

ICSA Guidance on Electronic Communications with Shareholders 2007

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Where to find further information

www.opsi.gov.uk – Companies Act 2006

www.opsi.gov.uk – Explanatory notes

Companies Act 2006 with DTI's explanatory notes

www.dti.gov.uk

Companies Act 2006; implementation briefing on the First Commencement Order (see Q&As on pages 4–8)

www.fsa.gov.uk – List!

www.fsa.gov.uk – Rules

Financial Services Authority (FSA)'s Disclosure and Transparency Rules and UK Listing Authority (UKLA)'s *List!* newsletters

1. Purpose and background

This guide replaces the December 2000 ICSA Best Practice Guide on Electronic Communications with Shareholders and the ICSA Electronic Communications Update (guidance note reference no. 011103). It is intended to assist companies in their understanding and interpretation of the regulation in this area and to highlight areas of recommended best practice. A consistent approach across companies will offer some certainty to shareholders with multiple holdings.

Electronic communications with shareholders have been possible since 2000 when the Companies Act 1985 (Electronic Communications) Order 2000 was enacted. However, this legislation only facilitated the use of electronic communications in certain limited contexts, namely the circulation to shareholders of reports and accounts, summary financial statements, general meeting notices and proxy appointments. The Income and Corporation Taxes (Electronic Certificates of Deduction of Tax and Tax Credit) Regulations 2003 then enabled the use of e-tax vouchers. The default position under the 2000 Order is for shareholders to receive hard copy: shareholders are required to give their consent to communication in electronic form. The problem has been a low take-up of electronic communications by shareholders, ranging from only 0.5% to 10% depending on the campaigning efforts of the company. As a result, millions of hard copy documents are printed by companies each year but never read.

The new provisions on company communications to shareholders and others in the Companies Act 2006, which include provisions facilitating communications in electronic form and by means of a website, came into effect on 20 January 2007. These provisions offer two main benefits over the provisions introduced in 2000. Assuming certain shareholder consents:

- they allow any document or information authorised or required by the Companies Acts to be sent or supplied by or to a company to be sent electronically (rather than just those identified above); and
- they allow the default method of communication to switch from hard copy to website communication, with a positive opt-in required for hard copy. As only those shareholders who want to receive the hard copy will opt-in, this is expected to result in cost savings for companies, a reduction in the environmental impact of wasted paper usage, printing and distribution and hopefully, by way of updated communication strategies, an overall enhancement in the level and quality of communication with shareholders.

In addition to the changes introduced under the Companies Act 2006, on 20 January 2007 the FSA's Disclosure Rules became the Disclosure and Transparency Rules, with a new section on electronic communications.

2. Where to find the provisions

Communications for all companies – public and private – are facilitated through the company communications provisions of the Companies Act 2006. The provisions only cover communications under the Companies Acts, and not more general communications falling outside the scope of this legislation. Companies may wish to apply the same provisions in respect of any communication with their shareholders, and not just those under the Companies Acts by including a provision in their articles to that effect. The recommendations for best practice in this guide should also be treated as applying to any such extended use of the provisions.

Both public and private companies need to refer to:

- Part 13 (Resolutions and meetings), sections 308–309 on the manner in which notice is to be given and the publication of the notice on a website, and section 333 on sending documents relating to meetings etc in electronic form
- Part 37 (Companies: supplementary provisions), sections 1143–1148 on ‘sending or supplying documents or information’
- Part 38 (Companies: interpretation), section 1168 for definitions of ‘hard copy and electronic form and related expressions’, and section 1173 for the definition of working day
- Schedule 4: on documents and information sent or supplied TO a company
- Schedule 5: on communications BY a company

Companies trading on a regulated market are also subject to the electronic communications requirements of the FSA’s Disclosure and Transparency Rules (DTRs): see DTR 6.1.8.

Guidance on the interaction between the Companies Act 2006 and the DTRs and the transitional provisions for companies with existing electronic communication authorities can be found in the UKLA newsletter, *List!* Issue 14.

3. Definitions of hard copy and electronic form

Before moving on to the provisions generally, it is worth clarifying the new definitions of ‘hard copy’ and ‘electronic form’ for the purposes of the Companies Acts.

S1168 of the Companies Act 2006 states that:

Hard copy

Hard copy form/hard copy is on paper or similar form capable of being read.

Electronic form

Documents/information sent or supplied in electronic form/electronic copy are those sent by ‘electronic means’ or by any other means while in an electronic form (eg sending an electronic copy (CD) by post).

Documents/information sent in electronic form must enable the recipient to both read/see them with the naked eye and *retain a copy* (and ability only to retain a copy in electronic form, such as retaining a text message, is sufficient).

Electronic means

A document or information is sent or supplied by electronic means if it is sent initially, and received at its destination by means of electronic equipment for the processing (which expression includes digital compression) or storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means. (Examples would be e-mail, fax and text message.)

