

New Guidance on Best Practice for Disapplying Pre-Emption Rights for UK Premium Listed Companies

May 10, 2016

Introduction

On May 5, 2016, the Financial Reporting Council's Pre-Emption Group published its [first monitoring report](#) on the application by listed companies of its revised 2015 Statement of Principles on disapplying pre-emption rights March 2015.

The Statement of Principles aims to provide clarity on the factors to be taken into account when considering the case for disapplying pre-emption rights and making use of an agreed authority for a non-pre-emptive share issue and the circumstances in which flexibility might be appropriate.

A reminder of the revised guidance on disapplying pre-emption rights

Key amendments to the previous 2008 Statement of Principles included:

- clarification of the scope of the Statement of Principles, making it clear that it applies to both UK and non-UK incorporated companies whose shares are admitted to the premium segment of the Official List of the UK Listing Authority;
- clarification that the Statement of Principles applies to all issues of equity securities that are undertaken to raise cash for the issuer or its subsidiaries, irrespective of the legal form of the transaction, including for example, "cashbox" transactions;
- flexibility to undertake non-pre-emptive issuance of equity securities in connection with acquisitions and specified capital investments, consistent with existing market practice; and
- greater transparency on the discount at which equity securities are issued non-pre-emptively.

The 2015 Statement of Principles provides that a company may seek authority by special resolution to issue non-pre-emptively for cash equity securities representing:

- no more than five per cent. of issued ordinary share capital in any one year; and
- no more than an additional five per cent. of issued ordinary share capital provided that, in the circular for the Annual General Meeting at which such additional authority is to be sought, the company confirms that it intends to use it only in connection with an acquisition or specified capital investment which is announced contemporaneously with the issue, or which has taken place in the preceding six-month period and is disclosed in the announcement of the issue.

Summary of the Pre-Emption Group's findings

In the period of the Pre-Emption Group's review of general meeting resolutions between March 2015 and March 2016, FTSE 350 companies proposed 351 general authorities to issue shares, all of which were approved.

Out of the 351 authorities to disapply pre-emption rights in connection with the general authorities to issue shares for cash, the vast majority were requests for disapplication of up to five per cent., less than 35 per cent. of the resolutions were requests for disapplication of 10 per cent. or more, and one resolution was a request for disapplication of 15 per cent. All but one of these resolutions were approved.

For disapplication authorities of 10 per cent., most companies requested this in one resolution covering all of the disapplication (with the associated undertakings regarding an acquisition or specified capital investment referred to in the explanatory notes to the resolutions or in the Chairman's

statement). However, four other resolutions referred to the two portions of five per cent. disapplication separately, but within the same resolution.

In addition, there were 13 specific authorities to issue shares and nine specific authorities to disapply pre-emption rights, variously in connection with placings, share consolidations and mergers and acquisitions, all of which were approved.

Proposal for template shareholder resolutions

The research shows that generally the 2015 Statement of Principles was adhered to in 2015, but 2016 will be the first year in which the Principles have been in place for the entirety of the traditional AGM reporting season.

The preference of investor representatives on the Pre-Emption Group is for companies to propose two separate resolutions, each requesting a five per cent. authority to disapply pre-emption rights. The investor view is that resolutions requesting the second five per cent. authority should refer specifically to use in connection with a specified capital acquisition or investment.

Accordingly, having considered the monitoring exercise and investor representatives' views on best practice, the Pre-Emption Group has published template resolutions for disapplying pre-emption rights to assist companies.

The template recommends companies propose two separate resolutions:

- The first resolution requests a five per cent. disapplication to be used on an unrestricted basis.
- The second five per cent. disapplication resolution, which will only be put forward when appropriate to do so, requests authority to disapply pre-emption rights when the board consider the use to be for an acquisition or specified capital investment in accordance with the 2015 Statement of Principles.

When an additional five per cent. disapplication authority is used, companies should disclose, in the announcement regarding the issue, the circumstances that have led to its use and describe the consultation process undertaken. In addition, the 2015 Statement of Principles provides that companies are expected, where they have undertaken a placing using the disapplication of pre-emption rights, to publish in the next annual report the actual level of discount achieved, the net proceeds raised, how those net proceeds were used, and the percentage increase in issued share capital due to non-pre-emptive issuance for cash over the three year period preceding the issue.

The template resolutions illustrate an approach which investors consider to be good practice and are drafted for companies with premium listings that are incorporated in the UK. Companies with premium listings and that are incorporated outside the UK, should adopt resolutions in an appropriate form. Companies are encouraged to use the template resolutions at their next general meeting, but will be expected to use the template resolutions for meetings held after 1 August 2016.

Conclusion

The Pre-Emption Group noted that in 2016 it will be looking for continued improvement in disclosure of the intended and actual disapplication of pre-emption rights and for all companies to engage with their shareholders and adhere to the letter and spirit of the 2015 Statement of Principles.

In certain circumstances, UK premium listed companies are able to raise up to 10 per cent. of their existing issued share capital in efficiently executed non-pre-emptive placings by combining the guidance in the 2015 Statement of Principles with the existing EU Prospectus Directive exemption from the requirement to prepare a prospectus in connection with the admission of shares to trading on a regulated market, where those shares represent less than 10 per cent. of the same class of shares already admitted to that market in the last 12 months.

With one of the forthcoming, proposed changes to the EU prospectus regime being to widen the scope of the above-mentioned prospectus exemption for secondary share issues by increasing the

annual threshold from 10 per cent. to 20 per cent. of shares already admitted ([which we reported on here](#)), it will be interesting to see how, if at all, the 2015 Statement of Principles evolves over time. Absent changes to the 2015 Statement of Principles, UK premium listed companies will not be able to take advantage of this improved ability to raise further equity capital without a prospectus, in compliance with the Pre-Emption Group guidelines.

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