

Corporate Briefing

Companies Act 2006: Public company annual general meetings



The Companies Act 2006 received Royal Assent in November 2006 and will be fully implemented by 1 October 2009. This note looks at the impact of the 2006 Act on AGM notices of public companies, both as regards the format and the content of the notice, as well as procedures to be followed by companies before and after the AGM. It also looks at changes made by the 2006 Act in relation to proxies, corporate representatives, members' rights and auditors.

Changes for 2009/2010 AGMs

Additional resolutions

If you have not already held your 2009 AGM, we recommend that you consider passing resolutions:

- to take advantage of the additional headroom for the allotment of shares permitted by the revised ABI Guidelines, i.e. a further one-third of the company's issued share capital, to be used only for fully pre-emptive rights issues; and
- (for traded companies only, that is companies whose shares are admitted to trading on the London Stock Exchange's Main Market) to allow general meetings, other than AGMs, to be held on 14 clear days' notice. The Companies Shareholders' Rights Regulations 2009 (which implemented the Shareholders' Rights Directive by amending the 2006 Act on 3 August 2009) requires companies to pass a special resolution to take advantage of the 14 day period allowed by the 2006 Act. This is required even if the company's articles already permit a 14 day notice period.

We have separate client notes on both of these topics on our website, and can provide you with the wording for these resolutions if you wish.

You may also want to consider passing a resolution to amend the company's articles (see below).

Changes to articles of association

Some of the changes introduced by the 2006 Act have impacted, or will impact, on companies' articles. As the 2006 Act will be fully in force from 1 October 2009, it is likely that you will want to propose a resolution at the company's next AGM to make the necessary final changes to the articles, or alternatively to adopt a new set of articles, to bring them fully in line with the 2006 Act. Examples of changes include amending the articles to reflect the provisions of the 2006 Act on share capital and constitution, as well as updating definitions and references to the Companies Act 1985. We have a separate client note on our website outlining the key changes you may wish to consider in this regard.

Format of AGM notice

The next AGM notice is likely to look different from the company's previous notices for two main reasons. Firstly, the references to the provisions of the Companies Act 1985 will be replaced by references to the provisions of the 2006 Act. In particular, this will affect the resolutions dealing with share capital - for example, instead of referring to an authority to allot shares under section 80 of the 1985 Act, the relevant resolution will instead refer to section 551 of the 2006 Act. Secondly, the Shareholders' Rights Regulations introduced changes which impact on the notes to the notices of AGMs for traded companies. For example, the notes must now refer to the website on which prescribed information (see below) can be found and to the new statutory rights of

We have prepared briefings on other aspects of the 2006 Act, including directors' duties and liabilities and more general summaries of the key changes for private companies, private equity firms, companies listed on AIM and Official List companies, all of which are available at our website at <http://www.traverssmith.com>

members to ask questions at the meeting and to add items, other than resolutions, to the AGM agenda.

Procedural points

Timing and notice period for AGMs

For financial years beginning on or after 6 April 2008, public companies must hold their AGM within 6 months of the day after their accounting reference date. For financial years beginning before this date, companies have seven months. The minimum notice period for AGMs is 21 clear days.

Publication of information in advance of meeting

As a result of the Shareholders' Rights Regulations, traded companies must now publish on a website certain information including the matters set out in the AGM notice and details of the company's share capital and voting rights. This information must remain on the website for a period of two years.

Obligations following AGM

The Shareholders' Rights Regulations have also impacted on the obligations of traded companies to publish information following meetings. The 2006 Act already required the results of polls at all general meetings of

"quoted" companies to be made available on a website. The details required are the date of the meeting, the text of the resolution (or a summary of the subject matter) and the number of votes cast in favour or against. Traded companies now also have to include the number of votes validly cast and the proportion of the company's issued share capital represented by those votes and the number of abstentions. In practice, any company whose shares are listed on the Official List will have to comply with both tiers of obligations as they are both "quoted" and "traded", whereas AIM companies are not caught by either definition.

Method of sending notice - electronic communications

Since January 2007, the 2006 Act has facilitated the greater use of electronic communications between companies and their shareholders. The term "electronic communications" covers both e-mails and publications on a company's website. While a company must ask each shareholder if he agrees to receive communications via a website, if the company has not received a reply from a shareholder within 28 days of the request, that shareholder is deemed to have agreed to receive communications in this way. Shareholders can still elect to receive communications in hard copy (or can change their election at any time).

In order to take advantage of these deemed consent provisions, a company must send a letter to shareholders and either pass a shareholders' resolution to allow communications via a website or amend the company's articles to allow for this.

