RELEASING SECURITY: FAQs

A note considering some common queries that arise when dealing with releasing security.

This note takes the form of a series of questions and answers on a range of topics, including deeds of release, DS1 issues, filing forms MR04 and MR05 and how to deal with errors in filing forms MR04 and MR05.

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DEEDS OF RELEASE

Is a deed of release required before I can file a Form MR04 or MR05 at Companies House?

Strictly speaking, you do not need a deed of release to file *Form MR04* or *Form MR05* (unlike when you register security where it is now necessary to provide a certified copy of the written charge instrument when filing Form MR01 or Form LL MR01).

However, if you file a Form MR04 or MR05 in circumstances where the debt for which the charge was granted has not been paid or satisfied in part or in full (in the case of Form MR04) or where the property charged (a) has not been released from the charge or (b) continues to form part of the company's property (in the case of Form MR05), then that is likely to cause problems.

This is because Forms MR04 and MR05 do not bring about the release of security – they simply record the satisfaction of the secured debt or the release of assets from the security in question. This means that it is common practice to obtain a deed of release before filing a Form MR04 or MR05, as this provides the necessary comfort for the person making the filing to give the relevant confirmations in Part C of Form MR04 or MR05 (as the case may be).

Exceptionally there may however be circumstances where a Form MR04 or MR05 can be filed without obtaining a deed of release first. The following are three examples of where a deed of release might not be necessary:

- If the security is a legal mortgage over real estate granted by a company that has previously been registered both at the Land Registry as well as Companies House.

  If the mortgagee signs a DS1 for filing at the Land Registry to acknowledge that the mortgage has been repaid, you may conclude that a separate deed of release is not necessary to file a Form MR04 at Companies House. This largely depends on the provisions of the security document creating the legal mortgage (for more information, see *Is a deed of release required in addition to form DS1 where the security is solely over property?*).

- The debt for which the security was granted may have been discharged a long time ago but without obtaining a formal release of the related security at the time from the security holder.

  In this situation, the security may represent a historic charge, and obtaining a deed of release now may prove difficult, especially where the security holder no longer exists. A director or other officer of the chargor may be willing to give the confirmation in Form MR04 that the debt for the charge has been paid or satisfied in full, even though no formal deed of release was ever obtained.

- A company that grants security might enter a transaction in which it transfers all or part of its assets and undertaking to another company with the consent of its secured creditor(s) (perhaps subject to a condition that the transferee grants equivalent security over the same assets). In that example, a company or officer may give the confirmation required in Form MR05 that part or all of the property or undertaking charged no longer forms part of the company's property or undertaking, even where no formal deed of release has been obtained.

Can security created by multiple security documents be released using one deed of release?

It is certainly possible for one deed of release to be used to release security created by multiple security documents. However, the drafting of a deed of release is likely to be more complicated where there are multiple parties and multiple security documents. Care would need to be taken to ensure that all the relevant security documents are correctly identified in the deed of release. The drafting would also need to make it clear that the security holder(s) only release and give further assurance undertakings in relation to the security they hold.

It may, therefore, be easier to use a separate deed of release for each security document, security under which is being released as the drafting will be more straightforward.

For forms of deed of release, see *Standard documents, Deed of release: full release* and *Deed of release: partial release.*

Does the chargor need to execute a deed of release, or just the lender?

A deed of release is typically required by a chargor to provide comfort that certain obligations and liabilities owed to a lender are irrevocably and unconditionally discharged and security provided for those obligations and liabilities is released. They are largely unilateral arrangements in that the obligations (such as taking all further steps that are necessary to ensure security is released) are imposed on the lender or it is the lender that is confirming that obligations and security are released. It is essential, therefore, that the lender executes a deed of release.

However, a deed of release will need to be executed by a chargor in the following cases:

- Where the release places obligations on the chargor (for example, with respect to further assurance or costs undertakings).

- If the chargor gives certain confirmations (for example, in relation to any continuing security (as would be the case with a partial release of security) or the application of any proceeds of sale arising from the disposal of assets subject to the security that is released).

If a chargor is not under any such obligations and gives no such undertakings or confirmations, then it should not be necessary for it to execute the deed of release.

However, if a deed of release releases security over real estate, the deed may constitute an agreement for the disposition of an interest in land. In this case, both the chargor and the lender may be required to execute the deed in order to comply with the provisions of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

For more information, see *Checklist, Reviewing a deed of release for a chargor: Who should be party to the deed of release?*.

Is a deed of release valid if it has not been signed by the chargor if it is listed as a party but does not have any obligations under the deed of release?

It will not always be necessary for a chargor to execute a deed of release. For information on when a chargor will need to execute a deed of release, see *Does the chargor need to execute a deed of release, or just the lender?*.

If a chargor truly has no obligations under a deed of release, it may have been a drafting oversight that it was listed as a party to the deed. If in doubt, it may be prudent for evidentiary purposes to obtain a further or retrospective deed of release which either lists only the lender as a party and is executed by the lender, or lists chargor and the lender as parties and is executed by both of them.