The glossary to the DTRs defines ‘electronic means’ similarly as any means of electronic equipment for the processing (including digital compression), storage and transmission of data, employing wires, radio, optical technology, or any other electromagnetic means.

4. What the other provisions cover

A Companies Act 2006

Section 308: Manner in which notice to be given

S308 states that notice of a general meeting of a company must be given in hard copy, in electronic form or by means of a website, but that it can be given partly in one form and partly in another. This must be read in conjunction with the general requirements of sections 1143–1148 and Schedule 5 which follow.

Section 309: Publication of notice of meeting on website

S309 goes into more detail on giving notice by means of a website. It states that giving notice in this way is only valid if the notification to a shareholder about the presence of the notice on the website states that it concerns a notice of a company meeting, specifies the place, date and time of the meeting, and in the case of a public company states whether the meeting will be an annual general meeting. The notice must be available from the date of the notification until the conclusion of the meeting.

Section 333: Sending documents relating to meetings etc in an electronic form

S333 allows a shareholder to communicate with the company by electronic means where the company has given an electronic address in a notice calling a meeting or in an instrument of proxy or proxy invitation sent out by the company. ‘Electronic address’ means any address or number used for the purpose of sending or receiving documents or information by electronic means.

This section goes beyond the Companies Act 1985 by deeming the provision of an electronic address by the company in one of the specified documents to be an agreement that any related document or information from the *recipient* may be sent back to the company by that medium. This is subject to any conditions or limitations specified in the notice. Accordingly, under the Act, a company putting its fax number or e-mail address (or even its telephone number) on a notice or proxy communication could be deemed to have agreed to receive responses, such as the receipt of proxy votes, via these media unless it has specified any conditions or limitations on the use of the particular electronic addresses in the notice of meeting.

Section 1143: The company communications provisions

S1143 introduces sections 1144–1148 and Schedules 4 and 5 as the ‘company communications provisions’. It specifies that the company communications provisions have effect ‘for the purposes of *any provision* of the Companies Acts that authorises or requires documents or information to be sent or supplied by or to a company’. The general principle behind the company communications provisions is therefore that *companies can use hard copy or electronic communications for any document* that comes within the scope of the Companies Acts, even if their articles do not provide for it (see also Section 6(A1) below in relation to provisions in the articles). However, the section goes on to state that the provisions can be subject to any contrary provisions in any enactments (ie legislation).

Section 1144: Sending or supplying documents or information

This section introduces two schedules:

- Schedule 4 covers documents and information sent or supplied to a company (this schedule only applies between persons (other than companies) and companies)
- Schedule 5 covers all communications *by* a company (to either an individual or another company).

In these schedules, covered in more detail below, there are references to agreement to receive documents in certain ways and that this agreement can be given 'generally or specifically'. This is not a reference to general meetings but is simply drawing a distinction between a general consent which relates to all documents or information as opposed to a specific consent relating to a specific document or piece of information.

Section II45: Right to hard copy version

This important section gives a shareholder or debenture holder the right to require that any document received electronically (by that person) be sent by the company in hard copy within 21 days of a request. No charge can be made by the company.

Section II46: Requirement of authentication

SI46 sets out the authentication requirements for documents sent to the company by persons that the Companies Acts require to be authenticated (eg a meeting requisition). As one would expect, a signature authenticates a hard copy document. For documents sent in electronic form, the company can specify the means of authentication. Where the company does not specify these, then if the communication contains or is accompanied by a statement of the identity of the sender and the company has no reason to doubt the truth of that statement, the company must consider the communication authenticated.

Section II47: Deemed delivery of documents and information

SI47 sets out when communications sent or supplied by a company are deemed to have been delivered, but is subject to contrary provisions in a company's articles or a relevant agreement/contract.

Hard copy and e-mail: 48 hours, only counting working days.

Website: When the material is made available on the website or, if later, when the recipient received (or was deemed to receive) the notification that the material was available on the website.

Section II48: interpretation of company communication provisions

This section provides definitions of address, company and document for the purposes of the company communication provisions.

Schedule 4: Documents and information sent or supplied to a company (but not covering communications from another company, even if a shareholder; these are governed by Schedule 5) are validly sent if sent in accordance with this schedule.

Part 2 covers hard copy communications to a company and there have been no significant changes here.

Part 3 covers communications in electronic form and states that a document or information may only be sent or supplied to a company in electronic form if the company has agreed (generally or specifically), or is deemed to have so agreed by a provision in the Companies Acts (eg see s333). The document or information must be sent to an address supplied by the company, or deemed to have been so specified by a provision in the Companies Acts.

Part 4 allows the company and sender to agree a means of communication other than hard copy or electronic form, unless the means are specified in the Companies Acts.

