

Share Capital

- 1. Please provide a step by step description of the procedure for the issuance of share capital for cash consideration in a private company.**

Step 1:

Application received from prospective purchaser.

Step 2:

Check whether there is sufficient unissued authorised share capital to permit the allotment and issue of new shares.

If there is insufficient unissued authorised share capital, the share capital of the company will need to be increased by a special resolution of the members.

Step 3:

Check whether the directors of the Company are authorised to allot and issue the number and class of shares proposed by the company's articles or by ordinary resolution of the members in general meeting. If the directors are not so authorised, the members must pass an ordinary resolution giving, varying or renewing an authority to allot and issue.

Step 4:

Check whether the shares must be offered on a pre-emption basis. If this statutory right has not been excluded in the articles of the company and the proposed offer of shares is not on the pre-emptive basis, the members of the company can pass a special resolution disapplying the pre-emption rights of the shareholders for this particular transaction.

If the members refuse to pass such a resolution, the shares must be offered on a pre-emption basis to existing shareholders.

If the articles of the company specify that pre-emption rights have been excluded, shares can be offered to the prospective purchaser up to the balance of unissued authorised share capital and within the director's authority.

Step 5:

Notify the purchaser, obtain payment from the purchaser and allot shares.

Step 6:

Complete form 88(2) and send to Companies House for filing.

Step 7:

Update register of applications and allotments and register of members in statutory books. Issue shares to purchaser and send share certificate to purchaser within 2 months from the date of allotment.

- 2. Please provide a step by step description of the procedure for the transfer of share capital for cash consideration in a private company.**

Step 1:

The transferor makes an application to the company indicating that he wishes to transfer his shares.

Step 2:

The transferor should complete a stock transfer form indicating the name of transferor and transferee, the number, nominal value and class of shares to be transferred and the consideration monies to be received in respect of the shares.

Step 3:

The completed stock transfer form should be sent to the stamping office together with payment of the stamp duty (payable by the transferee at 0.5% of the consideration) unless the transfer is exempt. This applies notwithstanding anything in the company's articles.

Step 4:

Once the stamped stock transfer form has been received, the company should update its register of transfers and registers of members accordingly.

Step 5:

Within 2 months of the date the application for transfer is lodged with the company, the company must complete and have ready for delivery the share certificates.

- 3. Please provide a description of how the above procedures differ if the consideration for the issuance or transfer is other than cash.**

Issuance

The procedure for issuance of shares in a private company for non-cash consideration is as set out above at question 1, with the exception that the company does not have to consider pre-emption rights as these do not apply to shares offered for non-cash consideration.

However, the procedure for issuance of shares is different if the shares being purchased for non-cash consideration are in a public company. Section 103 of the Companies Act 1985 requires that a public company shall not allot shares as fully or partly paid up (as to their nominal value or any premium on them) otherwise than in cash unless the consideration for the allotment has been independently valued and a report with respect to its value has been made to the company by a person appointed by the company during the 6 months immediately preceding the allotment of the shares and a copy of the report has been sent to the proposed allottee.

Transfer

The procedure for transfer of shares in a private company for non-cash consideration is the same as set out above at question 2.

Financial Assistance

- 1. In an acquisition of share capital, please describe the restrictions, if any, on the acquirer's use of the target's asset to fund or provide security for the funding of the acquisition.**

Use of the target's assets to fund or provide security to the acquirer for the funding of an acquisition would constitute financial assistance under the Companies Act 1985 ("the CA 1985") section 152(1)(a).

Financial assistance is generally prohibited by section 151 of the CA 1985. Section 151(1) states:

“...Where a person is acquiring or proposing to acquire shares in a company, it is not lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of that acquisition before or at the same time as the acquisition takes place”.

Section 151(2) goes on to state:

“Where a person has acquired shares in a company and any liability has been incurred (by that or any other person), for the purpose of that acquisition, it is not lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of reducing or discharging the liability so incurred”

These provisions do not have extra-territorial effect. If the subsidiary providing the financial assistance for the acquisition of shares in a company is a foreign company it is not subject to the prohibition.

There are certain factually specific exceptions provided by the CA 1985, these being:

1. the lawful distribution of assets by way of dividend or distributions made in the course of the company’s winding up;
2. the allotment of bonus shares;
3. a reduction of capital by court order;
4. the lawful redemption or purchase of shares;
5. schemes of arrangement made pursuant to a court order;
6. the acceptance of shares by a liquidator in a winding up as consideration for the sale of property;
7. any act done pursuant to a voluntary arrangement;
8. the lending of money in the ordinary course of business;
9. the funding of employee share schemes; and
10. loans to employees (other than directors) to enable them to acquire a beneficial interest in the company’s or its holding company’s shares.

Public companies may only rely upon the exceptions set out in paragraphs 8 to 10 above if the company has net assets, which are not reduced or to the extent that those assets are reduced the assistance is provided out of distributable profits.

There are exemptions where the financial assistance is not the main purpose of the transaction. However, case law suggests that these exemptions are very rarely available in practice.