It is difficult to set out the position for all deeds, as the matters contained within each deed will vary. However, in general terms, it is in the interests of the party (or parties) seeking to rely on the terms of the deed of release to ensure that it is valid and effective against the parties they would seek to enforce it against. As a matter of contract law, it is not always necessary for all parties to have executed a deed for it to be valid as between the parties who have. However, this will be at the discretion of the court and is likely to depend on the relevant circumstances of the transaction. Among other things it will depend on the terms of the document and the extent to which it specified the method of execution and its validity if not signed or delivered by all parties (see *Ask, Execution of documents: must a deed be executed by all the parties in order to be valid as a deed?*).

Does a deed of release need to be executed as a deed?

Market practice is to use a deed to release security. The reason commonly given for doing this is so as to avoid any question about any lack of consideration and to ensure third parties dealing with the chargor can be confident the release is effective.

Leaving aside market practice however, there are the following legal reasons why a release of security may need to be executed by way of deed:

- Under common law, a contract contained in a deed can only be varied or discharged by another contract contained in a deed (see *Practice note, Execution of deeds and documents: Releases and variations*). In most cases, a security document will have been executed as a deed (for information as to the reasons why, see *Practice note, Taking security: Does the security document need to be executed as a deed?*). Therefore, following the common law principle, any release of security created by way of deed must also be by way of deed.

- If a release of security involves a release of a legal mortgage over land (or an interest in land) then that release must be executed as a deed (*section 52, Law of Property Act 1925*).

I am drafting a deed of release for a lender to release some security. What are the key issues I should be considering?

The first point to consider is whether the lender has authority to grant the release. If the security holder (chargee) is acting as security agent or trustee, for example, check the relevant finance documents to determine if it has power to release the assets or whether it needs to obtain an instruction from the relevant secured creditor(s) first before granting the release.

In terms of the drafting of the release document itself, the main points for the lender to consider are as follows:

- The lender should only release the security (and any related contractual obligations or liabilities) to the extent necessary for the relevant transaction, and without recourse or representation as to nature of the assets subject to that security.
- Any further assurance undertakings the lender gives should not expose it to substantial ongoing obligations.
- Any costs and expenses in connection with the release should be for the account of the chargor(s).
- If the underlying security document contains a provision that provides that any release given by the lender is conditional on any payment or security given to the lender not being void or clawed back in any way, you may wish to specify that the release is given subject to that provision. However, be aware that many borrowers will push back on any such qualification as most will want to avoid a qualified release.

You should also give some thought as to whether any conditions of release need to be specified in the release, for example the following:

- If the security is released in the context of an intra-group transfer, it may be appropriate to specify a condition that the transferee of the secured assets gives equivalent new security over the same assets to the lender.
- If the security is released to allow for the sale of the secured assets to a third party, you may wish to specify that any continuing security extends to the sale proceeds (coupled perhaps an obligation for those sale proceeds to be applied in repayment of the debt within a relevant period).

For more information on issues to consider when releasing security, see *Checklist, Releasing security created by an English company*.

I am reviewing a deed of release prepared by the lender's lawyers. What are the key issues I should be checking?

As a chargor or borrower, the key areas you will want to check include the following:

- First, ensure the release covers the correct security and assets. This is particularly important in the case of a partial deed of release, where the assets released from the security may be set out in a schedule to the release.

  In particular, if those assets are being released in order to allow for their sale to a third party, the chargor (seller) will want to ensure it can properly give good title to the relevant assets to the third party (and that the assets covered by the release mirror those subject to any sale under any separate asset sale agreement).

  Similarly, if security is being released in the context of a refinancing, for example, with the chargor expected to grant new security in favour of an incoming lender, the chargor's lawyers will want to ensure that the old security has been properly released in order that it can grant first priority new security to the incoming lender.

  For more information, see *Checklist, Releasing security created by an English company: Identify the security interests and assets being released.*

- Ideally, since it is unusual for the security documents to be formally terminated, the chargor(s) will also want a release of any contractual obligations or liabilities under the relevant finance documents (as well as a release of the relevant security) (see *Standard document, Deed of release: full release: clause 2(1)(b)*).

  In the case of a partial deed of release, any such contractual release may be limited so that it only applies to the extent the relevant obligations relate to the assets released from the security.

- Check the deed of release is properly executed to avoid any questions as to whether it is effective. If it is governed by laws other than the laws of England and Wales, consider whether any local law advice is necessary.

- Check the release document for the following additional points:

  - that there is a further assurance provision by which the lender (or chargee) agrees to do all other things necessary to effect the release (including, for example, by providing any documents of title to secured assets);

  - that any costs and expenses payable by the chargor are limited to reasonable costs and are payable within any time limits agreed on the original transaction;

  - that any confirmation as to any continuing security is accurate;

  - that any power of attorney granted to the lender (or chargee) under the security document is revoked (without prejudice to any prior acts); and

  - that the chargor is authorised to give notice of the release to any relevant third parties (such as a bank, for example, with whom a secured account is held).

