

UK Pre-Emption Group Provides Temporary Additional Flexibility for Pre-Emption Disapplication Authorities

April 2, 2020

The UK Pre-Emption Group (PEG) issued a statement, published on April 1, 2020, regarding its expectations for non-pre-emptive issues by companies listed in the UK in the context of the coronavirus pandemic.

Temporary increase

The PEG recommends that investors, on a case-by-case basis, consider supporting non-pre-emptive issues by companies of up to 20% of their issued share capital until September 30, 2020 (the temporary period), rather than 5% for general corporate purposes with an additional 5% for specified acquisitions or investments, as set out in its statement of principles (the normal thresholds).

The PEG emphasised that its statement of principles already permits companies to request a specific disapplication of pre-emptive rights from shareholders outside of the normal thresholds, and this process should continue to be respected.

The PEG will reconvene before the temporary period expires to assess how companies and investors have responded to the additional flexibility and conduct a wider review of how companies utilised it. No inference should be drawn that the PEG intends to consider an extension to the normal thresholds outside of the present, unparalleled economic situation.

Practical implications

If additional flexibility over and above the normal thresholds is being sought:

- the particular circumstances of the company should be fully explained, including how it is supporting its stakeholders
- proper consultation with a representative sample of the company's major shareholders should be undertaken
- as far as possible, the issue should be made on a soft pre-emptive basis
- company management should be involved in the allocation process
- existing share awards should not be normalised to negate the dilutive effect of the extended issuance

The PEG made clear that directors will be held accountable for their decisions to utilise additional flexibility at the annual general meeting following its use and expects companies to disclose details of the consultation undertaken prior to any issuance and the efforts made to respect pre-emptive rights, given the time available, in their annual report and accounts. Companies are reminded that such disclosures are to be made in addition to those already required by the PEG's Appendix of Best Practice in Engagement and Disclosure.

Impact on cash-box placings

Ahead of being able to obtain pre-emption disapplications reflecting this updated guidance at their 2020 annual general meetings, some companies may seek to raise urgent funds through a so-called "cash-box" placing of shares up to 20% of the company's existing issued share capital without the need to publish a prospectus. A cash-box placing allows an issuer to issue new shares under the exemption from the pre-emption requirements in the Companies Act 2006 for issues of shares for non-cash consideration. The issue is not an issue of shares for cash as the shares are issued in exchange for preference shares in a special purpose subsidiary. The 2015

PEG statement of principles discouraged issuers from raising funds by way of a cash-box placing when the number of shares issued on a non-pre-emptive basis is in excess of the company's existing shareholder authority for non-pre-emptive issues for cash (5%, with an additional 5% for issues in connection with an acquisition or specified capital investment).

This announcement provides reassurance to the directors of companies considering such a transaction, as well as guidance as to institutional investor expectations for such transactions.

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Key Contacts

Claire Keast-Butler London	ckeastbutler@cooley.com +44 20 7556 4211
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