There is a procedure available to private companies which permits financial assistance in a private company acquisition. This procedure is known as the “whitewash procedure”.

Whitewashes are commonly used in buy-outs to enable a bank to take security over, and/or obtain guarantees from, the target and its subsidiaries. In these circumstances, the whitewash procedure is available because the security or guarantee granted will not

necessarily lead to a reduction of net assets (although this would depend on the likelihood of the security or guarantee being called).

Less commonly, the target group may be required to provide cash as part of the buy-out (usually by way of break fees) leading to a reduction of net assets. However, here, the whitewash procedure may still be used if the cash provided by the target group comes from distributable profits.

Both the company giving the financial assistance and (if different) the company whose shares are/have been acquired must be private companies.

The whitewash procedure specifies several requirements for the company providing the financial assistance:

1. The company giving the financial assistance must have authority in its Articles and positive net assets.
2. The directors of the company must sign a statutory declaration of solvency.
3. The shareholders of the company must pass a special resolution in a general meeting authorising the financial assistance (unless it is a wholly owned subsidiary).
4. The financial assistance must be given within 8 weeks of the date of the directors' statutory declaration or where a group of companies is giving the financial assistance, the date on which the earliest of the statutory declarations is made.

Sanctions for breach of section 151:

There are both civil and criminal penalties for breach of the financial assistance prohibition.

The transaction itself may be avoided and unenforceable (the Court has discretion) and unenforceable and if the provision of financial assistance is not in the best interests of the company, the directors will be in breach of their fiduciary duties and may have to account for any losses suffered by the company.

A director may also be liable for disqualification as a result of a company's involvement in a prohibited transaction.

The parties to an infringing agreement may be liable for damages in the tort of conspiracy.

The present government has proposed significant changes to the financial assistance laws. In their current state, the changes would permit private companies to give financial assistance without the need for a "whitewash". The public company restrictions would remain in place.

Corporate Governance

1. **Please describe the operative corporate governance law in your jurisdiction.**

Corporate governance in the U.K. is regulated by:

- Common law rules (i.e. case law relating to, for example, director's fiduciary duties).
 - Statute, notably:
 - the Companies Act 1985;
 - the Company Securities (Insider Dealing) Act 1985;
 - the Business Names Act 1985; and
 - the Companies Consolidation (Consequential Provisions) Act 1985.
 - A company's constitution, namely the memorandum and articles of association.
 - The Listing Rules published by the U.K. Listing Authority, which apply to all companies that are listed on the London Stock Exchange.
 - The Combined Code on Corporate Governance (the Combined Code), which applies to listed companies. Companies should include a statement in their annual report indicating how they apply the principles in the Combined Code. Its provisions are not mandatory, but companies are required to include a second statement in their annual report disclosing whether or not they comply with the Combined Code and, if they do not comply, they must give reasons for non-compliance. Companies listed on the Alternative Investment Market ("AIM") are not required to adhere to the Combined Code, but are encouraged to do so by institutional investors. The Combined Code is appended to the Listings Rules, details of which can be found on their website: www.fsa.gov.uk/ukla/2_listinginfo. The Combined Code is supplemented by:
 1. the Turnbull Guidance, which is designed to assist listed companies in complying with the internal control requirements of the Combined Code;
 2. the Smith Guidance on audit committees and auditors; and
 3. suggestions for good practice from the Higgs Report.
 - Guidelines issued by bodies that represent institutional investors. These apply to listed companies and, in some respects, go further than the Combined Code. Although the guidelines are informal, institutional investors may oppose any corporate actions that contravene them. (Institutional investors such as pension funds and insurance companies own the vast majority of shares in UK listed companies.)
 - In the context of takeovers of public companies, the City Code on Takeovers and Mergers and rules of the Takeover Panel.
 - The FSA's Code of Market Conduct (which came into effect in December 2001) (the Code of Market Conduct), which regulates, for listed company securities, the disclosure and use of confidential and price sensitive information, and actions that could create a false market.
2. **Please provide a web link, if any exists, to the corporate governance law in your jurisdiction (for example in England the link is found on the London Stock Exchange website).**

The London Stock Exchange's website is www.londonstockexchange.co.uk

As at May 2005, a practical guide to corporate governance can be found on this website at: www.londonstockexchange.com/NR/rdonlyres/C450E4FC-89C2-4042-804A-685855FF217B/0/PracticalGuidetoCorporateGovernance.pdf?&MSHiC=1252&L=10&W=Corporate+Governance+&Pre=%3CFONT+STYLE%3D%22color%3A+%23000000%3B+background%2Dcolor%3A+%23FFFF00%22%3E&Post=%3C%2FFONT%3E

Links to Economic Data in Member Countries

- 1. Please provide a web link to a banking institution which provides periodic economic information about your jurisdiction.**

The Royal Bank of Scotland's website is www.rbs.co.uk.

As at May 2005, reports on the UK economy can be found on this website at www.rbs.com/media03b.asp?id=MEDIA_CENTRE/RBS_AND_THE_ECONOMY