None of these points are essential to include in a release but they may, for example, help the chargor at a later stage.

For more information on key points for a chargor's lawyer to consider when reviewing a deed of release prepared by a lender's lawyers, see *Checklist, Reviewing a deed of release for a chargor*.

If I only want to release some assets from security under a debenture, what drafting issues do I need to consider when preparing the deed of release?

The main issues to address in the drafting are the following:

- Identify accurately what assets are to be released from the debenture. If there are multiple assets that need to be released, it may be easier, and clearer, to set these out in a schedule to the deed of release.

- Include a release of any covenants that relate to the assets that are released. It is acceptable to release the chargor from its contractual obligations under the debenture to the extent they relate to the released assets only, but any such contractual release should not go beyond this.

- Include a confirmation that the security continues in all other respects in relation to those assets which are not released from the debenture.

- Consider whether any conditions need to be mentioned. These could be, for example:

  - a requirement for any sale proceeds arising on the sale of the released assets to a third party to be applied within a specified period following the date of the release in prepayment of the debt for which the debenture was granted (including perhaps an express reservation of security over the sale proceeds); or

  - alternatively, or in addition (if the released assets are transferred to a related party) a requirement for the transferee to grant equivalent security over those released assets.

- As with any deed of release, consider when the deed of release should become effective. Some releases are silent on this and take immediate effect when dated and released. Others might make provision for an "effective date" concept, meaning that they can be signed in advance but take effect at a specified future date only (for example, on payment of a secured debt or upon completion of a relevant transaction) (see *Practice note, Execution of deeds and documents: Specifying an alternative effective date*).

The key is to be very careful about which assets you are releasing from the debenture. You should check the definitions within the debenture very carefully and ensure that you capture every asset that is meant to be released from the security.

Note also that debentures typically provide for different kinds of security interest over different assets, including legal mortgages, fixed and floating charges as well as assignments by way of security. If you are releasing assets from a debenture which are subject to different security interests, ensure the assets are released from each of the relevant types of security interest. For this reason, it is common to see a catch-all phrase such as a "release, surrender, re-transfer, re-assignment and re-conveyance" to do this.

For more information, see *Checklist, Reviewing a deed of release for a chargor: Partial or full release?*.

Can a deed of release be amended to correct a mistake, for example, if there is an error in the description of the property released from security or in the references to the documents some releases were effected under?

As with any deed, it is possible to amend a deed of release (for information on varying deeds, see *Practice notes, Contracts: variation* and *What, if any, formalities are required to vary a written contract executed as a deed?*). However, because a deed of release deals with security, depending on the nature of the error in a deed of release, the best course of action may not be simply to amend that deed of release.

In terms of amending a deed of release, you will need to consider the following issues:

- Has the deed of release been delivered and so become effective? If it has not, then rather than correcting any mistake in that deed it may be more straightforward to just execute a new deed of release. However, check carefully whether the deed has been delivered and note that it is possible for a deed to take effect as a simple contract in certain circumstances. For more information, see *Practice note, Execution of deeds and documents: Delivery of deeds and Defective deeds*.

- If the deed of release has been delivered and become effective, check whether the error means that the wrong security has been released or that the wrong assets have been released from security.

  If this is the case then, rather than the error in the deed of release needing to be corrected, it may be that the security released in error needs to be retaken. This will mean that new hardening periods will start and there may be issues with priority of that security if any other security has been granted before that new security is retaken and perfected. If the error also means that the deed of release is not effective to release the security or assets that should have been released, then rather than amending the existing deed of release it would typically be simpler to execute a new deed of release under which the correct security or assets are released.

For information on correcting mistakes in documents more generally, see:

- *Practice note, Contracts: mistakes affecting formation and terms: Can the parties correct the mistake by agreement?*.

- *Practice note, Contracts: rectification and other ways to correct mistakes*.

If my client is buying assets from a company that are currently subject to a floating charge that that company has given to a lender, will a letter of non-crystallisation suffice or should I ask for a deed of release in respect of those assets?

A letter of non-crystallisation should be sufficient in these circumstances, provided that the following apply to the scenario in question:

- It is clear under the terms of the relevant security document that the assets being purchased are subject to a floating charge only.

- The floating chargeholder confirms in the letter of non-crystallisation that no event has occurred which would crystallise the floating charge into a fixed charge and that it has taken no steps to crystallise the floating charge.

In general terms, a letter of non-crystallisation is appropriate where assets are to be released from a floating charge which has not yet crystallised. For a form of letter of non-crystallisation, see *Standard document, Letter of non-crystallisation of floating charge*.

If, however, the assets to be released are subject to a floating charge that has crystallised, or a fixed charge, then a deed of release will be required.

