

ICSA Guidance on the Implementation of the Shareholder Rights Directive

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1 Introduction

The Shareholder Rights Directive aims to facilitate and encourage effective shareholder control in EU companies, a prerequisite of sound corporate governance, by enabling shareholders to exercise their voting rights and rights to information more easily. It is anticipated that its implementation across Europe on 3 August 2009 will also solve some of the problems associated with cross-border voting.

The Companies (Shareholders' Rights) Regulations 2009 (the 'Regulations') implementing the Shareholder Rights Directive in the UK take effect on 3 August 2009 and apply in relation to meetings of which notice is given, or first given, on or after that date.

(Regulation 1)

The Regulations make changes to Part 13 of the Companies Act 2006 (the 'Act') relating to resolutions and meetings.

Some changes to the Act apply to all companies, some just to those traded on regulated markets in the EEA, including the UK. Regulated markets in the UK include the London Stock Exchange main market and the listed element of PLUS, but not AIM.

(Regulation 21, CA06 s360C)

This ICSA guidance note has been produced with the assistance of an industry working group of company secretaries, lawyers and registrars (see Appendix A). It is intended to provide a brief overview of the key changes, with some practice notes and recommendations.

A proforma circular produced by a working group of lawyers from City firms, which deals in detail with the principal article changes in respect of the implementation of the remaining parts of the Companies Act 2006 on 1 October 2009 and the implementation of the Shareholder Rights Directive, will be made available shortly and will be accessible via the ICSA website.

The full set of Regulations and some related Q&A can be found at the website of the [Department of Business, Innovation and Skills \(BIS\)](#).

2 New rules for all companies

2.1 Corporate representatives

The uncertainty around corporate representatives, which arose from the original drafting of the Act, has been resolved. S323 as amended clarifies that where a shareholder appoints more than one corporate representative in respect of its shareholding, but in respect of different shares, those corporate representatives can act independently of each other, and validly vote in different ways.

The Designated Corporate Representative procedure outlined in the ICSA guidance, published in January 2008 therefore becomes redundant for meetings of which notice is given on or after 3 August 2009. However, there are still best practice procedures concerning the appointment of a corporate representative and the content of the letter of appointment – updated ICSA guidance on this topic will follow.

In cases where the same corporate representative has been appointed by more than one corporation, legal opinion is divided over whether s323 as amended can be interpreted to mean that this corporate representative has only one vote on a show of hands or whether he has as many votes as members who appoint him (which would be administratively difficult). This point cannot be clarified in the articles, but there is comfort in the fact that where the result on a show of hands appears to be anomalous based on the proxy votes he has been given, the chairman has a duty to use his discretion to call a poll.

(Regulation 6, CA06 s323)

2.2 Proxies voting on a show of hands

The Act as amended clarifies, to a great extent, the position concerning the rights of proxies when voting on a show of hands. There are two elements: a proxy appointed for the same meeting by more than one member and a member who appoints more than one proxy, each one appointed in respect of different shares within the same holding.

If a proxy is appointed, in relation to the same meeting, by more than one member and all the shareholders who have appointed him instruct him to vote in the same way, he is only able to vote once, 'for' or 'against' as applicable. If, however, these members give different instructions to the proxy (so one or more 'for' and one or more 'against' on a resolution being voted on a show of hands) the proxy is able to reflect both types of instruction and have up to one vote 'for' and one vote 'against' on a show of hands. He is therefore able to put his hand up twice, once 'for' and once 'against'.

This scenario just described, and found in s285(2) as amended, is the only stated exception in the Act as amended to the general rule that the proxy has one vote on a show of hands.

There has been some debate about how this exception should be interpreted if the proxy also has discretionary votes. For example, if all the concrete instructions are one way ('for' or 'against'), the question is whether the proxy could have a second vote the other way if he wishes to use the discretions he has been given to vote the other way. Legal opinion varies on this point, but as s285(2) as amended is subject to the articles, companies have the ability to clarify this in their articles.

If a member appoints more than one proxy in respect of different shares within the same shareholding, each appointed proxy has one vote on a show of hands. This enables nominee shareholders, such as ISA providers, or corporate nominees, should they choose, to appoint the underlying beneficial owners as proxies in respect of those shares in which they have an interest, and the latter can vote at the relevant company meeting on a show of hands (as well as on a poll).

