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Updated UK share capital management guidelines

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The Investment Association, the trade body for UK investment managers, has published updated guidelines setting out the expectation of its members where premium listed companies seek shareholder authorisation for issuing new shares, disapplying pre-emption rights and effecting share buybacks.

The guidelines, which were last published in 2016, have been updated to reflect certain recommendations made by the UK Secondary Capital Raising Review in its report published in July 2022 for improving the efficiency of further capital raising by listed companies. The guidelines apply to premium listed companies, albeit standard listed companies, AIM companies and companies whose shares are admitted to the High Growth Segment are also encouraged to adopt them.

The principal changes made to the guidelines are as follows:

Directors' general power to allot shares

Investment Association (IA) members will still regard as "routine" an authority to allot up to two-thirds of a company's existing issued share capital. However, the scope of this recommended authority has been widened: the IA's previous position was that any amount in excess of one-third of existing issued shares should be applied to fully pre-emptive rights issues only, but the IA's new position is that the additional one-third should apply to all forms of fully pre-emptive offers (e.g., including open offers).

Directors' general power to disapply pre-emption rights

The guidelines have been updated to reflect the support of IA members for the Pre-Emption Group's (PEG) Statement of Principles and template resolutions published in November 2022 (see our November 7, 2022 client update). These resolutions allow companies to disapply pre-emption rights up to 24% of their issued share capital: (i) 10% on an unrestricted basis; (ii) 10% in connection with an acquisition or specified capital investment in the previous 12 months; and (iii) 4% for the purposes of a follow-on offer (of which 2% must relate to an acquisition or specified capital investment). By way of comparison, the previous version of the Statement of Principles and template resolutions published in 2015 allowed companies to disapply pre-emption rights up to 10% of their issued share capital (5% on an unrestricted basis and a further 5% in connection with an acquisition or specified capital investment in the previous six months).

Save with respect to capital hungry companies (see below), IA members expect any company seeking a disapplication of pre-emption rights of up to 24% of its issued share capital to follow PEG's template resolutions so far as they are applicable. The guidelines note that the disapplication of pre-emption rights over lesser amounts may be appropriate for some companies.

Where a company is seeking authorities against PEG's template resolutions, IA members expect that companies will confirm in their notice of meeting that they will follow the shareholder protections and approach to follow-on offers as set

out in the Statement of Principles.

In light of the above, IA members have asked IVIS, the IA's voting research service, to "Red Top" companies (i.e., issue a warning indicating that there is an issue of significant and serious concern to shareholders) that:

- seek a routine disapplication of pre-emption rights in excess of 24% of the issued share capital allowed for by the Statement of Principles; or
- seek a disapplication of pre-emption rights up to 24% that does not:
  - follow PEG's template resolutions; and
  - confirm that it will follow the shareholder protections and expected features of a follow-on offer as specified in the Statement of Principles.

Capital hungry companies

IA members support the approach adopted by PEG in providing more flexibility in terms of the size and frequency of non-pre-emptive authorities for companies that need to raise larger amounts of capital more frequently (defined as capital hungry companies in the Statement of Principles). The guidelines note that: (i) the Statement of Principles provides that companies seeking admission to the Official List of the Financial Conduct Authority that wish to be considered a 'capital hungry company' for the purposes of the Statement of Principles should disclose that fact in their IPO prospectus; and (ii) IVIS would "Amber Top" (i.e., raise awareness of an area which requires significant shareholder judgment) the pre-emption authorities in excess of 24% of the issued share capital for companies who have disclosed at the time of their IPO in their prospectus that they are a capital hungry company.

Share buybacks

No substantive updates have been made to the guidelines for companies who decide that share repurchases are in the best interests of their shareholders. Namely, among other things:

- companies should use a special resolution for seeking annual authority to purchase their own shares whether on market or off market, even though the Companies Act 2006 requires an ordinary resolution only;
- a general authority to purchase up to 10% of existing issued ordinary share capital is unlikely to cause concern, but IVIS will note a general authority to purchase more than 10% (a repurchase of more than 15% is not permitted under the Listing Rules unless carried out by a tender offer);
- in calculating existing issued share capital, any shares held in Treasury should be excluded;
- the IA's preference is for companies not to hold more than 10% of their shares in Treasury despite the flexibility to hold more under the Companies Act 2006; and
- IA members support the price limitations set out in the Listing Rules for share buybacks of less than 15% of issued share capital pursuant to a general authority.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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