REQUIREMENTS FOR DEEDS OF RELEASE DURING ENFORCEMENT PROCEDURES

Is a deed of release required on a sale by a lender under its power of sale?

The position varies depending on what the asset in question is. A sale of land by a legal mortgagee under its power of sale will release the land from the legal mortgage. However, for non-land assets, a purchaser will typically want to see a deed of release (which will need to take effect as soon as possible after the sale has completed, so that the lender's power of sale remains in place for the transaction to operate).

A lender exercising its power of sale would also need to procure the release of any prior ranking security whether the asset in question is land or not.

For more information on the issues to consider in this scenario, see *Practice note, Releasing security: Sale by a lender under its power of sale*.

Is a deed of release required to release security on a sale by a receiver?

A receiver has no power to discharge secured assets from any security interest, including the security interest under which the receiver was appointed, regardless of the date of creation of a security interest.

For more information on issues to consider in this scenario, see *Practice note, Releasing security: Sale by a receiver.*

For more information on issues to consider when the asset being sold is property, see *Practice note, Security over property: FAQs: Is a deed of release required to release security on a sale by a receiver?*.

Is a deed of release required to release security on a sale by an administrator?

An administrator can only sell an asset subject to a security interest as if the asset were not subject to that security interest in certain circumstances.

For more information on issues to consider in this scenario, see *Practice note, Releasing security: Sale by an administrator*.

Is a deed of release required to release security on a sale by an administrative receiver?

An administrative receiver has no power to discharge secured assets from any security interest, including the security interest under which it was appointed.

For more information on issues to consider in this scenario, see *Practice note, Releasing security: Sale by an administrative receiver.*

DS1 ISSUES

Is a deed of release required in addition to form DS1 where the security is solely over property?

The answer depends upon who you are acting for. If the security is being released in the context of a sale of the property and you are acting for the purchaser, a form DS1 should be sufficient without any separate deed of release.

Discharges and releases of registered charges (that is, legal mortgages over property that have been registered at the Land Registry) must be made in accordance with *rules 114* and *115* of the LRR 2003. Rule 114 of the LRR 2003 states that (subject to rule 115, which relates to electronic discharges), a discharge of a registered charge must be in form DS1 (and that release of part of the registered estate from a registered charge must be in form DS3). For more detailed information, see *Practice note, Mortgages and charges over land: Release of security and LR Practice Guide 31 - Discharges of charges*.

Form DS1 provides (in panel 6) that the lender acknowledges that the property identified in panel 2 is no longer charged as security for payment of the sums due under the charge. Where no other assets are being released, a duly completed and executed form DS1 will release the property from the legal mortgage.

However, if you are acting for the chargor, you should be aware that a deed of release will typically include language that goes beyond the wording in a form DS1. For example, it will often include an express release of the chargor's covenants, liabilities and obligations under the legal mortgage. For this reason, whenever acting for the chargor, it will almost always be beneficial to obtain a deed of release as well. For a form of full release, see *Standard document, Deed of release: full release* and for a form of partial release, see *Standard document, Deed of release: partial release.*

In practice, in a commercial transaction, it will almost always be the case that other assets are being released at the same time (for example, even where the main security is property, the security package will usually include insurance) so a deed of release will be required to release those assets. In these circumstances, the deed of release will typically include all assets including the property.

For more information on releasing security, see *Practice note, Releasing security*, in particular the sections *When do you need a deed of release?* and *Land Registry*.

If a form DS1 is registered at the Land Registry by mistake in relation to a property that should still form part of the lender's security package, can the lender apply for rectification of the register?

The register may be altered in the circumstances set out in Schedule 4 to the LRA 2002. Some alterations are classed as rectifications whereas others are not. An alteration is classified as a "rectification" if it involves the correction of a mistake and it prejudicially affects a registered owner's title (*paragraph 1, Schedule 4, LRA 2002*).

In particular, the registrar may alter the register for the purpose of correcting a mistake (*section 65 and paragraph 5(a), Schedule 4, LRA 2002*). The registered owner's consent will be required for a **rectification** in relation to land in its possession, unless the registered owner has fraudulently or carelessly caused or substantially contributed to the mistake, or it would be unjust not to rectify for another reason (*paragraph 6(2), Schedule 4, LRA 2002*). If the registrar has the power to rectify, the application must be approved, unless there are exceptional circumstances that justify not making it (*paragraph 6(3), Schedule 4, LRA 2002*).

The registrar may also alter the register to bring it up to date (*paragraph 5(b), Schedule 4, LRA 2002*).

Alterations may also be ordered by the court and when the order is served on the registrar a duty is imposed on the registrar to give effect to it (*paragraph 2, Schedule 4, LRA 2002*). A court may make an order for the register to be altered to correct a mistake or bring the register up to date (*paragraph 2(1), Schedule 4, LRA 2002*). The registered owner's consent will be required for a **rectification** in relation to land in its possession, unless the registered owner has fraudulently or carelessly caused or substantially contributed to the mistake, or it would for any other reason be unjust not to rectify for any other reason (*paragraph 3, Schedule 4, LRA 2002*). If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.