The fact that a shareholder can potentially appoint a different proxy in respect of each share in his holding could result in an anomalous result if a vote is taken on a show of hands. Therefore, the chairman of the meeting should be alert to this possibility and require a vote to be taken by way of a poll if necessary.

As proxies are required to be registered in advance of a meeting, companies are in a position to detect any unusual proxy appointment activity and plan for a poll to be taken if a vote on a show of hands appears likely to be anomalous.

These provisions on proxies are subject to a company's articles. Historically, most articles will state that a proxy has one vote on a show of hands. For reasons of consistency across companies in the EU, and because of the additional flexibility the revised statutory provisions give to proxies, we recommend that as a starting point companies amend their articles either to track the wording of s285(1) and (2) of the Act as amended or be silent and rely on s285 of the Act as amended. It is recommended that companies then consider confirming in their articles that a proxy appointed by more than one member is not restricted by the concrete instructions he has received from casting a second vote the other way under discretionary authority given by other members if he chooses to do so.

(Regulation 3, CA06 s285)

2.3 Members' power to require directors to call general meetings

Pre 3 August 2009, the Act required members to hold at least 10 per cent of voting share capital (or simply of voting rights if no share capital) in order to be able to require directors to call a general meeting (although for private companies, if certain conditions were met the threshold could be reduced to 5 per cent). This threshold has been reduced to 5 per cent for all companies in all circumstances.

(Regulation 4, CA06 s303)

2.4 Proxies to vote in accordance with instructions

It has always been the case under the common law that a proxy is required to vote in accordance with any voting directions provided by the appointing shareholder. The Directive required that this be put on a statutory footing so a new section, s324A, states that a proxy must vote in accordance with any instructions given by the member by whom the proxy is appointed.

As in the past, a company is not in a position to check and ensure that a proxy votes in accordance with the instructions given by the appointing member. If it later transpires that a proxy did not vote in accordance with such instructions, this fact would not invalidate the results of the meeting. (The legal position would be that the proxy would be in breach of his common law duty as agent and the new statutory duty.)

It may, however, be worth considering adding a provision to your articles to reinforce the position that there is no obligation on the company to check whether proxies (or indeed corporate representatives) are voting in accordance with instructions and that the vote is not invalidated should instructions not be followed.

(Regulation 7, CA06, s324A)

2.5 Advance voting on a poll

The Directive requires member states to allow companies to offer advance voting on a poll. This is different to voting by appointing a proxy. It involves companies being able to accept votes cast in advance of a meeting (ie not cast at the meeting as a proxy vote is). It is aimed at those EU member states which have no proxy system or which have restrictive proxy practices. The Directive is only permissive on this point and companies are not obliged to offer advance voting, but may amend their articles to do so if they wish.

The UK already has an established proxy voting system, which allows shareholders to register their votes in advance, but crucially also to change a voting direction in the run up to the meeting (and even turn up on the day should they choose and vote in person, thereby overriding a proxy appointment). In light of the unrestrictive nature of the UK proxy system, and the confusion that could result from the introduction of advance voting in conjunction with the proxy system, ICSA is not recommending that companies amend their articles to offer an advance voting facility.

(Regulation 5, CA06 s322A)

3 New rules for traded companies on regulated markets in the EEA – in the UK, companies listed on the London Stock Exchange main market or the listed element of PLUS (not AIM companies)

Apart from 3.3 below which does apply to both types of meeting, the following rules apply to shareholder meetings, but not class meetings.

3.1 Length of notice of shareholder meetings

The requirement in the Act for AGM notice periods remains unchanged at 21 clear days.

General meeting notice, however, increases from 14 to 21 clear days (an exception is made for certain types of takeover meetings).¹

However, this general meeting notice period can be reduced to 14 clear days provided the following three conditions are met:

- 1) the meeting is not an annual general meeting;
- 2) a special resolution (taken either at the last AGM or at a general meeting since the last AGM or inception of the company) enabling a notice period of not less than 14 clear days has been passed by members; and
- 3) the company offers the facility to allow all shareholders to vote by electronic means. This will be met if the company offers the facility to shareholders to appoint a proxy by means of a website.

