

AMF position 2011-12

Using the extension clause in capital increases with preferential subscription rights

Background legislations and regulations: Articles L. 225-135-1 and R. 225-118 of the Commercial Code

Certain issuers have expressed the desire to be given the right to exercise the extension clause when they make capital increases with preferential subscription rights - after all new shares are subscribed, either on a reducible or non-reducible basis - so as to meet public demand or demand from third parties designated by the board of directors or executive board.

The AMF considers that, as part of a capital increase with preferential subscription rights, the extension clause, which allows issuers to increase by up to 15% the size of the issue initially planned to meet oversubscription, may only be used to satisfy the orders that were subscribed for on a reducible basis by shareholders or by transferors of those preferential subscription rights.

As such, the AMF reminds that, ever since the Order n°2004-604 of 24 June 2004¹, the extension clause is based on Article L. 225-135-1 of the Commercial Code and that its use must be expressly provided for in the resolution of the extraordinary general meeting approving the issue or, should such authority be delegated to the board of directors, in a specific resolution, pursuant to Article L. 225-129-2 of the Commercial Code.

¹ The report to the President of the French Republic states that Article L. 225-135-1 was drafted in order to “allow issuers to adjust the amount of the capital increase to demand” (see “Report to the President of the Republic on the Order n° 2004-604 of 24 June 2004 relating to the reform of the regime for transferable securities issued by commercial companies and to the extension of amendments to the commercial Law to overseas departments and territories”, Official Journal of 30 July 2004, n°175, p.13577, text n°36).