The categorisation of the alteration has significant practical consequences. If the alteration is merely to bring the register up to date:

- It does not give rise to an entitlement to be indemnified by the Land Registry as it would in the case of a rectification where there is an entitlement to claim against the Land Registry for loss suffered because of the mistake in the register.
- The registered owner's consent is not required for the alteration to be made as it would be if the alteration is a rectification.
- The court does not have the power to change the priority of any interests affecting the property as it would do under *paragraph 8* of Schedule 4 to the LRA 2002 if the alteration is a rectification.

A formal application to the registrar should be made using *form AP1* (*rule 13*, LRR 2003). In addition, the Land Registry requires full details of the mistake and the correction sought (see paragraph 2.1, *LR Practice Guide 39 - Rectification and indemnity*).

Specific guidance about rectification can be found in *LR Practice Guide 39 - Rectification and indemnity*, which also contains an appendix with examples of what may amount to a mistake in the register.

The rules relating to alteration of the register were considered in *NRAM Plc v Evans [2017] EWCA Civ 1013*. It was held that following the setting aside of an e-DS1 that had been executed and filed in error, the lender was entitled to have the security it had released by mistake re-registered and for the register to be altered to bring it up to date. The court held, however, that this was not a rectification of the register within the meaning of paragraph 1 of Schedule 4 to the LRA 2002. In the circumstances, the e-DS1 was a voidable disposition. A voidable disposition is valid until it is set aside. Therefore, removal of the security did not give rise to a mistake in the register for the purposes of Schedule 4 because at the time of removal the e-DS1 had not been set aside and was valid. It should be noted that the court could not order re-registration of the security with retrospective effect so if the circumstances had been different it could have been subordinated to any interests created during the period after it had been removed until it was re-registered. For more information, see *Legal update, Should a discharge of a registered charge by e-DS1 be set aside for mistake? (Court of Appeal)*.

PROBLEMS IDENTIFYING THE CHARGEE OR MORTGAGEE

How do you remove a charge from the register at Companies House if that charge was in favour of a company that has been dissolved?

Any person with an interest in a charge (for example, as a chargor or chargee) can file Form MR04 at Companies House to remove a charge from the register. So, if the chargee has been dissolved but the chargor is comfortable that the charge has been satisfied in full, the chargor will be able to remove the charge from the register at Companies House by filing the appropriate Form MR04 (see *Is a deed of release required before I can file a Form MR04 or MR05 at Companies House?*).

If, however, the charge has not been satisfied then the answer is less straightforward. The chargor would not be in a position to file Form MR04 at Companies House and it would need to look into how to satisfy the charge and get the security released in order to be able to file that form.

When a company is dissolved, its assets (which will include debts due to it) become bona vacantia and the property of the Crown (see *Practice note, Company dissolution: voluntary strike off: Preliminary considerations and Assets and liabilities of dissolved company*). Normally the assets will be disclaimed or sold, and the proceeds of sale transferred to the Treasury. The Treasury Solicitor, via the Bona Vacantia division (BVD) of the Government Legal Department, acts for the Crown in relation to bona vacantia so the chargor will need to discuss satisfaction of the charge with the BVD. Note that the Crown can disclaim bona vacantia if, for example, it is of no value to the Crown or if it is not cost effective to sell it. For more information on bona vacantia, see *Practice note, Bona vacantia, Crown disclaimer and escheat: issues in liquidation,*

dissolution and restoration: Bona vacantia. See also the guidance from the BVD, *Government Legal Department, Send money due to the Crown under a bona vacantia mortgage (BVC5) (December 2013)*.

However, when a company is dissolved, one would expect it to have assigned the benefit of any debts due to it before dissolution. So, the chargor should see whether it is possible to ascertain whether such an assignment took place before the chargee was dissolved. If the benefit of the debt owed to the chargee by the chargor was assigned to another entity then the chargor will need to discuss the issue of satisfaction of the charge with that entity.

It is possible for a dissolved company to be restored to the register of companies so one option available to a chargor who wishes to satisfy a charge would be to apply to restore the chargee to the register. However, this would be very expensive and time consuming so is not a practical option. For more information on restoring a dissolved company to the register, see *Practice note, Restoring a dissolved company to the register of companies*.

How can a mortgage over property be discharged if the mortgagee cannot be found so it cannot sign the DS1?

The answer will depend on whether the monies secured by the mortgage have previously been repaid and this is essentially a tidying up exercise or whether the mortgagor is trying to locate the mortgagee to repay the secured monies and deal with the necessary release formalities at the same time.

Assuming that the secured monies have been repaid, *rule 114(4)* of the LRR 2003 allows the registrar discretion to accept, instead of a form DS1, any other proof of satisfaction of a mortgage that the registrar may regard as sufficient (see *LR Practice Guide 31 - Discharges of charges*).