Schedule 5: Communications by a company are validly made if the document or information is sent or supplied in accordance with the relevant part of this schedule.

Much of the discussion on Schedule 5 has been as if it applies only to a company in its capacity as an issuer communicating with its shareholders or debenture holders, but that is not set out in the Act. Schedule 5 applies equally to communications by corporate shareholders with issuers and other communications between companies under the Companies Acts e.g. a corporate shareholder responding to an enquiry about interests in shares under Part 22 of the Act. In practice, the main impact of this is simply that companies will need to obtain express consent to communicate with each other electronically on matters authorised or required by the Companies Acts. The provisions on 'deemed agreement' to website communication in this schedule, which are described below, are specific to companies sending communications to their shareholders and debenture holders.

Part 2 of Schedule 5 covers hard copy communications. Paragraph 4(2) confirms that, where no new address is provided, a company can use the last known address. As with ss370 and 238 of the Companies Act 1985, once in force, ss310(4) and 423(2) of the Companies Act 2006 will allow a company to make provision in its articles such that it does not have to keep sending notices of general meetings and reports and accounts to shareholders for whom there is no current address.

Part 3 covers communications in electronic form (other than website, so primarily e-mail in the current environment) and states that a document/information can only be sent in this manner to a person who has agreed (generally or specifically) or to a company that is deemed to have so agreed by a provision in the Companies Acts. The address must have been specified by the recipient, or where the recipient is a company, deemed by a provision of the Companies Act to have been so specified. Where the individual does not agree or fails to provide an address, hard copy must be sent.

Part 4 covers communications by means of a website and states that a document/information can only be sent by being made available on a website if the person has agreed (generally or specifically) to receive it in that way or is taken to have so agreed.

New to the Companies Act 2006 is this concept of deemed agreement to website communication. In respect of shareholders or persons nominated by a shareholder (see Part 9), where shareholders have either resolved, or the articles state that the company may communicate via the website, and the shareholder/nominated person has not responded within 28 days of an invitation to say that he does not want website communication, he can be deemed to have agreed to it. The company's communication which poses this question must be clear about the effect of a failure to respond. Companies need to leave 12 months between making requests of this nature to shareholders in respect of the same or a similar class of documents or information (any number of other communications in the year encouraging signup to electronic communications is acceptable; it is the process of deeming agreement from a non-response that can only be applied annually). The deeming procedure works in the same way for debenture holders.

Documents or information made available on a website have to be readable, and the recipient must be able to retain copies.

The company must notify the intended recipient that the document or information is available on the website, give the address of the website and full details of how to access the document/information. This notification will need to be in paper form where the company has not been given an electronic address for this purpose. The document or information is taken to be 'sent' on the date the notification is sent or, if later, on the date that the document/information becomes available on the website.

As per Paragraph 14 of Schedule 5, the document/information must be available on the website throughout any period specified in the Companies Acts (eg see S309) or, if no time period is specified, for at least 28 days from the date of notification. Paragraph 14(2) states that a failure to make a document or information available throughout the required period shall be disregarded if it is made available for part of that period *and* the failure is wholly attributable to circumstances that the company could not reasonably have prevented or avoided.

This schedule also covers how to deal with communications to joint holders and in circumstances of death and bankruptcy. These provisions need to be considered when making article changes. Schedule 5, Part 6, Paragraph 16 states that anything sent to a holder can either be sent to each joint holder *or* the first-named holder, whereas anything agreed or specified by the holder must be agreed or specified by *all* joint holders. These rules are expressed as having effect subject to a company's articles. A company could therefore amend its articles to allow instructions to be accepted from the first-named holder only. In any event, you should discuss the treatment of joint-holders under the Companies Act 2006 with your registrars where applicable.

A document or information that is sent or supplied otherwise than in hard copy, electronic form, or via a website is validly sent if sent in a form or manner agreed by the intended recipient.

B FSA rules for companies traded on a regulated market

See the Disclosure and Transparency Rules, Chapter 6.

DTR 6.1.7 states that an issuer of shares or debt securities may use electronic means to convey information to shareholders or debt securities holders.

DTR 6.1.8(1) requires an issuer to seek shareholder/debt security holder agreement in general meeting for the issuer to communicate with them electronically (whereas the Companies Act 2006 only requires shareholder approval, as a body, for the website default). The FSA has confirmed that a resolution to amend the articles to insert the relevant provisions on electronic communications will be treated as shareholder approval for this purpose (see also Section 5 below in relation to transitional provisions).

DTR 6.1.8(2) stipulates that the use of electronic means must not depend on the location of the shareholders and other persons. We understand that the UKLA has adjusted its initial interpretation on this matter as published in Issue 14 of its newsletter *List!* in December 2006, and that this rule should be interpreted to mean that within the EEA companies cannot discriminate between shareholders who hold shares of the same class in relation to the use of electronic communications. UKLA will be revising *List!* to reflect this.