Transitional provisions allow for this resolution to have been taken before the implementation date of 3 August 2009.

Simply offering electronic voting through the CREST stock settlement system does not meet this 'electronic means' requirement as the majority of shareholders by number do not use the system (note, however, that it does meet the requirement to provide an 'electronic address' in 3.4 below). To comply, companies need to offer electronic proxy appointment to all their shareholders by means of a website. The facility does not necessarily need to be on the company's own website and could be hosted for example on the registrar's website.

¹ The extended notice period of 21 days does not apply to an opted-in company, as defined by s971(1) where the meeting is held to decide whether to take any action that might result in the frustration of a takeover bid for the company, or the meeting is held by virtue of s969 (power of offeror to require general meeting to be held).

It is important to note that electronic proxy appointment, which is accessible to all shareholders, only needs to be in place for the particular meeting that the company wishes to call on less than 21 clear days' notice. Companies which do not routinely offer proxy appointment accessible to all shareholders by means of a website, assuming they have taken the enabling resolution, can put the website facility in place on a one off basis (by arrangement with their registrars) and then can be in a position to take advantage of the minimum notice period of 14 clear days should it be in the best interests of shareholders to convene a meeting at the shortest possible notice.

For maximum flexibility companies should consider putting the necessary resolution to shareholders annually, even if they do not routinely offer the facility to all shareholders to appoint a proxy electronically.

Suggested wording for the required special resolution is:

'That a general meeting, other than an annual general meeting, may be called on not less than 14 clear days' notice.'

(Regulation 9, s307A and Regulation 23)

3.2 Adjournments

If a meeting is adjourned because the necessary quorum has not been met the adjourned meeting must be held at least 10 clear days after the original meeting.

In addition, in respect of meetings adjourned for a lack of quorum, if new business which was not covered in the original notice is to be dealt with at the reconvened meeting, the reconvened meeting must be held on 14 clear days' notice (or 21 clear days if the company has not enabled 14 day notice periods).

(Note that adjournments for all other reasons, such as a problem with the venue, are not caught by these new provisions and can continue to be reconvened at short notice, such as later the same day.)

It is recommended that if a company's articles allow a meeting adjourned due to lack of quorum to be held less than 10 clear days after the date of the original meeting, they should be amended so as not to conflict with the Act.

(Regulation 9, s307A)

3.3 Introduction of a voting record date

The Act as amended, introduces a new requirement for a company to determine a record date. This is distinct from setting a deadline for appointments of proxies and relates to the right to vote at a general meeting. The voting record date must be determined by reference to the register of members not more than 48 hours before the time for holding the meeting, ignoring any part of any day that is not a working day.

Provision for a record date already exists in CREST. In respect of this, the Uncertificated Securities Regulations (USRs) apply a 48 hour limit, which at present includes non-working days. The USRs apply to all companies in CREST, including AIM companies. These regulations have been amended, and with effect from 1 October 2009, will align with the Act and ignore part of any day that is not a working day.

To give themselves maximum flexibility on the voting record date, companies are recommended to either remove any existing provisions about voting record dates from their articles, or mirror the wording of the Act as amended.

In order to allow maximum flexibility to a company in terms of the deadline for the appointment of proxies, which since October 2007 can under the Act be as early as 48 hours before the meeting, not including non-working days, articles should reflect the wording of the Act. Clearly, if the articles state simply 48 hours, the more generous terms of the Act, which allow non-working days not to be counted, cannot be applied.

Therefore, in respect of both the voting record date and the proxy deadline the articles will override the Act if the resultant dates would be set at a time closer to the meeting than the minimums allowed by the Act. If the articles set voting record dates or proxy deadlines further from the date of the meeting than allowed by the Act they are unlawful and will be overridden.

(Regulations 20, CA06 s360B)

3.4 Requirement to provide electronic address for receipt of proxies

The Act as amended introduces a new requirement for a company to provide an electronic address for the receipt of any document or information relating to proxies for a general meeting.

