

The Companies Act 2006: What's happening on 3 August 2009? Implementation of the Shareholders' Rights Directive in the UK and other changes

Introduction

The EU Shareholders' Rights Directive (the "**Directive**") aims to improve corporate governance by enabling shareholders to exercise their voting rights, and rights to information, more easily. Whilst the Companies Act 2006 (the "**CA06**") already reflects a number of the Directive's provisions, not all of the provisions are reflected and some amendments need to be made to the CA06 to achieve this. At the same time, the CA06 is being amended to correct anomalies in the existing law on shareholders' rights.

This alert summarises some of the key amendments being made to the CA06 and highlights some corresponding action points for companies to consider. A number of the action points relate to a review of a company's articles of association. To the extent possible, companies may want to amend their articles at the same time as they update their articles to take account of implementation of the CA06 on 1 October 2009 (see our Corporate Legal Alert *The Companies Act 2006: What's happening on 1 October 2009?*).

The amendments being made to the CA06 to implement the Directive will apply to UK-incorporated companies whose shares are traded on a regulated market in the UK (such as the London Stock Exchange's main market but not AIM) or another EEA state. Those companies are referred to as "**traded companies**". Some of these amendments are being applied more widely, and will apply to all UK-incorporated companies. The amendments being made to the CA06 to correct anomalies in the existing law on shareholders' rights are not limited to traded companies, and will also apply to all UK-incorporated companies.

The amendments discussed in this alert come into force on 3 August 2009 (the deadline for implementation of the Directive) and apply in relation to meetings of which notice is given (or first given) on or after that date.

Before a general meeting

KEY CHANGES WHICH APPLY TO ALL COMPANIES

Advance voting on a poll

The Directive requires Member States to allow traded companies to offer their shareholders the possibility to vote by correspondence ahead of a general meeting. This requirement is being implemented in the UK so that it applies to all companies, not just traded companies. A company's articles will be able to provide that on a vote on a resolution on a poll taken at a general meeting, the votes may include votes cast in advance. Certain restrictions will apply to the drafting of this kind of provision. For example:

- the provision may not require a document casting a vote in advance to be received by the company more than 48 hours before the time for holding the meeting (and, when calculating that 48 hour period, no account is to be taken of any part of a day that is not a working day); and
- in the case of a traded company, the provision may only be made subject to requirements and restrictions that are necessary to ensure the identification of the person voting and that are proportionate to achieve that objective.

Respondents to the consultation on the Directive's implementation generally felt that advance voting on a poll is unnecessary in the UK as the proxy system already provides a remote system of voting. Consequently, we do not anticipate that companies will be amending their articles to allow for advance voting on a poll.

Action point: Companies that want to allow for advance voting on a poll must amend their articles.

Members' power to require the directors to call a general meeting

Members of a company may require the directors to call a general meeting. This power is exercisable by members representing a certain percentage of the paid-up share capital – currently 10 per cent. for public companies, and either five or 10 per cent. for private companies depending on the length of time since the last general meeting called by the members (or the last general meeting in relation to which the members had certain rights to circulate a resolution). From 3 August 2009, members representing five per cent. of the paid-up share capital of all companies (both public and private) will be able to require the directors to call a general meeting. This change therefore enables a smaller minority group to require the directors of a company to call a general meeting.

KEY CHANGES WHICH APPLY TO TRADED COMPANIES ONLY

Length of notice required for a general meeting

Currently, the CA06 requires at least 21 days' notice to be given for an annual general meeting ("AGM") of a public company, and at least 14 days' notice to be given for any other general meeting of a public company.

At least 21 days' notice will be required for an AGM of a traded company called on or after 3 August 2009. Accordingly, assuming the traded company is a public company, there is no change from the current position under the CA06.

