

# COMPANIES ACT 2006

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 17: a Company's Share Capital**

#### ***Chapter 3: Allotment of Equity Securities: Existing Shareholders' Right of Pre-Emption***

#### ***Section 560: Meaning of "equity securities" and related expressions***

865. This section sets out a definition of "equity securities" for the purposes of Chapter 3 of this Part (which is concerned with the allotment of equity securities and existing shareholders' right of pre-emption). It partially restates section 94(2), (3), (3A) and (5) of the 1985 Act. The exception for shares taken by a subscriber to the memorandum and for bonus shares provided in section 94(2) of the 1985 Act is contained in sections 577 and 564. The exclusion of the allotment of shares pursuant to the grant of a right to subscribe for such shares contained in section 93(3) of the 1985 Act is contained in section 561(3).

#### ***Section 561: Existing shareholders' right of pre-emption***

866. Subject to some exceptions, under section 89(1) of the 1985 Act, a company that is proposing to allot equity securities (defined in section 560) must offer them to existing shareholders first (that is, on a pre-emptive basis). The basic principle (which is unchanged by the Act) is that a shareholder should be able to protect his proportion of the total equity of a company by having the opportunity to subscribe for any new issue of equity securities. This is subject to various exceptions and *subsection (5)* provides a pointer to these exceptions.

#### ***Section 562: Communication of pre-emption offers to shareholders***

867. This section replaces section 90(1), (5) and (6) of the 1985 Act. Section 90(6) of the 1985 Act provides that where a company communicates a pre-emption offer to its existing shareholders the offer must state a period of not less than 21 days during which it may be accepted and it may not be withdrawn before the end of that period. This section contains a new provision which gives the Secretary of State the power to vary, in regulations made under the Act, the period of 21 days (but not so as to reduce it to fewer than 14 days) – see *subsection (6)*.

868. It also updates the 1985 Act provision to ensure that the communications of pre-emption offers to shareholders continue to be compatible with EU law: in particular, in future companies will be required to give individual notice (which may be in hard copy or electronic form) to all shareholders who have a registered address in the EEA or who have given an address for service of notices in the EEA (under the 1985 Act, a company is only required to give individual notice to shareholders who have given a service address in the UK). As now, where no relevant address for service has been provided,

the company may discharge its obligation by causing notice of the offer to be published in the London, Edinburgh or Belfast Gazette as appropriate.

***Sections 569 to 573: Disapplication of pre-emption rights***

869. This group of sections deals with the circumstances in which the statutory pre-emption requirements may be disapplied or modified by a power under the articles or by special resolution in accordance with the detailed rules in these sections. The rules replace or restate equivalent provisions in section 95 of the 1985 Act.
870. **Section 569** is a new provision which sets out how members of a private company with only one class of shares may authorise the directors to allot shares without complying with the statutory pre-emption provisions.
871. **Section 573** is concerned with the disapplication of pre-emption rights in connection with a sale of treasury shares. Generally speaking, where a company buys back its own shares, it is normally required to cancel those shares (see section 706(b)). Certain companies (principally those which are listed or those whose shares are traded on the Alternative Investment Market and equivalent companies in the EEA) may however elect not to cancel shares which have been bought back but may hold the shares “in treasury”. A share which is held in treasury may be sold at a future point in time and this facility enables such companies to raise capital more quickly than they would otherwise be able to do, as the directors do not have to obtain prior authority from the company’s members before selling treasury shares. However, the provisions of section 561 do apply to sales of treasury shares as they apply to allotments of shares (see section 560(2)(b)).
872. This section applies to a sale of shares which have been held in treasury by the company. It replaces section 95(2A) of the 1985 Act and reproduces the effect of that section by enabling a company’s members to give a general power to the directors (through the company’s articles or by special resolution of the company’s members) to sell such shares as if statutory pre-emption rights did not apply, or applied with modifications.
873. This section also permits the members to confer upon the directors (by special resolution) a specific power which enables them to sell treasury shares as if statutory pre-emption rights did not apply to a specified sale, or applied with modifications.