Once a company has taken the above steps, it will be able to publish its future AGM notices on the company's website, rather than sending a hard copy to each shareholder. However, as with all website publications under the 2006 Act, all shareholders must be notified in writing (by e-mail or letter) that information has been posted on the company's website. The company must send letters requesting consent to any shareholders who have joined the company after the date on which the articles were changed, if it wants to communicate with them electronically. A more detailed note on the electronic communications provisions is available on our website.

Communications to the company

The 2006 Act also provides for shareholders to communicate electronically with the company. A company can provide an electronic address in its notice of meeting or, more specifically, provide an electronic address for the receipt of proxies (this is a requirement for traded companies). In either case, where an electronic address is included, the company is deemed to agree that any documents or information relating to that meeting (or to proxies for that meeting, as the case may be) may be sent by electronic means to that address, subject to any limitations the company may specify.

The duty of traded companies to provide an electronic address for the receipt of any document or information relating to proxies for a general meeting can be satisfied by either providing the address when sending out an instrument of proxy or issuing an invitation to appoint a proxy, or ensuring that it is made available on the website containing the prescribed information (see above). ICOSA suggests that this requirement can be satisfied by companies offering the CREST proxy facility and referring in their notice of meeting to the CREST Manual on the Euroclear website.

Proxies and corporate representatives

Appointment of proxies

The 2006 Act has made a number of relatively minor, but important, changes to the procedure for appointing proxies, and their powers once appointed, including the following:

- since October 2007, proxies have had a statutory right to speak and vote on a show of hands. Members can appoint more than one proxy provided that each proxy is appointed to exercise the rights attached to different share(s). The default position is that every proxy has one vote on a show of hands. However, where a proxy has been appointed by more than one member and has been instructed to vote both for and against a resolution, he will have one vote for and one vote against the resolution on a show of hands;
- anything in a company's articles which would mean that a proxy would have fewer votes on a show of hands than the member would have if he were present in person is void;

- the cut-off point for lodging proxies is, as before, to be no earlier than 48 hours before a meeting but the 2006 Act makes it clear that weekends and bank holidays can be excluded from the timing calculation, although this will only be the case if the articles reflect this. This means, for example, that for a meeting to be held at 3pm on the Tuesday after a bank holiday Monday, the cut-off point for proxy appointments could be 3pm on the previous Thursday;
- companies are permitted to give proxies more extensive rights in their articles than those set out in the 2006 Act;
- notices of meetings must contain a statement informing members of their right to appoint a proxy and, in addition, of any more extensive rights conferred by the articles;
- subject to anything contrary in a company's articles, a proxy may be elected as chairman of a meeting; and
- there are default statutory provisions on termination of a proxy appointment, which apply subject to any contrary provisions in the company's articles. Any provision of a company's articles will be void if, for example, it requires notice of termination to be given, in the case of a meeting, earlier than 48 hours before the time for holding the meeting. As above, the articles can exclude weekends and bank holidays from the timing calculations.

Corporate representatives

Following uncertainty surrounding the original provisions of the 2006 Act relating to votes of multiple corporate representatives, the Shareholders' Rights Regulations amended the 2006 Act to clarify that multiple representatives can vote in different ways from one another in respect of different blocks of shares.

Auditors

Appointment

Public companies remain subject to the requirement to appoint their auditors before the conclusion of their accounts meeting (which is defined as the general meeting at which the annual report and accounts are to be laid). Auditors do not take office until the previous auditor(s) have ceased to hold office and they cease to hold office at the conclusion of the next

accounts meeting following their appointment, unless re-appointed i.e. there is still no deemed re-appointment of auditors of public companies.

Members' right to require website publication of audit concerns

For financial years beginning on or after 6 April 2008, members of quoted companies representing 5% of the voting rights or at least 100 members holding shares on which an average sum per member of at least £100 has been paid up, have the right to require the company to publish on a website a statement setting out members' concerns which they propose to raise at the next accounts meeting about any matter which relates to the audit of the company's annual accounts (including the auditor's report and the conduct of the audit) which are to be laid before the next accounts meeting, or any circumstance connected with the auditor ceasing to hold office since the previous accounts meeting. The company must draw attention in the notice of meeting to the possibility of a statement being included on a website. The statement must be made available within three working days of the company being required to publish it and must be available until after the meeting to which it relates.

Limitation of liability agreements

The 2006 Act allows auditors to agree limitations on their liability to their audit clients in respect of any negligence, default, breach of duty or breach of trust occurring in the course of an audit of accounts. In the case of public companies, the limitation of liability agreement ("LLA") must be authorised by the members and the limitation must be to an amount which is "fair and reasonable in all the circumstances". To date we are not aware that any public companies have entered into such LLAs.

