Differences between a private and public company Checklist

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Are you thinking of re-registering as a public or private company? This checklist highlights the key differences between public companies and private companies.

Please note: this checklist is for guidance only and is not a substitute for legal advice. If you are in any doubt about the applicability of any of the steps summarised in this checklist or the legal issues involved, please contact Paul Emmett or Richard Naish.

1 Payment for share capital

1.1 A public company must have a minimum issued share capital of £50,000 before it can carry on business as a public company.

1.2 A public company may not allot shares unless at least 25 per cent of the nominal value of the shares and the whole of any premium has been paid up. Private companies can allot shares nil paid, partly paid or fully paid.

1.3 A public company may not accept an undertaking to do work or perform services as consideration for the allotment of shares.

1.4 A public company is not permitted to allot shares for non-cash consideration, unless an expert's valuation is obtained. An exception is available where the non-cash consideration comprises all or part of the share capital of another body corporate.

2 Serious loss of capital

If the net assets of a public company fall to 50 per cent or less of its called up share capital, the directors are required to notify the shareholders and convene a general meeting of the company. Contravention of this requirement may render each director liable to a fine.

3 Distributions

3.1 The Companies Act 2006 permits a public company to make a distribution only out of profits available for the purpose and only if the net assets of the company are not less (and would not be less following the distribution) than the aggregate of its called up share capital and distributable reserves.

3.2 The availability of profits for distribution is determined by reference to the company's latest statutory accounts. If these do not disclose sufficient profits for an intended distribution, special accounts must be prepared and (in practice) audited to justify the distribution, and must then be filed at Companies House before the distribution is made. Particular, more rigorous, requirements apply to the preparation of such requirements by a public company.

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4 Purchase of own shares

Unlike private companies, public companies cannot purchase their own shares out of capital. Enhanced requirements also apply to quoted companies on a share buyback.

5 Capital reductions

Public companies must go to court to carry out a capital reduction, whereas private companies can carry out a capital reduction without having to do this.

6 Financial assistance for the acquisition of shares

Public companies are generally prohibited from giving direct or indirect financial assistance for the acquisition of their shares or the shares of their holding company or for reducing or discharging the liability so incurred. The prohibition covers gifts, guarantees, securities, indemnities or loans. Breach of this provision may make the assistance in question void, and is a criminal offence by the company and any officer in default.

7 Loans to directors

Where a group of companies encompasses a public company, the rules which relate to restrictions of loans to directors and their connected persons are extended to credit transactions of a similar nature to loans and 'quasi-loans'.

8 Company secretary

The company secretary of a public company must be qualified for appointment either by his or her experience or through membership of a professional body. Subject to their articles of association, private companies are not obliged to have a company secretary.

9 Situational conflicts

There must be express provision in a public company's articles enabling the directors to authorise situational conflicts of interest. The position for private companies varies according to when the company was incorporated: for private companies incorporated on or after 1 October 2008, the board is automatically empowered to authorise a situational conflict provided there is no contrary provision in the articles. For private companies incorporated before 1 October 2008, companies must pass a shareholder resolution empowering the board to authorise the conflict.

10 Number of directors

Public companies must have at least two directors; private companies need only to have one.

11 Shareholders

A public company has the power to send out a statutory notice to find about interests in its shares; a private company does not.

12 Accounting requirements

12.1 Public companies must file their accounts within six months of their accounting year end. Private companies have nine months.

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12.2 Under the Act, small and medium sized companies may file short-form accounts with Companies House. Public companies are not permitted to file such accounts.

13 Resolutions and general meetings

13.1 Members of private companies can agree to written resolutions instead of having resolutions proposed at general meetings (members of public companies cannot).

13.2 Public companies must hold an Annual General Meeting, whereas private companies may not have to (though check the articles).

13.3 The requisite percentage for a public company to hold a general meeting on short notice is 95 per cent; for private companies it is 90 per cent.

14 Takeovers

Acquisitions of public companies are subject to the City Code on Takeovers and Mergers. This is rarely the case for private companies.

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