For these purposes, documents relating to proxies include:

- appointment of a proxy
- any document necessary to show the validity of, or otherwise relating to, the appointment of the proxy
- notice of the termination of a proxy's authority

This new requirement applies to all general meetings but does not necessarily have to be available to all shareholders and should not be confused with the requirement to offer a facility to allow all shareholders to vote by electronic means, which only applies if a company wishes to hold a meeting on less than 21 clear days' notice (see 3.1 above).

An electronic address means any address or number used for the purposes of sending or receiving documents or information by electronic means.

The company must provide the electronic address either:

- 1) by giving it when sending out an instrument of proxy, or issuing an invitation to appoint a proxy, for the purposes of a meeting; or
- 2) by ensuring that it is made available, throughout the period beginning with the first date on which notice of the meeting is given and ending with the conclusion of the meeting, on the website referred to in 3.6 below

The 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. However, this is subject to any limitations specified by the company when providing the address.

CREST provides for an electronic method for appointing proxies and revoking proxy appointments. Companies that offer this CREST proxy facility typically include a statement in their notice of meeting referring shareholders to the CREST Manual. These companies (even if they do not provide a website proxy voting facility) can comply with the new requirement by offering the CREST proxy facility and referring to the CREST Manual on the Euroclear website (www.euroclear.com/CREST).

Companies that do not offer the CREST proxy facility and also do not provide a website proxy facility will need to consult with their registrar about how to comply with the new requirement.

(Regulation 13, CA06 s333A)

3.5 Codification of the right of shareholders to have questions answered at general meetings

The Act as amended states that at a general meeting, the company must cause to be answered any question relating to the business being dealt with at the meeting put by a member attending the meeting. It is clearly stated that no answer need be given if it is undesirable in the interests of the company or the good order of the meeting. Further no answer need be given if to do so would interfere unduly with the preparation for the meeting, involve the disclosure of confidential information, or if the answer has already been given on a website in the form of an answer to a question.

There is no intention for the chairman's ability to control meetings to be reduced, but clearly the chairman is in new territory and has to be sure that one of the tests applies when refusing to answer a question. It is apparent that chairmen need to be well briefed on this codification so that they can refer to the Act as necessary when deciding how to answer a particular question at a meeting.

Making a decision on whether one of the tests is met, such as whether further questions on a particular topic would jeopardise the good order of the meeting is ultimately a judgement call, and a chairman should therefore use his discretion, in good faith, in deciding whether a particular question is to be answered.

It is likely that to continue to answer a question that was being repeated, or answering a string of very similar questions, could be said to be undesirable in the interests of the company or the good order of the meeting. The Directive after all states, in Article 9, that Member states may allow companies to provide one overall answer to questions having the same content.

A company cannot prepare for all questions which might relate to the business being dealt with at a general meeting, but companies may like to review and expand the Q&A sections on their websites so that chairmen can refer questioners to answers posted there where possible.

The Directive, in recital 8, states that the rules on how and **when** (as distinct from whether) questions are to be asked and answered should be left to be determined by Member states. There is nothing in the Act as amended which requires the answer to a question (to which the company is obliged to give an answer) to be given at the meeting itself. Instead s319A requires that: 'At a general meeting of a traded company, the company **must cause to be answered** any question relating to the business being dealt with at the meeting put by a member attending the meeting.' A company should attempt

to answer all questions at the meeting itself but in circumstances where the answer, or a full answer, is not available for the chairman to provide, it will be reasonable to nominate a representative of the company to answer a question, or provide a fuller answer to a question, after the meeting.

(Regulation 12, CA06 s319A)

3.6 Website requirements (pre-meeting)

On or before the date that notice is given, the following information must be made available on a company's website:

- The matters set out in the notice
- The total number of shares in the company and total number of shares of each class, in respect of which members are entitled to exercise voting rights
- The total number of votes that members are entitled to exercise at the meeting in respect of each share class

In respect of shares and voting rights, the totals should be ascertained at the latest practicable time before the date on which notice is given.

Any members' statements, resolutions and matters of business received by the company after notice has been given, assuming they are validly requisitioned or required and not time-barred, should be added to the website as soon as reasonably practicable.

This information is required to be available on a company's website for a period of two years.

