Companies Act 2006: Statements of Capital
Consultation on Financial Information Required

Response of City of London Law Society Company Law Committee, the Law Reform Committee of the Bar Council and the Law Society Company Law Committee

Q1. Do you agree with the description of the problems in paragraphs 27-29?

A. Yes.

Q2. Do you have any further concerns about the financial information requirements in the statement of capital?

B. We have a further concern in addition to those described in the consultation paper. We understand that Companies House are adopting the position of rejecting any statement of capital where the figure for share premium is stated in a different currency from the currency of the shares' nominal value. This is likely to be an issue for companies which have a functional accounting currency different from the currency (or currencies) of its share capital. The legislation and the accounting rules permit a company to state share premium in its accounts in a currency different from the currency of its share capital, and we can see no reason for the statement of capital to be different. If share premium is to be included in statements of capital, it should be clarified that a company may state share premium in whatever currency it chooses for accounting purposes. Pending a reformulation of the statutory requirements, we think Companies House should change their policy.

Q3. Do you agree with the conclusion that number of shares in total and in each class should be included in the statement of capital for all companies?

C. We agree that the number of shares in total and in each class should be included in the statement of capital for all companies, given the importance of this information for members.

Q4. Do you agree with the conclusion that total paid up nominal value of issued shares should be required for statements of capital relating to formation for both public and private companies?

D. We have identified an issue that means that, at least for private companies, there can be uncertainty in ascertaining the paid up nominal value on shares that have been partly paid up.

E. For public companies the Second Directive requires the total paid up nominal value of shares to be stated on incorporation or being authorized to commence business (Art.3(g)), so clearly this requirement must be retained. However, section 586(1) CA2006 provides certainty for public companies about the order in which amounts paid up should be credited as between the share premium and the nominal value. It states that plcs must not allot shares unless they are paid up at least as to one-quarter of their

nominal value and the whole of any premium on them. This makes it clear that for public companies the priority is to pay up share premium before nominal value. This accords with the characterisation that is sometimes given to share premium as the price a shareholder is willing to pay for the right to subscribe for a share.

F. The Act does not make the same stipulation for private companies. On formation of a private company, where shares are partly paid, a requirement to state the total paid up nominal value will give rise to uncertainty and compromise the validity of the information given. If private companies are required to give this information, it is suggested this should be clarified. However, we do not think private companies should be required to give this information as readers will at most be interested in the total unpaid amount, as this represents an asset of the company. They will not be interested in the allocation of paid and unpaid amounts as between nominal value and share premium. Therefore we do not agree with the conclusion in Q4 in relation to private companies.

Q5. Do you believe that the benefit to readers of including the total paid up nominal value of issued shares in other statements of capital would justify imposing on the company the cost of providing it?

G. We are not in favour of imposing this requirement for the reasons given in paragraphs E and F above. It is not really a question of the cost imposed on the company to provide the information; rather it is a question of the relevance of the information, the extra administration for companies in providing it and the fact that some private companies may not be able to provide this information.

Q6. Do you agree with the conclusion that amounts unpaid on shares in each class should be included in the statement of capital for all companies?

H. We agree companies should be able to ascertain relatively easily the total unpaid amount on its shares. This would appear as a single line item in accounts. Given that the interest to creditors and shareholders is in ascertaining how much in aggregate is still due to the company, and that there is no requirement in the Second Directive to break this down further by class, we think only the aggregate amount should be required, to avoid imposing an unnecessary burden on companies. There can be no interest to a creditor in knowing how the unpaid amount is divided between the classes; a creditor will simply want to know the total unpaid amount that the company would be able to claim from shareholders on a liquidation.

Q7. Do you agree with the conclusion that the total nominal value of issued shares should continue to be required in the statement of capital for public companies?

I. Yes, given that this is required by the Second Directive. However, where the company has share classes denominated in more than one currency, it should be permitted to state the separate total nominal values for each currency.

Q8. Do you believe that the benefit to readers of including the total nominal value of issued shares in the statement of capital for private companies would justify imposing on the company

the cost of providing it?

J. We are not convinced that this information is particularly useful. However, it does not seem to be a difficult piece of information to provide.

K. We note that, although the concept of authorised share capital has effectively been abolished by the Companies Act 2006, there will be companies which mention authorised share capital in their articles – either by virtue of section 28 or otherwise –for which the requirement in article 2(1)(e) of the First Directive, which is cited in paragraph 52 of the consultation paper, may continue to be relevant.

