsection (2)*).

**Public company becoming private and unlimited**

***Section 109: Re-registration of public company as private and unlimited***

232. This section is a new provision, which, as recommended by the CLR (Final Report, paragraph 11.11), enables a public company to re-register as a private unlimited company with a share capital without first having to re-register as a private limited company. The conditions specified in *subsection (2)* must be met and all of the members must give their assent to the company being so re-registered. In the case of a deceased member, assent may be given by the personal representative of the deceased member's estate. Where a member is bankrupt, assent may be given by his trustee in bankruptcy (to the exclusion of the member in question).

233. A public company may not re-register as an unlimited private company under this section if it has previously been re-registered as limited or as unlimited (see *subsection (2)*). The intention behind this subsection (which is based on the provision in *subsection (2)(e)* of section 90) is that a company should not be able to enjoy the benefits of limited liability or avoid the obligations that are attached to this, for example, the increased reporting requirements, by continually swapping from limited to unlimited status.

***Section 110: Application and accompanying documents***

234. This section is a new provision. It prescribes the contents of the application for re-registration where a company is proposing to re-register from public to unlimited private and the documents/information that must accompany this application. There is a requirement for a statement of compliance (see note on section 13) and, in contrast to the statements of compliance that are required elsewhere in the Act, the statement of compliance that is required here must contain a statement made by the directors confirming that:
- the persons by whom or on whose behalf the form of assent is authenticated constitute the whole membership of the company; and
  - if any of the members have not authenticated that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who authenticated it on behalf of a member was lawfully empowered to do so.
235. This mirrors the requirements of the directors' statement in section 103(4).

***Section 111: Issue of certificate of incorporation on re-registration***

236. This section is a new provision which requires the registrar to issue a new certificate of incorporation if she is satisfied that a public company is entitled to register as private and unlimited. On the issue of a new certificate of incorporation (which must state that it is being issued on the re-registration of the company), the company becomes a private unlimited company and the change to its name and any amendments that were made to the articles take effect.
237. The certificate of incorporation on re-registration is conclusive evidence that the company is now a private unlimited company and that the requirements of the Act as regards re-registration have been met.