

COVID-19: RELAXATION OF PRE-EMPTION GUIDELINES

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UK Corporate Alert

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Many listed companies currently need to raise funds on an urgent basis to protect their businesses and maintain their solvency, as a result of the COVID-19 crisis. On 1 April 2020, the Pre-Emption Group (*PEG*) therefore issued a [statement](#) setting out a temporary relaxation of its guidance on disapplying pre-emption rights for listed companies.

PEG'S TEMPORARY RELAXATION

PEG recommends that investors, on a case-by-case basis, should consider supporting issuances by companies of up to 20% of their issued share capital. This is as opposed to the usual 5% for general corporate governance purposes, with an additional 5% for specified acquisitions or investments, as set out in the Statement of Principles that PEG issued in 2015. Requests for a specific disapplication of pre-emptive rights outside of the above limits (for example, to fund the acquisition of a new asset) is permitted by the [Statement of Principles](#) and PEG has stated this process should continue to be respected.

Where a company decides to seek this flexibility from its shareholders it should:

- fully explain the particular circumstances of the company, including how the company is supporting its stakeholders;
- properly consult with a representative sample of the company's major shareholders;
- make the issue on a soft pre-emptive basis (as far as possible); and
- ensure company management is involved in the allocation process.

In addition to the disclosures already required to be included in a company's annual report and accounts by PEG's [Appendix of Best Practice in Engagement and Disclosure](#), companies are expected to disclose information about the consultation undertaken prior to the issuance and the efforts made to respect pre-emptive rights, given the time available. PEG makes clear that directors will be held accountable for their decisions to utilise additional flexibility at the annual general meeting following its use.

This temporary recommendation will be in place until 30th September 2020, at which point it will be reviewed by PEG.

Industry groups such as the Investment Association and the Association for Financial Markets in Europe have welcomed the guidance, which should offer companies an avenue to raising money quickly.

CASH-BOX PLACINGS

If companies want to take advantage of the relaxed pre-emption guidelines, they will probably need to use a 'cash-box' structure to do so. A 'cash-box' placing allows an issuer to issue new shares under the exemption from the pre-emption requirements for issues of shares for non-cash consideration. The shares are issued in exchange for shares in a special purpose subsidiary (the sole asset of which is cash) and therefore the issue is not an issue of shares for cash.

A cash-box transaction has significant timing and cost advantages - it can often be effected within as little as five business days from its inception - a significantly shorter period than if a company needs to call and hold a general meeting of shareholders or to carry out a full rights issue.

For companies on the Official List, they are restricted by the Prospectus Rules which require a company to produce a prospectus if it proposes to apply for admission to trading of shares equal to 20% or more of its existing issued share capital. However, this does not apply to AIM companies (AIM is not a 'regulated market' for the purpose of the Prospectus Rules) so they are able to use the cash box to issue as many shares as they are able under their existing shareholder authorities, usually 33% of their issued share capital per year.

The 2015 PEG Statement of Principles discouraged issuers from raising funds through this method, as it raised concerns that cash-box placings were being used to evade pre-emption rights while having the same effect as an allotment of shares for cash, and as a result cash-box placings have been uncommon since 2015. However, given the recent relaxation by PEG, we expect that they will be used much more frequently over the next few months.

K&L Gates has extensive experience of advising listed companies on cash-box structures and other forms of equity fundraisings. Please do not hesitate to contact us if you would like to discuss further the contents of this alert.

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