DTR 6.1.8(3) requires issuers to put in place 'identification arrangements' so that they can effectively inform shareholders or 'other persons' who control voting rights. The UKLA has indicated in *List!* Issue 14, Paragraph 4.4 that an issuer does not have to contact all 'other persons' in order to use electronic communications. This provision reinforces an obvious requirement for the careful recording of e-mail addresses etc.

DTR 6.1.8(4) states that among others, shareholders with voting rights must be contacted in writing to request their consent for the use of electronic means for conveying information and that if they do not object within a reasonable period of time

(List! Issue 14 indicates that a period of 28 days would also satisfy the 'reasonable' time limit), their consent can be considered to have been given. The shareholder must be able to opt back in for hard copy. However, the FSA has confirmed that the note to this rule means that DTR 6.1.8(4) does not apply at all to any company to which Schedule 5 of the Companies Act 2006 applies. It therefore does not apply to UK incorporated companies which are subject to the 2006 Act.

DTR 6.1.8(5) states that any apportionment of costs entailed in the conveyance of information by electronic means must be determined by the issuer in compliance with the principle of equal treatment.

5. Transitional provisions for companies which already offer electronic communications under the provisions in the Companies Act 1985 inserted by the Companies Act 1985 (Electronic Communications) Order 2000

The transitional arrangements and guidance, confirmed in respect of both the Companies Act 2006 and the DTRs, state that if a company wants to continue with its *existing* use of e-mail or website communications under the provisions in the Companies Act 1985 inserted by the Companies Act 1985 (Electronic Communications) Order 2000 it can do so with no further action and that its articles remain valid, notwithstanding the repeal of the sections in the Companies Act 1985 inserted by the 2000 Order. Companies that are traded on a regulated market should refer to the UKLA's *List!* Issue 14 which states that a company can continue to communicate via a website in circumstances where it would have been lawful to do so before 20 January 2007 (also see Transitional Provision 12 in DTR Sourcebook Transitional Provisions).

However, if under existing arrangements there is a limitation on the type of documents or information that can be sent or supplied to shareholders electronically, companies may want to change their articles to take advantage of the flexibility of the new regime. Also, any company that wants to take advantage of the new default to website capability may well need a new resolution or article change.

6 Issues, guidance and recommended best practice (RBP)

A Communication by means of a website

A1 Article changes for companies

Do you need to change your articles in every circumstance?

No. The general position for all companies is that except where explicitly stated in the section or schedule (such as is the case with Paragraph 10 of Schedule 5 on deemed agreement), the provisions introduced by section 1143 and Schedule 5 apply irrespective of the provisions in a company's articles. Therefore if a company wants simply to continue with electronic communications as they have been prior to the Companies Act 2006 (with or without an existing authority in the articles), or want to start using electronic communication, with no default to website, no article changes or resolutions are required. However, for those companies subject to the Disclosure and Transparency Rules there *must* be a decision taken by shareholders in general meeting enabling the company to use any electronic means to convey information unless it would previously have been lawful under the 1985 Act. In the case of existing companies subject to the Disclosure and Transparency Rules which have not hitherto used electronic communications, a shareholder resolution will be required.

Companies who do not envisage having to change their articles (eg because they do not want to start to use the deeming option) or who currently do not have any provision in relation to electronic communications may still wish to consult their legal advisers as to whether it would anyway be preferable to change their articles: see the additional considerations around article changes below.

Could some existing articles already allow deemed agreement under Schedule 5, Paragraph 10?

Schedule 5, Paragraph 10 states that before the deemed agreement provision to communications by use of a website can be relied upon, the company must be authorised by way of the articles or express ordinary resolution to 'send or supply documents or information to members by making them available on a website'. There is debate around whether some existing articles might meet this requirement, eg by referring to communications 'allowable by law'. Ultimately this is a matter for each company to decide with its advisers and is dependent on the exact wording in the articles. It may be that there is reference to website communication, but not in respect of all documents, thereby limiting its authority to those documents envisaged by the 2000 Order.

In any event, the deemed agreement provisions to communication by means of a website are new and unlikely to have been contemplated specifically by companies in the earlier drafting of their articles. If companies are contemplating using deemed agreement to website communications it is therefore **recommended best practice** to seek shareholder approval via an authorising resolution or article change, unless it is absolutely clear that the articles have already been drafted in clear anticipation of the deemed agreement provisions. This will reduce the likelihood of shareholder complaints that the new regime came in with inadequate profile and, particularly where the articles are changed, will be easily apparent to new shareholders.

For use of the deemed agreement route, is a change in the articles better than an authorising resolution?

The benefits of an article change over an authorising resolution are that future shareholders will be able to easily see the provision in the articles. You can also make further changes to the articles at the same time to cover the other issues that arise in relation to the new company communications provisions – see the following section for details. A distinction to be aware of is that the authorising resolution can be an ordinary one, whereas a special resolution is required to change the articles.