Any other general meeting of a traded company called on or after 3 August 2009 may be called on at least 14 days' notice if:

- the company offers the facility for members to vote by electronic means accessible to all members who hold voting shares. This condition will be met if the company offers to all those members a facility to appoint a proxy by means of a website. Enabling electronic appointments of proxies through CREST membership, on its own, is insufficient; and
- a special resolution reducing the notice period to not less than 14 days has been passed at the most recent AGM or at a general meeting held since that AGM.

If the company has not yet held an AGM, a special resolution reducing the notice period to not less than 14 days will need to be passed.

However, if these conditions are not met, the required notice period for the relevant general meeting will increase to at least 21 days.

Where a general meeting of a traded company is adjourned, the adjourned meeting may be called on less than 21 or 14 days' notice (as applicable). However, if the adjournment is due to lack of quorum, the adjourned meeting may only be held on reduced notice if no business is to be dealt with at the adjourned meeting the general nature of which was not stated in the notice of the original meeting, and the adjourned meeting is to be held at least 10 days after the original meeting.

Action points: Traded companies with articles that set out the notice period for calling general meetings should review those provisions to ensure consistency with the new notice periods prescribed by the CA06.

Traded companies wishing to continue to be able to call a general meeting (other than an AGM) on 14 days' notice after 3 August 2009 should consider passing an appropriate special resolution at their next general meeting (whether AGM or other general meeting). The resolution will be valid until the next following AGM, and should therefore be reviewed at each AGM.

Contents of the notice of general meeting

A notice of general meeting of a traded company called on or after 3 August 2009 must include the following additional information:

- a statement giving the address of the website on which certain information will be published before the meeting;
- a statement that the right to vote at the meeting is determined by reference to the register of members, and of the time when that right to vote will be determined;
- a statement of the procedures which members have to comply with to be able to attend and vote at the meeting;
- a statement giving details of any forms to be used for the appointment of a proxy;

- where the company offers members the facility to vote in advance on a poll or by electronic means, a statement of the procedure for doing so, and details of any forms to be used; and
- a statement of the members' right to ask questions at the meeting.

Where a notice calling an AGM of a traded company is given more than six weeks before the meeting, the notice must also include: (a) a statement of the right to require the company to give notice of a resolution to be moved at the meeting (if the company is a public company); and (b) a statement of the right to require the company to include a matter in the business to be dealt with at the meeting (whether or not the company is a public company).

Publication of information on a website

In advance of a general meeting, a traded company will need to ensure that the following "pre-meeting" information is made available for free on a website (which must be maintained by or on behalf of the company and must identify the company):

- the matters set out in the notice of meeting;
- the total numbers of: (a) shares in the company; and (b) shares of each class, in respect of which members are entitled to exercise voting rights at the meeting;
- the totals of the voting rights that members are entitled to exercise at the meeting in respect of the shares of each class; and
- members' statements, members' resolutions and members' matters of business received by the company after the first date on which notice of the meeting is given.

This information must be available on the website on or before the first date on which notice of the meeting is given, except for the members' statements, resolutions and matters of business received after the first date on which notice of the meeting is given, which must be made available on the website as soon as reasonably practicable. In each case, the information must be kept available on the website for a two year period beginning with the date on which it is first made available on the website in accordance with the CA06 requirements.

Members' powers to include other matters in the business dealt with at an AGM

In addition to the members' existing power to require circulation of resolutions for AGMs (which is not being amended), the members of a traded company will be able to request the company to include in the business to be dealt with at an AGM a matter (other than a proposed resolution) which may properly be included in the business. A matter may be properly included in the business at an AGM unless it is defamatory of a person, frivolous or vexatious. A company will be required to include such a matter in the business to be dealt with at an AGM once it receives requests to do so from: (a) members representing at least five per cent. of the total voting rights of all members who have the right to vote at the meeting; or (b) at least 100 members who have a right to vote at the meeting and who hold shares in the company on which there has been paid up an average sum, per member, of at least £100. A request must be received by the company no later than six weeks before the meeting or, if later, the time at which notice is given of the meeting.

