



## *Issuing New Shares*



## Preliminary

The Companies Act 2006 ("2006 Act") made significant changes to the law regarding share issues which are complicated by the fact that a number of the changes are subject to transitional provisions. This means there are different rules for companies that were incorporated before 1 October 2009 (the date when the relevant provisions of the 2006 Act took effect).

## Restrictions on Share Capital

For companies incorporated prior to 1 October 2009 the authorised share capital as set out in the Memorandum of Association will restrict the number of shares that may be allotted.

This restriction will fall away if the Company passes an ordinary resolution removing the restriction. It will also fall away if either:

- 1) the Company adopts new Articles that make no reference to a limit; or
- 2) the Company passes a special resolution altering its Articles authorising the Directors to allot shares in excess of the stated authorised minimum.

The 2006 Act abolished the concept of authorised share capital but a company may still restrict the number of shares that it can issue by including a suitable provision in the Articles.

Where the Articles also set out the authorised share capital it is not clear that an ordinary resolution will be sufficient to remove or amend this. In such situations it would be prudent to adopt new Articles by special resolution.

## Private Companies with only one class of share

Historically the Directors of any company needed authority from the shareholders to allot shares. This was granted by an ordinary resolution under Section 80 Companies Act 1985. The authority could be given for up to 5 years and had to state the maximum number of shares that could be allotted.

Now, under Section 550 of the 2006 Act, a private company (provided it has only one class of share both before and after the allotment), no longer requires shareholder authority for any allotment of shares.

(Section 550 cannot be used by a *public company* even if it has only one class of shares).

Again, however, there are transitional provisions that are a trap to the unwary. A private company incorporated before 1 October 2009 can only take advantage of the new Section 550 2006 Act if it has passed an ordinary resolution to that effect.

So for "old companies" it is necessary first to check to see whether an ordinary resolution to this effect has been passed.

## Section 551 Companies Act 2006

Where Section 550 does not apply (i.e. public companies, private companies with more than one class of share and "old" private companies that have not passed a resolution adopting Section 550) then the Directors need authority to allot shares under Section 551 of the 2006 Act. This authority is given either by ordinary resolution of the shareholders or in the company's Articles. Any authorisation by resolution of the company may be by way of an ordinary resolution, even though the resolution alters the Articles.

The authorisation must state a maximum number of shares and a period not exceeding 5 years from the date the resolution is passed for the authority to run. Further ordinary resolutions can be used to renew the authorisation in the future.

Section 551 applies to allotments not just of shares but to convertible loan stock and options to acquire shares.

However, the Section 551 authority (like Section 80 before it) is not needed for allotments under any "employee share scheme". There is also an exclusion for a share issue under conversion rights that have already been authorised.

## Pre-emption rights on new share issues

The 2006 Act (like the 1985 Act) includes statutory rights of pre-emption on new share issues: Section 561 2006 Act. This gives an existing shareholder a 14 day right of first refusal before shares are issued to a third party.

The provisions apply to "equity securities" which are defined so as to include rights to

convert debt or preference shares into equity and to the grant of share options. There is an exclusion for issues of shares under an employee share scheme.

It is common for private companies to exclude these statutory pre-emption rights. However, it is equally common for Articles of private companies to incorporate their own bespoke rights of pre-emption: these might allow shareholders to opt to take excess shares not subscribed by others. So the Articles must be carefully checked for any pre-emption procedures.

A private or a public company may also exclude Section 561 generally or for a specific share issue.

If the pre-emption rights under Section 561 do apply, a special resolution can be passed to enable the directors to allot shares as if the pre-emption provisions did not apply if necessary.

## Prohibition of public offer by private company

A private company must not offer shares to the public: Section 755 of the 2006 Act.

## Payment for shares

Since shares must be given a par or nominal value this sets the minimum price per share at which shares can be subscribed. Shares can, however, be issued as "partly paid" so that not all of the nominal value (plus share premium, if any) is paid at the time of subscription.

## Post Allotment

Under the 2006 Act, a company should issue a share certificate within 2 months of an allotment unless the terms of issue stated otherwise, or unless the allotment falls into certain other very limited exceptions.

A Return of Allotments should be made at Companies House within one month of the allotment on Form SH01 along with copies of any shareholder resolutions (if required).

You should also check to see if the share allotment(s) has resulted in any changes to the company's PSC Register, in which case further filings will need to be made at Companies House to notify them of this.



## Do you need more information?

For more information, contact:



**James Hunt**

Location: Oxfordshire  
Direct Dial: 01993 893622  
Email: james.hunt@everymanlegal.com



**Nicola Blackford**

Location: Oxfordshire  
Direct Dial: 01993 893624  
Email: nicola.blackford@everymanlegal.com



**Gail Vallis**

Location: Oxfordshire  
Direct Dial: 01993 893968  
Email: gail.vallis@everymanlegal.com



**Natalie Hopkins**

Location: Oxfordshire  
Direct Dial: 01993 893626  
Email: natalie.hopkins@everymanlegal.com



© Everyman Legal Limited 2012 - 2019

### **Important Notice**

This memorandum is designed to provide a general commentary on aspects of the subject matter covered. It does not purport to be comprehensive or render legal advice. Everyman Legal Limited and the author expressly disclaims any liability in respect of the consequences resulting from acting or refraining from acting on the basis of any matter contained in this publication.

All rights are reserved