Are there additional points to consider if changing your articles?

Companies will wish to review their articles to see what other provisions relating to communications should be changed at the same time. In particular, use of the new defined terms for 'electronic form' etc in the Act (cf the definitions in the 1985 Act), reviewing the deemed receipt times in s1147, applying the provisions to all documents rather than just those required or authorised under the Acts, dealing with undeliverable e-mails and overriding the provisions in Schedule 5, Part 6 on communications with joint holders.

A2 Content and frequency of invitations to shareholders requesting agreement to website communications

Can you send the invitation before the articles are changed?

There has been considerable debate about whether the invitation to a shareholder under Paragraph 10(3)(a) of Schedule 5 (to which a non-response would result in deemed agreement) can be sent before the articles have been changed or a resolution passed allowing the deeming provisions.

Schedule 5, Paragraph 10 does not expressly prevent the invitation being sent before the resolution/article change is in place. The Act simply states that a condition of deemed agreement to website communication is that a person *has been asked* individually to agree to such communication; it does not prescribe the order of events. Indeed, so long as the invitation and forthcoming meeting are clearly associated, the DTI can see no reason why the invitation cannot precede the resolution/article change. Legal opinion does, however, vary on this point, with some taking the view that the power to issue the invitation cannot be exercised until the authority to use website as the default communication has been obtained. Companies will want to take their own advice.

You will also want to consider whether, in terms of managing communications with shareholders and from a reputational perspective, it is preferable to explain the new regime with the notice of general meeting and then follow this with an invitation later in the year (possibly as a separate mailing, or with the dividend).

If you do decide to send out the invitation in advance of the article change/authorising resolution and the period between the date the invitation is sent and the date of the meeting is greater than 28 days, you could consider extending the deadline for responses until the day after the meeting. In any event the deemed agreement would not take effect until the authorising resolution or article change was passed.

Invitations to new shareholders once the articles are changed

It has been suggested by some that once the articles have been changed such that they expressly include reference to the website communication default, the simple fact that a shareholder has joined the company indicates that they have accepted the terms of the articles and is equivalent to consent to website communication in the event that the company does not hear anything to the contrary within 28 days. This is not the case, and individual invitations must be sent under Schedule 5, Paragraph 10(3)(a).

Content of the invitation

The invitation should specifically detail any hardware/software requirements for shareholders in respect of any electronic communication – see the recommended best practice point in the ‘website management’ section below.

What should the scope of the agreement be?

Choices can be made as to the scope of the agreement as a result of the invitation in terms of whether authority/approval for website communication is sought that is without limit in time and in respect of all documents/information required to be sent by a company. It is possible for the agreement to apply for an indefinite period. Whichever route is chosen, the company will in any event want to reserve the right to use hard copy in any particular case.

You should also discuss with your registrars, where applicable, whether you want to include reference to the fact that any deemed agreement, or indeed express agreement, would apply to the existing account *and* any account which may thereafter stand in that shareholder’s name in the company’s books. On this basis the consent could continue until cancelled, or any nil holding is removed from the register (currently after 20 years but to be reduced to 10 years under the Companies Act 2006) and it would mean that the consent would be preserved for those shareholders that come off and then back onto the register.

A shareholder is only deemed to have agreed to website communication if the invitation to agree to website communication is sent out more than 12 months after any previous invitation for the same or similar documents. What issues does this raise?

The context to consider here is that after your invitation there will be three communication categories of shareholders:

1. Those that replied to say that they would like to continue to receive hard copy and consequently do not need to be sent a separate notification about website publication.
2. Those that did not reply within 28 days. These you can deem to have agreed to website communication. In future you will have to send them hard copy notification letting them know when material becomes available on the website (until such time as they might let you have an electronic address for this purpose). If any shareholders reply within 28 days to say that they want website communication but do not provide an e-mail address, they will be in the same position as those who did not reply and will in future need to be sent hard copy notification of the availability of the material on the website.
3. Those that replied that they would like to be advised electronically when new material is available on the website and provided an e-mail address for this purpose. You will have to send them e-mail notifications letting them know when material becomes available on the website (this group is distinct from those that might have signed up separately to a company's website to receive e-mail alerts about company news, marketing offers etc).

The issues:

a) Pestering shareholders

As mentioned previously you are not allowed to contact a shareholder that has opted-in for hard copy more than once every 12 months (see Schedule 5, Paragraph 10(4)(b)) with a communication that would deem agreement to website communication in respect of the same or a similar class of documents or information should there be a non-response. Therefore, if you are dispatching this type of 'deeming' invitation with your AGM mailings you need to be aware that this 12-month minimum interval must be interpreted literally; if your AGM date is brought forward for any reason, and consequently your notice of meeting is sent out earlier (even if only by one day), you will be unable to dispatch these documents together. It is anyway our view that, in normal circumstances, **recommended best practice** is to consult no more frequently than every other mailing cycle. This is because we do not believe that those that want hard copy should be unduly pestered by the company into having to reaffirm this preference too often.