If a company is required to include a matter in the business to be dealt with at an AGM, it must give notice of that matter to each member entitled to receive notice of the AGM in the same manner as the notice of meeting, and at the same time as (or as soon as reasonably practicable after) it gives notice of the meeting. It must also publish the matter on the website on which the other "pre-meeting" information is made available for a specified period (see *Publication of information on a website*).

The company's expenses in complying with these requirements do not have to be paid by the relevant members if requests to require the company to include the matter in the business are received before the end of the financial year preceding the meeting. If requests are not received until after that date, the company's expenses must generally be paid by the members making the request, and unless the company has previously resolved otherwise, it is not bound to circulate members' items for the AGM unless it has received a sum reasonably sufficient to meet its expenses for doing so six weeks before the AGM to which the request relates, or if later, the time at which the notice of meeting is given.

Share dealings before meetings - record dates and share blocking

Traded companies will be required to determine the right to vote at a general meeting by reference to the register of members as at a time (determined by the company) that is not more than 48 hours before the time for the holding of the meeting. When calculating that 48 hour period, no account is to be taken of any part of a day that is not a working day.

This requirement is largely consistent with the position under the Uncertificated Securities Regulations 2001, which permit a participating issuer to specify in the notice of meeting a time, not more than 48 hours before the time fixed for the meeting, by which a person must be entered on the relevant register of securities to have the right to attend and vote at the meeting. Whilst non-working days are currently included when calculating the 48 hour period under the Uncertificated Securities Regulations 2001, those regulations are to be amended with effect from 1 October 2009 to provide that non-working days are not to be taken into account for this purpose. Until 1 October 2009 (when the discrepancy between the CA06 and the regulations will be rectified), additional care should be taken when determining the record date for a meeting.

The Directive abolishes share blocking (a practice which prevents shareholders from selling their shares for several days before any general meeting). Whilst share blocking does not take place in the UK, there is not currently anything to prevent it and the CA06 is being amended to include an express prohibition. Any provision in a traded company's articles will be void to the extent it restricts:

- a member's right to participate in and vote at a general meeting unless the member's shares have (after having been acquired by the member and before the meeting) been deposited with, or transferred to, or registered in the name of another person; or
- a member's right to transfer shares in the 48 hours before a general meeting if that right would not otherwise be subject to that restriction.

Action point: Traded companies with articles that deal with determining the record date for a meeting should review those provisions to ensure they are not inconsistent with the new CA06 requirements.

Proxy appointments and termination of a proxy's authority

The appointment of a proxy and the termination of a proxy's authority will need to be notified to a traded company in writing. When a member appoints a proxy, a traded company will only be able to require reasonable evidence of:

- the identity of the member and of the proxy;
- the member's instructions (if any) as to how the proxy is to vote; and
- if the appointor is acting on the member's behalf, the appointor's authority to appoint the proxy.

A traded company will also need to provide an electronic address for receiving documents or information relating to proxies for a general meeting. Documents relating to proxies include proxy appointments, documents necessary to show the validity of, or otherwise relating to, a proxy appointment and notices of termination of a proxy's authority. A company will need to provide this electronic address either:

- when sending out an instrument of proxy, or issuing an invitation to appoint a proxy, for the purposes of the meeting; or
- on the website on which the other "pre-meeting" information is made available (see *Publication of information on a website*). This information will need to be made available during the period beginning with the first date on which notice of the meeting is given and ending with the conclusion of the meeting.

A company is deemed to have agreed that any document or information relating to proxies for the meeting may be sent by electronic means to the address provided (but this is subject to any limitations specified by the company when providing the address).

Requirement to hold an AGM

It will continue to be the case that every public company must hold an AGM within the six month period after its accounting reference date. There will be a new requirement for any private company that is a traded company to hold an AGM – this must be held within the nine month period after its accounting reference date.