Approval of political donations

The 2006 Act prohibits a company from making a political donation or incurring political expenditure, unless authorised by the company in a general meeting. There are exemptions to the prohibition on donations within a 12 month period of less than £5,000 and for membership subscriptions to trade associations and to all-party parliamentary groups or where the Secretary of State has made an order setting out an exemption. The changes to the regime under the 2006 Act that impact on the approval

resolutions to be passed at the AGM are as follows:

- a holding company is permitted to seek authorisation of donations and expenditure in respect of both the holding company itself and one or more subsidiaries through a single approval resolution;
- a holding company must authorise a donation or expenditure by a subsidiary company only if it is a "relevant holding company" (i.e. the ultimate holding company or, where such a company is not a UK-registered company, the holding company highest up the group which is a UK-registered company);
- companies are allowed to table separate approval resolutions in respect of donations to political parties and donations to other political organisations; and
- donations to independent election candidates are covered by the provisions.

Members of both any relevant holding company (i.e. the ultimate UK-registered holding company) and the subsidiary must approve the resolution. However, if the subsidiary is a wholly-owned subsidiary of a UK-registered company then a separate approval resolution by the subsidiary is not required.

Members' requisitions

Members of a public company representing 5% of the voting rights or at least 100 members holding shares on which an average sum per member of at least £100 has been paid up, have the right to require circulation of a resolution for an AGM. The 2006 Act requires that their shares must in each case carry rights to vote on the relevant resolution. If the request is received before the financial year end preceding the meeting (which may be several months in advance of the meeting) then the relevant members are not required to cover the costs of circulation. If this is not the case, the expenses of circulating the resolution must be paid by the members making the request, unless the company resolves otherwise.

Independent report on a poll

The 2006 Act introduced a procedure whereby members of quoted companies representing 5% of the voting rights or at least 100 members holding shares on which an average sum per member of at least £100 has been paid up, have the right to require

an independent report on any poll taken, or to be taken, at a general meeting. Again, the members must have the right to vote on the relevant poll. The request must be made within one week of the meeting where the poll was taken. Requests may be made in advance - although, in such a case, members have to ensure that all votes taken at the meeting are then taken on a poll.

Those preparing the chairman's script and other AGM papers might wish to contemplate how such a request, and the appointment of the independent assessor, would be dealt with if requested prior to the meeting.

Exercise of members' rights

Nomination of persons to enjoy information rights

Since October 2007, the 2006 Act has allowed a member of any company whose shares are admitted to trading on a regulated market (such as the LSE's Main Market) and who holds shares on behalf of another person to nominate that person to enjoy certain information rights in respect of the company.

The information rights in respect of which such a nomination can be made are defined in the 2006 Act. They comprise the right to receive a copy of all communications that the company sends to its members generally or to the class of shareholders which includes the nominating member and the rights to receive copies of accounts and reports and to require hard copy versions of documents. A company is not obliged to act on any nomination if it relates only to certain of the information rights referred to.

The 2006 Act provides that, unless the company is otherwise notified that the nominated person wishes to receive information in hard copy, the company is able to send or supply information to the nominated person by means of a website.

There are certain circumstances in which a nomination will be terminated or suspended. These include where the company makes enquiries of a nominated person as to whether he wishes to retain the information rights and does not receive a response within 28 days (provided that only one such enquiry can be made of a person in any 12-month period).

A company can either send two separate copies of its notice (one to members and one to nominated persons) or one combined notice. Most companies appear to send combined notices. Notices sent to nominated persons are required to include, in the notes section, a statement that the nominated person may have a right under an agreement between him and the member who nominated him to be appointed, or appoint, a proxy for the meeting or the right to give instructions to the nominating member as to the exercise of the voting rights. The notice should either omit the statement that the recipient has a right to appoint a proxy under the 2006 Act, or (in the case of a combined notice) state that this does not apply to nominated persons.

Exercise of rights attached to shares

The 2006 Act also deals with the situation where a member holds shares in a company on behalf of more than one person. In such a case "rights attached to shares" and "rights under any enactment exercisable by virtue of holding the shares" do not all need to be exercised, nor exercised in the same way. Although there is some debate about exactly which rights are covered, there can be little doubt that voting at a general meeting is covered by this provision. Proxy appointments therefore need to contemplate a member voting in different ways on the same resolution. The 2006 Act also permits certain members' requests be exercised by the beneficial owner, rather than the registered member where the shares are held by a nominee company. This includes the powers to require circulation of a resolution for an AGM, to require an independent report on a poll and to require website publication of audit concerns referred to above.

If you would like more information on any of the topics discussed in this note, or what you should do to prepare for the changes, please contact your usual contact at the firm.

Travers Smith September 2009

10 Snow Hill
London EC1A 2AL
T +44 (0)20 7295 3000
F +44 (0)20 7295 3500

www.traverssmith.com