Q9. Do you believe that the benefit to readers of including the aggregate value of the share premium account in the statement of capital would justify imposing on the company the cost of providing it?

L. We agree with the conclusion that, if a statement of share premium is going to be required (we do not think it should be), then it should be aggregated, not broken down by class.

M. Share premium will be stated once a year in the annual accounts of all companies, and those will have to be audited accounts for all companies other than small companies which qualify for exemption. In addition, listed companies are required to publish a financial report on a half yearly basis. We are not in favour of requiring companies to calculate their share premium more frequently and think that this imposes an unnecessary burden on companies. The task of calculating share premium may not be straightforward for companies with complicated share capital structures involving different currencies.

N. If BIS insist that a statement of share premium is going to be required, then the only way we can see of reducing the cost and administrative burden for companies would be if they only had to provide the share premium stated in their most recent accounts. However, the inclusion in statements of capital of a historical figure for share premium taken from the accounts would be odd because the company may be well aware that the share premium has subsequently been affected by share issue, capitalisation, or reduction. The confusion that this would create in our view militates in favour of dropping the requirement for share premium to be stated.

O. We are also doubtful that creditors will find it useful to see the share premium in statements of capital, where that information will be in isolation from the company's other statutory reserves and not in the context of all the other information which is found in the accounts and from which creditors can make a proper judgement about the company's financial health.

P. The information will not be of interest to a shareholder either, since the share premium is not allocable to his or her shares.

Q10. Overall, for the five items listed above [i.e. number of shares, total paid up nominal value

of issued shares, amounts unpaid up, nominal value of issued shares (including paid and unpaid), paid up share premium], do you agree with our assessment of the value and costs of the information?

Q. Please see our comments above. In summary, we think that statements of capital should require only (i) the number of issued shares and nominal value per class and in aggregate (ii) the total unpaid amount (if any) outstanding on the shares (not by class).

R. In addition, the statement of capital on incorporation of a public company should contain a statement of total paid up nominal value of issued shares, in order to comply with the Second Directive. We are not in favour of extending this requirement to subsequent statements of capital, as there seems to be no additional value in providing this information and it will only detract from the more useful information. The effect of section 586 is that any amount unpaid will be allocated to nominal value. Therefore the total paid up nominal value of issued shares will already be ascertainable, in the unlikely event that a reader is interested in that information, by subtracting the total unpaid amount from the total nominal value of issued shares.

S. The statement of paid up nominal value of issued shares should not be required for private companies, either on formation or subsequently, because of the uncertainty described above and because the information is not useful.

Q11. In addition to any comments you have made on the individual elements above, do you have any views on the minimum and maximum described, and on the choice of a point between them?

T. Please see response in paragraphs Q to S above. In effect, we are advocating a modified form of the minimum set out in the consultation paper, so that (i) the requirement to state unpaid amounts is aggregated, not per class and (ii) for plcs, the total nominal value paid up on shares should only be required on formation.

Q12. Do you agree that the statement of capital provided on formation of a new company should remain as it is?

U. No. See response in paragraphs Q to S above.

Q13. Do you agree that – apart from on formation – the requirements in the statement of capital should be the same in all the different situations in which it is required? If not, what differences do you think there should be?

V. Our view will depend on how much information is eventually required but in general we would be in favour of consistency between different statements of capital.

Q14. Do you believe that we should change all of the statements of capital at the same time, or that we should consider taking earlier opportunities to amend those for which powers are available?

W. A two-tier regime during an interim period, when some of the requirements are modified by statutory instrument while others are not (including the requirements for allotment of shares), is likely to cause greater confusion and unnecessary complexity. For consistency, they should be changed at the same time but this should be done as soon as possible.

Q15. Do you have any comments on the Impact Assessment at Annex B?

X. No.

Prescribed particulars of rights

Y. Paragraph 8 of the consultation paper refers to the concerns in relation to the description of the share rights in statements of capital. We would support a review of this as soon as possible, as this is turning out to be a pointless exercise of summarising rights that are available in full in the articles or in resolutions on the company search. The requirement is proving particularly troublesome because Companies House have taken the view that, based on legal advice they have received, they must reject statements which cross-refer to the articles. As the share rights requirement is set out in regulations it should be possible to fix it by secondary legislation alone.

11 January 2010