If the secured monies have not been repaid *section 50* of the LPA 1925 outlines a procedure for court discharge of security if the property is being sold. If the property is not being sold then court intervention whereby someone is appointed to sign a discharge on payment of monies in to court may also be a solution.

It will also be necessary to consider whether the mortgage needs to be removed from the records at Companies House (where the mortgagor is a company or limited liability partnership to whom the security registration regime applies). There is no statutory requirement to file a release form at Companies House but doing so is usually regarded as a matter of good company house-keeping. The Companies House release form can be signed by someone with an interest in the registration of the security concerned (such as the mortgagor, acting by one of its officers). That person will need to be satisfied, however, that the release form can be filed at Companies House. For more information, see *Practice note, Registration of charges created by companies and limited liability partnerships on or after 6 April 2013: Does a company have to register satisfaction of the secured debt or release of a charge?*.

FILING FORMS MR04 AND MR05

Can I file Forms MR04 and MR05 online or do I have to use a paper form?

Forms MR04 and MR05 can be filed electronically at Companies House as well as in paper form. For more information on filing procedures at Companies House, see *Practice note, Companies House: filing procedures*.

Is there any Companies House guidance on filing Forms MR04 and MR05?

Companies House has published the following guidance on filing forms MR04 and MR05:

- For guidance on completing Form MR04, see *Companies House: Guidance on completing paper form: Statement of satisfaction in full or part of a charge (MR04): (January 2015)*.
- For guidance on completing Form MR05, see *Companies House: Guidance on completing paper form: Statement that part or whole of the property charged (a) has been released from the charge (b) no longer forms part of the company's property (MR05) (January 2015)*.

If I am filing a Form MR04 at Companies House on behalf of my client (the chargor), can I sign the form?

Yes, a solicitor can sign Form MR04 on behalf of their client, but must insert their name in section C2 as the person delivering the statement. They must use their full name (that is, first name and surname) or the firm's corporate name.

For further guidance on this, see *Companies House: Guidance on completing paper form: Statement of satisfaction in full or part of a charge (MR04): (January 2015)*.

The debt secured by a charge has been satisfied in full and all the assets subject to the charge or have been released from security. Should I file Form MR04 or MR05 at Companies House?

Which form you should use depends on the circumstances on question.

Form MR04 is for use where the debt for which the charge was granted has been paid or satisfied in full or in part.

Form MR05 is for use where some or all of the property or undertaking which is the subject of the charge has been released from the charge and/or no longer form's part of the company's property.

Where a charge has been satisfied in full and all assets released from security, the most common approach, and best practice, would be to file Form MR04 stating that the charge has been satisfied in full. Doing so will mean that Companies House will update the register to show that the charge in question has been satisfied in full.

Filing Form MR05 would be more appropriate where some or all of the secured assets have been disposed of as part of say a permitted disposal or transaction, but where the underlying financing continues. As part of such a transaction, a lender might agree to release its security over the relevant asset(s) being sold or disposed. It would then be possible for the relevant chargor to file a form MR05, but the underlying financing would continue.

If you filed MR05 where a charge has been satisfied in full and all assets released from security, this would be unusual and may prompt questions later as to whether the underlying finance transaction has in fact been discharged.

My client has disposed of a property as a permitted disposal under a facility agreement. My client had granted security over that property (under a debenture given to the lender) to secure amounts owing under the facility agreement. As agreed with the lender, my client used the disposal proceeds to repay part of the amount owing. Should I file a Form MR04 or MR05 at Companies House in respect of the debenture to reflect the release of security and payment of part of the amount secured?

In this situation it would be possible to file either *Form MR04* (to record that the debt for the charge has been satisfied in part) or *Form MR05* (to record that the property sold has been released from the charge and no longer forms part of the company's property).

In deciding which form to use the following points should be considered:

- If Form MR04 is filed, make sure that Part C is completed to confirm that the debt for the charge has been satisfied "in part" rather than "in full" (since only part of the debt has been discharged).
- Note that there is no requirement in Form MR04 to specify how much of the outstanding debt has been discharged. In practice, this means that Companies House will update its records to indicate that the charge has been "part satisfied".
- If Form MR05 is filed, consider carefully whether all or part only of the property charged under the debenture has been released and no longer forms part of the company's property.

- In this particular scenario, filing Form MR05 might offer some advantage, in that it allows the person completing the form to give a brief description of the assets or property released from the charge and which have ceased to form part of the company's property.

- Although it is not relevant to this particular scenario (as the debt in this case has been part repaid only), for completeness it is worth noting that it is not possible to file Form MR05 if Form MR04 has been filed previously to record the debt for which the charge was given as satisfied "in full".

In what circumstances would it be appropriate to file a form MR04 for satisfaction of a debt in part?

Form MR04 would be the appropriate form to use where there has been a partial satisfaction of the secured debt and the assets forming the security remain unaffected.

