

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 17: a Company's Share Capital

Chapter 2: Allotment of Shares: General Provisions

840. Generally speaking, the directors of a company may currently only allot shares (or grant rights to subscribe for shares or to convert any security into shares) if they are authorised to do so by ordinary resolution of the company's members or by the articles.
841. Such an authority may be general or specific (that is, it may, for example, be restricted to a specified allotment, an allotment of shares up to a specified value, or an allotment of shares of a particular class). In either case, the authority must state the "maximum amount of relevant securities that may be allotted under it" and the date when the authority will expire, (which must not be more than five years from the date on which the authority is given). The authority may be renewed for further periods not exceeding five years.
842. There is a relaxation for private companies from the requirement to state the date on which the authority will expire and so such companies may, by elective resolution under section 379A of the 1985 Act, give such authority either for an indefinite period or a fixed period of the company's choice.
843. The Act removes for private companies the requirement for prior authorisation in certain circumstances (described in section 550). It also abolishes the concept of authorised share capital (see note on section 542) and a company's constitution will therefore no longer have to contain a ceiling on the number of shares that the directors are authorised to allot.

Section 549: Exercise by directors of power to allot shares etc

844. This section replaces section 80(1), (2), (9) and (10) of the 1985 Act. It provides that the directors may not allot shares (or grant rights to subscribe for shares or to convert any security into shares) except in accordance with one of the following two sections.
845. *Subsection (2)* of this section provides that directors may allot shares in pursuance of an employees' share scheme without having to comply with one of the following two sections. This mirrors the current position (see section 80(2) of the 1985 Act).
846. Similarly, where a right to subscribe for, or to convert any security into, shares already exists, then the directors may allot shares pursuant to that right without having to comply with one of the following two sections (see *subsection 3*).
847. A director who knowingly allots shares in contravention of the requirements imposed by this section commits an offence. Such an allotment is not, however, invalid.

Section 550: Power of directors to allot shares etc: private company with only one class of shares

848. In line with the recommendations of the CLR (Final Report, paragraph 4.5), this is a new provision which empowers the directors to allot shares (or to grant rights to subscribe for or convert any security into shares) where the company is a private company which will have only one class of shares after the proposed allotment and removes the current requirement, contained in section 80 of the 1985 Act, for the directors to have prior authority from the company's members for such an allotment of shares. In addition, it provides that the members may, if they wish, restrict or prohibit this power through the articles. The definition of "class of shares" is contained in section 629.

Section 551: Power of directors to allot shares etc: authorisation by company

849. This section replaces section 80(1) and (3) to (8) of the 1985 Act and applies both to private companies which will have more than one class of shares after a proposed allotment and to public companies. It provides that the directors may only allot shares (or grant rights to subscribe for shares or to convert any security into shares) if they have been given prior authorisation for the proposed allotment by ordinary resolution of the company's members or by the articles.
850. *Subsections (2) to (5)* set out details of the way in which prior authorisation (or a renewal of such authorisation) may be given and, in particular, provides that the authority may not be given for a period of more than five years. An authority given to the directors under this section, and any resolution of the company renewing such an authority, must state "the maximum amount of shares" to be allotted pursuant to the authority. This mirrors the formulation of words used in section 80 of the 1985 Act and enables the members to limit the authority to a specific number of shares or shares up to a given maximum nominal value.
851. *Subsection (8)* makes it clear that an ordinary resolution of the company's members will suffice for the purposes of giving authority to the directors, even where the effect of the resolution is to alter the company's articles of association (which would normally require a special resolution of the company's members).

Section 554: Registration of allotment

852. This is a new provision which requires the directors to register an allotment of shares as soon as practicable (but in any event within two months of the date of allotment). Whereas the 1985 Act imposes a duty on the company to issue certificates within two months after the allotment of its shares it does not stipulate a timescale relating to the step which is anterior to this, namely the registration of the allotment.
853. *Subsection (2)* makes it clear that the requirement to register an allotment of shares does not apply if the company has issued a share warrant in respect of the shares in question (see section 779).
854. Where a company fails to comply with this section, the company and every officer of the company who is in default commits an offence. The penalty for this offence is set out in *subsection (4)*.