To be clear, there is nothing to prevent you encouraging and inviting shareholders to sign up to electronic communications as often as you like and as part of all your shareholder mailings; you simply cannot deem agreement to website from a non-response more than once every 12 months.

b) Managing the 12-month anniversary

If you decide to seek deemed agreement with your welcome pack (or perhaps even earlier via the broker) you will need to manage the fact that the 12-month anniversaries for shareholders will vary. If you decide that you prefer to consult all relevant shareholders on the same date, there is nothing to stop you encouraging an opt-in for electronic communications as part of the welcome pack communication; the point is that you would not be applying the deeming provision as part of this communication; this would come later, perhaps with an AGM or dividend mailing. This way there is less complication in keeping track of when the 12-month anniversaries fall.

A3 Responses to a deemed agreement to website invitation

The issue here relates to the drafting of the provision that a person is taken to have agreed to website communications if 'the company has not received a response' within 28 days of a request.

If a shareholder does respond to the invitation positively (ie the shareholder agrees to the use of the website) we consider that such positive agreement would be covered by Schedule 5, Paragraph 9(a) (actual agreement, general or specific) and the consenting person would fall outside Paragraph 10, which concerns deemed agreement. The invitation could make this use of express agreement clear.

Should a response requesting hard copy arrive later than the 28 day cut off (at which point you can deem agreement to website communication) this should be treated as a revocation of the shareholder's deemed agreement and communications should revert to hard copy. Should a record date for posting have been recently missed it is **recommended best practice** to send that person a hard copy of that communication.

A4 Notifications referring to material on the website

While Schedule 5, Paragraph 10 requires companies to actively seek the *individual* agreement of shareholders to website communication, Schedule 5, Paragraph 13, which requires the company to notify those who have agreed or been deemed to have agreed to the availability of the information on the website, does not employ the word 'individually' but refers to the notification of the 'intended recipient'. There is debate about the interpretation of this section. Our understanding is that the intention behind the drafting was that shareholders would be notified individually.

The second area of debate is around when you send the notification. In terms of annual report mailings, as is the practice now for those signed up to electronic communications, it is **recommended best practice** that the notification of availability, if an e-mail, is sent on the publication date for the AGM material (ie the date on which the material would be both on the website and expected to land on the doorsteps of shareholders receiving hard copy) and that your articles state that an e-mail is deemed to be delivered on the same day that it is sent (the default position in the Act is that e-mails are deemed to have been received 48 hours + non-working days after sending). Where the notification is sent in hard copy, it should be sent at the same time as the full hard copy mailing (the default position in the Act in relation to hard copy is also that it is deemed to have been received 48 hours + non-working days later, subject to any contrary provisions in the articles). We do not support the concept of advance notification, for example with the publication of an annual calendar, as shareholders should not have to diarise a future event. When the shareholder receives the notification, the material should be available; clearly an advance notification also has the disadvantage of being subject to unforeseen events and change. In any event, as regards notices of meeting, s309 states that the notice must be available on the website at the time the notification is sent.

It seems sensible to keep the notifications, whether by electronic means or in hard copy, short and to the point to keep the interest of the reader. To ensure consistency, apart from any necessary adaptation for the specific medium, the content of the electronic and hard copy notification should be identical. The notifications should provide signposts to the more detailed information on the website. When the notification of availability is in respect of a general meeting you need to comply with the requirements of s309. It is also **recommended best practice** that the notification spells out any

proxy appointment deadlines. You may want to also consider highlighting any non-routine business. We recommend you read this section in conjunction with our guidance on encouraging shareholder voting in section 5 below.

A5 Managing notifications of availability on the website without discouraging shareholder voting and participation

The issue here is that in the process of changing the communications environment with shareholders, it is important to ensure that voting and participation levels are not negatively affected. Where a company chooses to use the website as a default, it is likely that in the first few years of the new regime, a number of shareholders will inadvertently be deemed to have accepted the website by failing to respond to the invitation sent to them under Paragraph 10 of Schedule 5. During this transitional phase, until shareholders become accustomed to the new communications regime, it is **recommended best practice** that any notification of website availability for general meeting material should not only give the website link, but where sent in hard copy should include a hard copy personalised proxy card (possibly with return envelope) and details of any online voting facility or, where sent by e-mail, a direct link to any online voting facility. Details of any telephone voting options should also be made clear.

It is not good practice to post blank proxy cards on the company website as unpersonalised proxy cards with unclear signatures often have to be rejected by registrars.