If, however, certain of the assets have been released from the charge (for example, in order to make a partial repayment), it may be more appropriate to file form MR05 (see *My client has disposed of a property as a permitted disposal under a facility agreement. My client had granted security over that property (under a debenture given to the lender) to secure amounts owing under the facility agreement. As agreed with the lender, my client used the disposal proceeds to repay part of the amount owing. Should I file a Form MR04 or MR05 at Companies House in respect of the debenture to reflect the release of security and payment of part of the amount secured?*). Doing so will make it obvious to anyone reviewing the charges register that the asset in question no longer forms part of the company's property and/or has been released from the charge.

In what circumstances would it be appropriate to file a form MR05 if all assets have been released from security?

The only situation in which this is likely to be appropriate is where the lender has agreed to release all of its security over the assets of a company, but where the loan facilities for which the security was granted continue without any of the sale proceeds being used to pay down the debt. This might arise where, for example, the lender has taken security from multiple obligors, and one of those companies is being sold by the obligor group.

ERRORS IN FILING FORMS MR04 AND MR05

A Form MR05 filed at Companies House included an error because it said that all assets had been released from the charge in question but in fact only some of the assets subject to the charge were released. Can this error be corrected?

The first thing to note is that filing a *Form MR05* at Companies House does not of itself release a charge. A charge can only be released by the chargeholder executing an appropriate deed of release. In addition, charges over certain assets require further formalities before they are released. For example, if the charge is a legal mortgage of registered land that has been registered at the Land Registry, a *Form DS1* (or *Form DS3* in the case of a release of part of a registered title) must be executed by the chargeholder. So, if the charge in question has not been released in full by way of a deed of release, and any other necessary formalities have not been complied with, then the charge should continue in full force and effect.

However, the lender will want to have the register rectified to reflect the true position (otherwise the priority of its security could be affected). To rectify the entry on the register, an application will need to be made to the court for rectification of the register. The section of the *Companies Act 2006* (CA 2006) under which the application must be made will depend on when the charge in question was created:

- If the charge was created on or after 6 April 2013, then an application must be made under section 859M of the CA 2006.

- If the charge was created before 6 April 2013, then an application must be made under section 873 of the CA 2006.

Companies House has published guidance on applying for rectification under these sections (see *Companies House: Rectification of Charges (February 2016)*). Note that there is no guarantee that a court will make an order for rectification.

Companies House has advised that an application to rectify an entry on the register can be made to a local county court or to the Royal Courts of Justice. *The White Book: Civil Procedure Vol (2) (Sweet & Maxwell) at 2G-45* contains some general guidance on such applications, but it is advisable to contact Companies House for guidance on the procedure to be followed for a specific application.

If the form MR05 was filed fraudulently or knowingly in error, note that it is in an offence for any person knowingly or recklessly either to deliver or cause to be delivered to the Registrar, for any purpose of the CA 2006, a document, or make to the Registrar, for any such purpose, a statement that, in either case, is misleading, false or deceptive in a material particular (*section 1112, CA 2006*). For more information, see *Checklist, Companies Act 2006: Schedule of offences*.

For more information, see *Practice notes, Registration of charges created by companies and limited liability partnerships on or after 6 April 2013: Omission or mis-statement in statement of satisfaction or release* and *Registration of charges created by companies and limited liability partnerships on or after 1 October 2009: Does a company have to register satisfaction of the secured debt or release of a charge?*.

My client has filed a statement of satisfaction of a charge (Form MR04) in error. Will Companies House reinstate the charge on the register?

The first thing to note is that filing a statement of satisfaction of a charge at Companies House (*Form MR04*) does not of itself release a charge. A charge can only be released by the chargeholder executing an appropriate deed of release. In addition, charges over certain assets require further formalities before they are released. For example, if the charge is a legal mortgage of registered land that has been registered at the Land Registry, a *Form DS1* (or *Form DS3* in the case of a release of part of a registered title) must be executed by the chargeholder. So, if the charge in question has not been released by way of a deed of release, and any other necessary formalities have not been complied with, then the charge should continue in full force and effect.

However, the lender will want to have the charge restored to the register (otherwise the priority of its security could be affected). To do so, an application will need to be made to the court for rectification of the register. The section of the *CA 2006* under which the application must be made will depend on when the charge in question was created:

- If the charge was created on or after 6 April 2013, then an application must be made under section 859M of the CA 2006.

- If the charge was created before 6 April 2013, then an application must be made under *section 873* of the CA 2006.

Companies House has published guidance on applying for rectification under these sections (see *Companies House: Rectification of Charges (February 2016)*). Note that there is no guarantee that a court will make an order for rectification.

Companies House has advised that an application to rectify the register can be made to a local county court or to the Royal Courts of Justice. *The White Book: Civil Procedure Vol (2) (Sweet & Maxwell) at 2G-45* contains some general guidance on such applications, but it is advisable to contact Companies House for guidance on the procedure to be followed for a specific application.

