

*These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006*

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 17: a Company's Share Capital

Chapter 4: Public Companies: Allotment Where Issue Not Fully Subscribed

Section 578: Public companies: allotment where issue not fully subscribed

874. The provisions of this section restate section 84 of the 1985 Act and relate to the allotment of shares by public companies, and apply where not all the shares offered are taken up. A public company must not allot shares following an offer to subscribe for shares unless all the shares offered are taken up or the offer is made on the basis that it will go ahead even if all the shares offered are not taken up or if other conditions specified in the offer are met. It is not possible for the terms of the offer to override the requirements of this section (*subsection 6*).
875. The purpose of this rule is to protect persons who apply for shares, by ensuring that if the increase in capital is not fully subscribed, the capital will be increased by the amount of the subscriptions received only if the conditions of the issue so provide (Article 28 of the Second Company Law Directive (*77/91/EEC*)).
876. If 40 days after first making the offer, the offer is unsuccessful because not enough shares have been applied for under the offer, any money or other consideration received from those that did apply for shares under the offer must be repaid or returned (*subsection 2*). Interest becomes payable after the expiration of the 48th day after the offer was first made (*subsection 3*). The rate of interest will be as specified at the time under section 17 of the Judgments Act 1838 (currently 8%). This is a change from section 84(3) of the 1985 Act which sets the interest rate at 5% per annum.
877. The 40 day and 48 day time limits imposed by subsections (2) and (3) now run from the making of the offer rather than from the issue of any prospectus (as was the case under section 84 of the 1985 Act) given that the requirement or otherwise for a prospectus is a matter of securities law.
878. The regulation of public offers, especially requirements relating to prospectuses, is generally a matter of securities law. Sections 82 and 83 of the 1985 Act are, therefore, not restated in this Act.

Section 583: Meaning of payment in cash

879. This section replaces section 738(2) to (4) of the 1985 Act. It provides a definition of "payment in cash" for the purposes of the Companies Acts and is relevant to a number of provisions (for example section 593 requires public companies to obtain an independent valuation of any non-cash consideration where it allots shares otherwise than for cash).
880. *Subsection 3* provides a definition of "cash consideration" which lists the items currently contained in section 738(2) of the 1985 Act. It is generally accepted that

certain forms of payment, in addition to those listed in subsection (3), constitute “payment in cash” where shares in a company are deemed to be paid up or allotted for cash, for example an assured payment obligation under the CREST assured payment system, but this matter is not beyond doubt. (An assured payment obligation is the creation of an obligation to make payment to or for the account of the company in accordance with the rules and practices of the operator of a relevant system as defined by regulation 2(1) of the Uncertificated Securities Regulations 2001). The power contained in *subsection (4)* will enable the Secretary of State to make provision for other forms of payment to be regarded as falling within the definition of “payment in cash”. This will eradicate the uncertainty which currently surrounds certain forms of payment and will also “future proof” the current definition should other settlement systems be developed in the future (or should other settlement systems within the EU be identified).

Section 589: Power of court to grant relief

881. **Section 589** restates section 113(1) to (7) of the 1985 Act. It enables the court to grant relief, to the applicant, from a liability to the company which has arisen as a result of a contravention of section 585, 587(2) or (4) or 588. There is a minor change in the restatement insofar as the matters to which the court must have regard in applying the just and equitable test in *subsection (3)* also apply where the liability relates to the payment of interest (under section 113 (2)(b)) of the 1985 Act the court is not required to have regard to those matters in applying the just and equitable test).

Section 606: Power of court to grant relief

882. **Section 606** restates section 113(1) to (8) of the 1985 Act. It enables the court to grant relief, to the applicant, from a liability to the company which has arisen (under any provision of Chapter 6) in relation to payment in respect of shares in a company or an undertaking given to the company in, or in connection with, payment for any shares in it. There is a minor change in the restatement insofar as the matters to which the court must have regard in applying the just and equitable test in *subsection (2)* also apply where the liability relates to the payment of interest (under section 113 (2)(b)) of the 1985 Act the court is not required to have regard to those matters in applying the just and equitable test).