Companies should make sure that there are procedures to ensure that this information remains on the website for two years and is not 'automatically' removed after a shorter period, for example when the website is redesigned.

(Regulation 11, CA06 s311A)

3.7 Website requirements (post-meeting)

In addition to the current requirements in the Act for 'quoted companies' for the results of a poll to be made available on a website (ie date of meeting, resolution text, number of votes in favour and number against), the Act as amended obliges traded companies to publish additional information.

All traded companies are also quoted companies and are therefore already subject to the current requirements. Companies which are only listed on NYSE or Nasdaq but not on a regulated market in the EEA are quoted companies, but not traded companies.

The following additional information, in respect of each resolution voted on a poll, must now be published by traded companies on the website after the meeting:

- the total number of votes validly cast
- the proportion of the company's issued share capital (taken as at the record date) represented by those votes validly cast
- the number of abstentions if counted

The timing of publication is subject to overlapping requirements. S353 of the Act already provides that the information must be made available as soon as reasonably practicable and be kept available for two years. S341 as amended provides that the information must be put on the website within 16 days beginning on the day of the meeting, or if later, the end of the first working day after the poll results are declared. This follows closely the requirements of the Directive.

In accordance with s353 and good practice, the requirement to make the information available as soon as reasonably practicable will mean poll results should be published much earlier than the 16-day deadline.

The terminology used in the Act as amended is ‘abstentions’. This is not a reference to those who did not vote at all, but has the same meaning as ‘votes withheld’.

(Regulation 19, CA06 s341)

3.8 New right of members to include a matter in the AGM business

Shareholders have a new right to require the company to include a matter in AGM business (this is in addition to the existing rights to require the circulation of statements and resolutions).

The rules of timing and expenses are the same as for requisitioned resolutions, ie:

- Shareholders must have 5 per cent of total voting rights or 100 members entitled to vote with an average of at least £100 paid up share capital per member
- The request must be received not later than 6 weeks before the meeting or if later, the time notice is given.
- The company bears the cost of circulating details of such business if the request is received before the end of the financial year preceding the AGM.

As is the case with requisitioned resolutions, a company can refuse to include a matter in the AGM business if it is defamatory of any person, or frivolous or vexatious.

It is advisable to wait until six weeks before the meeting date before sending out the notice to check for member requests at this point.

(Regulations 17 and 18, CA06 ss338A, 340A, 340B)

3.9 Additional contents requirements for notice of meetings

Notices of meetings must now include:

- The address of the website where certain meeting information is available (see pre meeting website requirements above)
- The record date (see introduction of a voting record date above)
- The procedure to attend and vote
- Details of the proxy form
- The right to ask questions (see the codification of the right of shareholders to have questions answered)
- Explanation of members’ rights to requisition resolutions and include a matter in the business to be dealt with at the meeting (this provision only applies where the notice goes out more than six weeks before the meeting)

Please note that companies should not make unpersonalised proxy forms available on the website as there will be a risk that these will be returned, completed, but in such a way that the registrar cannot identify the shareholder. It follows that the shareholder's vote will then not be able to be counted. As part of disclosing the procedure to attend and vote, the website content should make clear how to obtain a personalised proxy form.

Note that if the notice is sent out less than six weeks before the meeting no reference needs to be made to the members' right to requisition resolutions and include matters in the agenda.

(Regulation 10, s311 and Regulation 16, s337)

3.10 Abolishing the chairman's casting vote

From 3 August 2009 the chairman of a traded company cannot have a casting vote where there is an equality of votes on an ordinary resolution at a general meeting and any provision in the articles which would give the chairman a casting vote shall be void.

Should there be provision in your articles providing for a casting vote, it is recommended that this be removed.

(Regulation 22, disapplication of saving in Commencement Order 3)

4 [Minor regulations not dealt with in this guidance note](#)

Regulation 2:	Voting on a show of hands – minor points of clarification
Regulation 8:	Electronic meetings and voting – permissive and is not likely to change the current practice
Regulation 13:	Appointment of proxy and termination of proxy's authority
Regulation 14:	Class meetings
Regulation 15:	Duty to hold AGM
Regulation 20:	Shareblocking disallowed

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Appendix A

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