Section 555: Return of allotment by limited company

855. This section replaces section 88 of the 1985 Act. As now, within one month of an allotment of new shares in a limited company, the company is required to make a return of allotments to the registrar. This return must contain "*prescribed information*" relating to the allotment (that is, prescribed by the Secretary of State by order or by regulations made under the Act).
856. A return of allotments made under this section must be accompanied by a statement of capital. A statement of capital is in essence a "snapshot" of a company's total subscribed

capital at a particular point in time (in this context, the date to which the return of allotments is made up).

857. The requirement for a statement of capital when an allotment of new shares is made is new. It is based on a recommendation by the CLR (Final Report, paragraph 7.30) and for public companies, this implements a requirement in the Second Company Law Directive (77/91/EEC) which states:

“the statutes or instruments of incorporation of the company shall always give at least the following information...(c) when the company has no authorized capital, the amount of the subscribed capital....

“Statutes” and “instruments of incorporation” equate to the articles and memorandum and the need to disclose information pertaining to the aggregate of a company’s subscribed capital flows from the abolition of the requirement for a company to have an authorised share capital (see note on section 542).

858. Whilst this Directive only applies to public companies, the requirement to provide a statement of capital, here and elsewhere in the Act, has been extended to private companies limited by shares (and in certain cases to unlimited companies having a share capital, for example, where such companies make their annual return to the registrar). This will mean that the public register will contain up-to-date information on a company’s share capital (the requirement for a statement of capital supplements existing provisions which require a company to give notice to the registrar when it amends its share capital in any way).
859. The information which will in future be set out in the statement of capital includes prescribed particulars of the rights attached to each class of shares. Again this information will be prescribed in regulations or by order made under the Act. Such information is currently required to be filed under either section 123 of the 1985 Act (which relates to increases in authorised share capital) or section 128(1) and (2) of that Act (which relates to allotments of a new class of shares).
860. Currently, if shares are allotted as fully or partly paid up otherwise than in cash, the company must deliver the contract that it has with the allottee (or details of this contract if it is not in writing) to the registrar. Such a contract may contain commercially sensitive information which the company would not normally want to disclose. This section does not reproduce this requirement. It should be noted, however, that, in prescribing the information which must be included in the return of allotments, the Secretary of State may require details of any consideration received in respect of shares which are allotted as fully or partly paid up otherwise than in cash.

Section 556: Return of allotment by unlimited company allotting new class of shares

861. This section requires unlimited companies to make a return of allotments to the registrar where the directors allot a new class of shares. This carries forward the provisions of section 128(1) and (2) of the 1985 Act as they apply to unlimited companies. The return must contain “prescribed particulars of the rights attached to the shares”, that is such information as may be prescribed by the Secretary of State in regulations or by order made under the Act.

Section 557: Offence of failure to make return

862. This section replaces section 88(5) and (insofar as it relates to a requirement for an unlimited company to register particulars of an allotment of a new class of shares) section 128(5) of the 1985 Act. Where a company fails to comply with the requirements to make a return of allotments to the registrar, every officer of the company who is in default commits an offence.

863. As now under section 88(6), where there is a default in making a return of allotments within the specified time (one month after the allotment) a person who is liable for the default may apply to the court for relief (see *subsection (3)* which extends the right to apply for relief to a person liable under section 556).

Section 559: Provisions about allotment not applicable to shares taken on formation

864. this provision replicates the effect of section 80(2)(a) of the 1985 Act and provides that the allotment provisions in Chapter 2 of this Part do not apply to the shares taken by the subscribers to the memorandum on the formation of a company. Such persons become members of the company in respect of the shares that are taken by them on formation by virtue of section 16 and the provisions of the Act on share allotments do not apply to them.