A6 Website management

When designing the website pages which carry the documents or information you are communicating to shareholders you need to consider the varying levels of technology available to those shareholders. It is **recommended best practice** that any invitation to shareholders about the use of electronic communications gives details, or provides a link to details of any particular software or equipment specifications which will be required to enable the shareholder to take advantage of the options being made available. Guidance on where the relevant software can be downloaded free of charge should also be provided.

Care needs to be taken to distinguish carefully between audited and non-audited information on websites. To avoid the risk of sections of the website being deemed to be part of the company's report and accounts it is currently **recommended best practice** not to allow any hyperlinks from the online report and accounts to any other part of your website.

You need to bear in mind that the shareholder needs to be able to retain a copy of the document or information being made available to him, and that the document must be able to be read and pictures seen with the naked eye; see paragraph 12 of Schedule 5. A format that can be retained/saved by the shareholder may not be the best format type for online printing, viewing and navigation, so you may want to offer more than one format. Providing more than one format may also be helpful in compliance with the requirements of the Disability Discrimination Act. In the current environment it is generally better to provide a link to a holding webpage, from which a pdf (or similar) can be accessed, rather than providing a link directly to a pdf. This holding webpage approach does not assume the recipient has the software to open a pdf and provides opportunity to offer explanations and options. It would be bad practice to give people who may have a slow internet connection a direct link to download a very large document.

It is **recommended best practice** that the company's and/or registrar's website should either include an online facility to enable shareholders to notify the company of any change in their choice of communication medium or electronic address details or inform them as to how they may do so.

It is clearly increasingly important to ensure the availability of your website at all times.

A7 Period of availability of materials on the website

There are various requirements to be aware of including Paragraph 14 of Schedule 5, s309 and those relating to the availability of accounts on the website in the DTRs and in other provisions of the Companies Act 2006 which are not yet in force. Certainly your web designers will need to incorporate archiving options in the website structure.

A8 Impact on printing requirements

After the first invitation to which a non-response results in deemed agreement you are likely to have a large proportion of shareholders in this category. Clearly an unknown number, not having taken on board the result of their inaction, may later come forward and request hard copy, so a contingency figure should be added to your print run. In subsequent years, experience will make this number easier to estimate.

It is also possible that it may impact on practice regarding Summary Financial Statements, including whether these are sent at all.

B Communications in electronic form

B1 Treating shareholders the same

It is **recommended best practice** that the offer and provision of a facility to communicate with shareholders electronically should not discriminate between shareholders of the same class. The invitation to participate and provision of the facility should be made available to all shareholders on equal terms and in such a way as to make it as simple as possible for shareholders to participate.

Companies traded on a regulated market should also be aware of DTR6.1.8(2).

B2 Ensuring in all communications in electronic form that the shareholder can 'retain a copy' of the document or information

When reviewing any electronic means (such as telephone or text) you might be considering for communications with your shareholders you need to be mindful of the need for the shareholder to be able to retain a copy of the document/information under s1168.

B3 Impact on general meeting documentation

You need to be aware of the impact of s333 in the design of your notice and proxy card and ensure that any electronic address (which extends to telephone numbers) that appears in the notice or proxy card that is not intended for use by shareholders in their

communications back to you (such as lodging proxy appointments) is specifically limited in its application or has conditions attached to its use in your notice of meeting (eg being clear that a telephone number has been made available for enquiries only). It may be easier to ensure that electronic addresses that are not intended for use by shareholders in relation to the meeting do not appear on the notice or proxy card. In an extended 'notice' circular, thought needs to be given to where the 'notice' begins and ends for the purposes of s333.

B4 Mix of hard copy and electronic communications

It may be preferable to offer electronic communications as a complete package (reserving the right to send hard copy at any time). After all, those receiving everything electronically can always print any of the documents made available to them, or exercise their right under s1145 and request a hard copy of a particular document at any time.

The document that is sent in hard copy in response to a request under s1145 can be a version of what was sent electronically (ie it does not have to be identical) but it must not exclude any information or exclude any text or exclude any visuals (photographs, charts etc) if they add anything of substance to the text: for example, by showing shareholders a new design of a company product. If the document was originally sent to the shareholder electronically there is no time limit to this right under s1145 for as long as he remains a shareholder.

Companies may choose to offer shareholders a tick list so that the latter can choose which documents they would like to receive electronically and which in hard copy. It does not have to be all or nothing. However, companies may want to be mindful of the impact of any decision on the mailing matrix – which may already be complex. If you do offer a tick list you might want to include a fallback presumption as it may not always be possible to list every single type of possible document.

B5 Identification arrangements, record keeping and record dates

It is important to set up a system to meet requests for hard copies of all information made available electronically as you have a statutory 21 days within which to supply the hard copy. You will also need to keep records of those who have revoked consent to electronic or website communication.