At a general meeting

KEY CHANGES WHICH APPLY TO ALL COMPANIES

Votes by corporate representatives

The CA06 provisions allowing a corporate member to authorise one or more persons to act as its representative at meetings came into effect on 1 October 2007. There has been legal uncertainty as to whether or not these provisions allow multiple corporate representatives for a member to vote in different ways. This has been a particular issue for corporate nominees that hold shares for different beneficial owners. The prevailing solution to avoid this uncertainty has been to either appoint multiple proxies or to rely on what has been referred to as the “designated corporate representative procedure”. The CA06 provisions are being amended to resolve this uncertainty. Consequently, if a corporation authorises more than one person to act as its representative, on a show of hands, each representative will have the same voting rights as the corporation would be entitled to and, on a poll, each will be able to vote in different ways in respect of different blocks of shares held by the corporation.

Action point: Companies with articles that set out how many votes a corporate representative has should review those provisions to see if they should be amended to reflect the number of votes prescribed by the CA06.

Votes by proxies on a show of hands

The CA06 is being amended to clarify how many votes a proxy has on a vote on a show of hands at a meeting. On a vote on a show of hands, each proxy present will have one vote. However, if the proxy has been appointed by more than one member and the proxy has been instructed by those members to vote both for and against the resolution, the proxy will have one vote for and one vote against. These rules apply subject to any provisions of a company’s articles.

Action point: Companies with articles that set out how many votes a proxy has on a show of hands should review those provisions to see if they should be amended to reflect the number of votes prescribed by the CA06.

Obligation on proxy to vote in accordance with instructions

Proxies must vote in accordance with any instructions given by the member appointing them.

KEY CHANGES WHICH APPLY TO TRADED COMPANIES ONLY

Conducting meetings by electronic means

If a traded company is using electronic means to enable members to participate in a general meeting, that company can only impose requirements and restrictions to the extent necessary to ensure the identification of those taking part and the security of electronic communications. Any such requirements or restrictions must be proportionate to the achievement of those objectives.

Questions at meetings

At a general meeting, a traded company will need to ensure an answer is provided to any question relating to the business being dealt with at the meeting put by a member attending the meeting. However, a question will not have to be answered if: (a) to do so would interfere unduly with the preparation for the meeting or involve disclosing confidential information; (b) the answer has already been given on a website in the form of an answer to a question; or (c) it is undesirable in the interests of the company or the good order of the meeting that the question be answered.

Chairman’s casting vote

Under the CA06, the chairman cannot generally use a casting vote to pass an ordinary resolution at a general meeting. However, under a saving provision, if immediately before 1 October 2007 the articles of a company gave the chairman a casting vote on an ordinary resolution (and that provision remains in the articles or has been removed and re-inserted), that provision of the articles continues to have effect. This saving provision will cease to apply to traded companies, and any provision in a traded company’s articles giving the chairman a casting vote on an ordinary resolution proposed at a meeting called on or after 3 August 2009 will be ineffective.

After a general meeting

KEY CHANGES WHICH APPLY TO TRADED COMPANIES ONLY

Publishing poll results on a website

The Directive extends the information that a traded company must make available on a website if a poll is taken at a general meeting. If poll is taken at a meeting of a traded company called on or after 3 August 2009, the following information must be made available:

- the date of the meeting;
- the text of the resolution or, as the case may be, a description of the subject matter of the poll;
- the number of votes validly cast;
- the proportion of the company's issued share capital (determined at the time at which the right to vote is determined) represented by those votes; and
- the number of votes cast in favour, the number of votes cast against and (if counted) the number of abstentions.

This information must be available on a website by the end of 16 days starting on the date of the meeting or, if later, the end of the first working day after the day on which the result of the poll is declared, and must be kept available for a period of two years.

If you have any questions or require specific advice on any matter discussed in this alert or on the Directive or the CAO6 more generally, please contact:

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