If the statement of satisfaction was filed fraudulently or knowingly in error, note that it is in an offence for any person knowingly or recklessly either to deliver or cause to be delivered to the Registrar, for any purpose of the CA 2006, a document, or make to the Registrar, for any such purpose, a statement that, in either case, is misleading, false or deceptive in a material particular (*section 1112, CA 2006*). For more information, see *Checklist, Companies Act 2006: Schedule of offences*. For more information, see *Practice notes, Registration of charges created*

by companies and limited liability partnerships on or after 6 April 2013: Omission or mis-statement in statement of satisfaction or release and *Registration of charges created by companies and limited liability partnerships on or after 1 October 2009: Does a company have to register satisfaction of the secured debt or release of a charge?*.

My client's security was incorrectly noted as discharged on the register at Companies House and now another lender has taken security from the same company. Does this mean my client has lost priority?

The priority of security may be affected by a number of factors, including the following:

- The nature of the secured assets (for example, are they freehold or leasehold land, chattels, securities, choses in action or a mixture of assets?).
- The precise legal effect of the security interests (for example, are they legal mortgages, equitable mortgages, fixed or floating charges or a mixture of all these?).
- Whether the relevant security interests were properly perfected by, for example, the service of notice or registration in any appropriate asset registries.
- Whether any priority, intercreditor or subordination agreements have been entered into.

As such, it may not necessarily be the case that registration of a charge at Companies House is definitive as to the priority of any given security interest and other considerations will need to be taken into account.

However, steps should be taken as soon as possible to rectify the register (see *My client has filed a statement of satisfaction of a charge (Form MR04) in error. Will Companies House reinstate the charge on the register?*).

For more information on factors affecting the priority of security, see *Practice note, Perfection and priority of security.*

OTHER ISSUES

Are there any timing issues I need to consider when executing a deed of release?

The timing of execution of a deed of release should always be considered in light of a transaction timetable. If the deed of release is a free-standing matter which does not form part of a wider transaction, the lender may be comfortable to execute and date the deed of release, or it may send a signed, but undated, deed of release back to its solicitors to hold pending completion. In either such case, the intention is that the deed of release becomes immediately effective upon being dated and release.

Often, a deed of release is required to effect the transfer of an asset which was subject to security. Sometimes this is a "permitted disposal" under a loan agreement. Lenders frequently require the proceeds of such a disposal to be used in partial or full payment of the loan. In these circumstances, a deed of release is often executed in advance and held by the solicitors acting for the lender to be held to the lender's order pending completion. Alternatively, an executed deed of release may sometimes be provided to the solicitors to the borrower, supported by a solicitor's undertaking as to the precise timing at which it may be completed and so delivered, again to be held to the lender's order pending completion. Once the transaction documents are all agreed and the parties are ready for completion, the deed of release will usually be completed contemporaneously with the transfer of the assets and the receipt of the disposal proceeds. Any proceeds to be repaid to the lender will usually be held by a solicitor pending completion (supported by a solicitor's undertaking) and transferred to the lender as soon as reasonably practicable after completion.

Occasionally deeds of release incorporate an "effective date" concept, according to which the release takes immediate effect upon the occurrence of an agreed trigger event. This enables a release to be signed and dated in advance, but on terms whereby the release does not become effective until the relevant trigger condition takes place.

For more information on timing issues that may arise when executing a deed of release, see *Practice note, Releasing security: Timing issues on sale of assets and refinancing.*

If security has been released using a deed of release, and Form MR04 or MR05 has been filed at Companies House, are there any other issues that need to be considered, or action that needs to be taken in relation to releasing security?

After a deed of release has been delivered, the lender should return any documents of title relating to the released assets (such as share certificates and signed but undated blank stock transfer forms (see *Practice note, Releasing security: Shares and securities*)) to the chargor. It is helpful for all parties to do this shortly after completion and it is therefore best practice to locate and have these ready to return before completion.

If a legal mortgage over land is being released, a Form DS1 should be executed (by the releasing chargor) and sent to the Land Registry so that the relevant title entries can be updated. In practice Form DS1 will typically be executed at the same time as the relevant deed of release. For more information, see *Practice note:, Releasing security: Land Registry*.

If the security that has been released was an assignment by way of security of, or a fixed charge over, a chose in action (such as rights under contracts or a right to a cash deposit held with a bank), check whether a notice of that security interest was served on the relevant counterparty (the contract counterparty in the case of rights under a contract, or the bank where the account is held in the case of a cash deposit). Typically, such a notice will have been served so a chargor may wish to notify the relevant counterparties that that security interest has been released. In addition, if any directions were given to the counterparty in the original notice, the chargor should revoke those directions. For more information, see *Practice note, Releasing security: Choses in action*.

For more information on procedural requirements that may need to be met when releasing security, see *Practice note, Releasing security: Procedural issues* and *Checklist, Releasing security created by an English company: Procedural steps after the security has been released.*