B6 Failed delivery or non-receipt of information

When the electronic communications provisions were inserted into the Companies Act 1985 by the 2000 Order, Regulation 115 of Table A was amended to refer to the ICSA best practice guide on Electronic Communications with Shareholders. It was provided that 'proof that a notice contained in an electronic communication was sent in accordance with guidance issued by the Institute of Chartered Secretaries & Administrators shall be conclusive evidence that the notice was given'. For those companies which have adopted Regulation 115 in their articles this guidance reproduces here the relevant provisions of the original ICSA best practice guide. It is important that such companies follow the best practice recommended in this section.

With material sent by post the company has only to provide proof of posting. Given the large mailings that are normally involved, this is usually a matter of routine. With information delivered electronically, however, this may not be quite so simple. It will be necessary for the company to set up systems to provide evidence that information has been properly sent by each of the methods being used.

Although the use of the telephone for delivering notices is expected to be a rarity and used only by small companies with few shareholders, it is **recommended best practice** that when notices are delivered by telephone the company should compile and retain a suitable evidential record of all those contacted with the date and time of the call. A copy of an itemised telephone account showing the numbers called would provide additional evidence of the call but not, of course, of the subject matter.

It is **recommended best practice** that, when information or notifications of availability are sent by fax, a comprehensive transaction report or log generated by the fax machine should be suitably certified and retained by or on behalf of the company as 'proof of sending'.

It is **recommended best practice** that, when information or notifications of availability are sent by e-mail, the company should ensure that it uses a system which produces either confirmation of the total number of recipients e-mailed or, preferably, a record of each recipient to whom the message has been sent. A copy of such record and any notices of any failed transmissions and subsequent re-sending, suitably certified, should be retained by or on behalf of the company as 'proof of sending'.

It is **recommended best practice** that the company should alert those shareholders electing to receive communications electronically that the company's obligation is satisfied when it transmits an electronic message and that it cannot be held responsible for a failure in transmission beyond its control.

However, where the sender of a fax or an e-mail receives a fairly prompt message back to say that delivery was unsuccessful, the company is put on almost immediate notice that the information has not got through to the recipient. It is **recommended best practice** that the company should, where it is aware of the failure in delivery of an electronic communication (and subsequent attempts do not remedy the situation), revert to sending a hard copy of the communication by mail to the recipient's last known postal address. This should be done within 48 hours of the original attempt. The company should include a standard notice advising the shareholder why he/she is being sent a copy by post and should take the opportunity of asking him/her to confirm his contact details.

It should be noted that it is only a hard copy of the actual document which is being sent electronically which needs to be posted in the event of a communications failure. If that document is merely a notification of availability to say that certain information will be accessible on the website from a specified date, it is not suggested that hard copies of the report and accounts or whatever other information is being made available on the website should also be posted. If, on the other hand, it has been agreed that the shareholder will be sent a full copy of the notice of meeting, the report and accounts etc by fax and it is that transmission which fails then it must be a copy of that same material that is sent by post.

Another point which has been raised regarding the use of e-mail is the ability for some systems to trigger an 'out of office' response to incoming messages. An 'out of office' response cannot be considered to be a failed delivery of the e-mail as to have generated the response the message must have reached its destination. This would be analogous to post piling up on the doormat of a shareholder who has gone on holiday.

B7 Nominated persons under Part 9, Exercise of Members' Rights

For companies admitted to trading on a regulated market, once Part 9 of the Act is in force, anything sent to shareholders will also need to be sent to nominated persons (the position is not quite the same as by law the default for nominated person is website

communication). Nominated persons are those persons on whose behalf a shareholder is holding shares and who have been nominated by the shareholder to receive information rights under Part 9. Therefore companies should consider these indirect investor rights when setting a communications strategy and developing new systems. It is not necessary for articles to specifically provide for the information rights of these indirect investors as s150 of the Act provides that the corresponding provisions in the articles will apply to them in relation to company communications.

B8 Deemed delivery

With reference to s1147 we suggest that you consider reviewing the deemed delivery provisions in your articles (see Section 6(A4) above).

C General

C1 Viruses

It is **recommended best practice** that shareholders electing to communicate with the company in electronic form are warned that a communication containing a virus may not be accepted by the company but that every effort would be made to inform the shareholder of the rejected communication and that companies ensure that outgoing communications are, as far as reasonably practical, virus free.

C2 Register of members

It is **recommended best practice** that any e-mail address or electronic address provided by the shareholder should not be recorded as part of the publicly available part of the company's register of members. You may want to consider the status of electronic addresses in takeover/merger situations and check that wording in standard offer documents etc refers specifically to permission for agreements relating to electronic communications to be carried over so that they can apply in relation to any bidder shares issued to target shareholders under the offer.

C3 Other electronic means

The focus in this guide has been on e-mail and websites as this is the prevailing practice, but there is no intention to rule out other means allowable under the Companies Act.

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