Chartered Secretary
focus
Issued as a supplement to the ICSA magazine

in association with Computershare

The Companies Act 2006

The countdown to October implementation begins here

Kevin Eddy, *Assistant Editor,*
Chartered Secretary

Theory into practice

It seems amazing that it's less than a year since the Companies Bill became the Companies Act. Indeed, its omnipresence since it received Royal Assent almost makes it a struggle to remember what the corporate landscape was like before the behemoth landed.

Even so, it's become quite evident that there is still huge uncertainty surrounding the implementation of various sections of the Act. While this might be understandable for parts coming into force in October – or indeed April – 2008, it's a little more concerning when there are still grey areas around aspects of the Act which will have a real impact on business in less than four months.

Our aim for this issue of *Chartered Secretary Focus* is to give you some practical guidance on how the legislation will work. I hope you find that it sheds some light on some of the more complex parts of the new Act.

Naz Sarkar, *Director,*
Computershare Investor Services

After years of talking theory, it's great to see the Companies Act moving ahead with its implementation phase.

Indeed, with the e-communications provisions already bedding down, we're seeing companies such as British Airways, Woolworths, and the Henderson and Weir Groups taking advantage of the deemed consent regime and saving money.

This supplement will help you to prepare for the upcoming phase of implementation, including guidance on making the most of the sections dealing with members' rights, company meetings, voting and derivative claims.

Computershare is also working closely with ICSA and other industry bodies to offer support to business over the coming months. We're looking forward to playing a key role in helping you enact the new legislation.

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PUBLISHER'S NOTE

Chartered Secretary Focus is published by ICSA Information & Training Ltd for ICSA International.

ICSA Information & Training Ltd,
16 Park Crescent, London, W1B 1AH

Printed by: Headley Brothers Ltd
Queens Road, Ashford, Kent TN24 8HH

Coming into focus

UK business is gearing up for the realities of what the new company law means. ***Kevin Eddy*** *takes a birds-eye view of what's around the corner.*

Already implemented:	
With effect from Royal Assent:	
Part 43, SS. 1265–1273	*Transparency obligations and related matters*
*Part 46, SS.1288–1297**	*General supplementary provisions*
Part 47, SS.1298–1300	*Final provisions*
With effect from January 2007:	
*Part 13, SS.308–309 and 333***	*Resolutions and meetings*
Part 22, SS.791–828	*Information about interests in a company's shares*
With effect from April 2007:	
Part 28, SS.942–992	*Takeovers etc*
*Part 44, S.1281****	*Miscellaneous provisions*
Part 45, SS.1284–1287	*Northern Ireland*

** except S.1295 and Schedule 16 relating to company law repeals (Great Britain)*
*** provisions on electronic communications*
**** disclosure of information under the Enterprise Act 2002*

Repealed:	
With effect from April 2007:	
CA 1985, SS.324–329 and Schedule 13	*Disclosure of directors' interests in shares*
With effect from 1 October 2007:	
*Part 8, SS.116–119 only**	*A company's members*
Part 9, SS.145–153	*Exercise of members' rights*
*Part 10, SS.154–259***	*A company's directors*
Part 11, SS.260–269	*Derivative claims and proceedings by members*
*Part 13, SS.281–361****	*Resolutions and meetings*
Part 14, SS.362–379	*Control of political donations and expenditure*
*Part 15, S.417 only*****	*Accounts and reports*
*Part 16, SS.485–488 only******	*Audit*
Part 29, SS.993	*Fraudulent trading*
Part 30, SS.994–999	*Protection of members against unfair prejudice*
Part 32, SS.1035–1039	*Company investigations: amendments*

** the right of members and the public to inspect a company's register of members, 'tapered' according to submission of first annual return after 30 September 2007*
*** except SS.155–159 relating to natural and underage directors, SS.175–177 and 182–187 relating to directors' conflicts of interest, and SS.240–246 relating to disclosure of residential addresses*
**** except SS.308–309 and 333 relating to electronic communications), already in force (see above)*
***** business review requirements, to commence for reports for financial years beginning on or after 1 October 2007*
****** appointment of auditors of a private company*

October marks the first major phase of implementation of clauses from the new Companies Act.

The parts coming into force in October are, according to the Department of Trade and Industry, the parts of the Act which will allow companies to benefit from its deregulatory measures as quickly as possible, while still allowing them and their advisers time to familiarise themselves with the more complex changes coming in 2008. Companies House is also a factor: the majority of clauses relating to the Register of Companies are being delayed until October 2008, as Companies House needs time to completely upgrade its IT systems – and then give appropriate notice of changes to company forms.

The clauses coming into force in October, then, involve a wide range of areas. The most significant of these are the introduction of codified directors' duties, changes to the rights of company members and a number of changes to company meeting procedures. Further sections that will have a wide-ranging impact introduce a new process under which derivative claims can be brought, and expansion of the oft-maligned business review. These are all examined in greater detail elsewhere in this issue.

A number of other sections will also come into force in October. Sections 485 to 488 of Part 16 set out the methodology and restrictions on appointment of auditors for private companies, as well as dealing with terms of office and how members can prevent re-appointment if necessary. Part 29 sets out the offence of fraudulent trading and its consequences – which is either a jail term of up to ten years and/or an apparently unlimited fine. Part 32 amends the company investigations regime, particularly in terms of the Secretary of State's powers to direct investigators.

Finally, Part 14 reworks the rules on political donations and expenditure: while approval of donations and expenditure must still be given by a resolution passed at a general meeting, there is greater flexibility as to the use of written resolutions and as to what a resolution can contain. There are also changes to the rules on ratification and liability over unauthorised donations or expenditure.

Already in force

Of course, a number of clauses from the new Act have already come into force (detailed opposite). Of these, probably the most significant are the clauses relating to e-communication with shareholders. From anecdotal evidence, a number of companies have already made the relevant changes at their AGMs, and are carrying out 'deemed consent' mailings. However, much is still unclear around what effect the e-communications clauses will have – not least in terms of maintaining registers of shareholder preferences and deciding just how many copies of the annual report and accounts companies will have to print.

Kevin Eddy, Assistant Editor, ***Chartered Secretary***

In the director's chair

Do the new statutory directors' duties confirm best practice or present new, more onerous obligations for executives? Time will tell, but companies need to be prepared for their impact – otherwise the repercussions could be costly.

The list of statutory duties set out in Part 10 (SS.170–181) of the new Act should all be familiar by now, but they are as follows:

- Duty to act within powers
- Duty to promote the success of the company
- Duty to exercise independent judgment
- Duty to exercise reasonable care, skill and diligence
- Duty to avoid conflicts of interest
- Duty not to accept benefits from third benefits
- Duty to declare interest in proposed transaction or agreement

These all take effect from October 2007. There are a number of other provisions on conflicts of interests, residential addresses and underage and natural directors which are all scheduled to come into effect from October 2008, but companies should still be preparing themselves for the changes.

The codification of directors' duties has been one of the more contentious topics handled within the Act. However, one of the key benefits of codifying them is that it offers directors of small private companies a quick indication of what their role and responsibilities are.

The complexities come with the interplay between the new duties and common law, as although the clauses purport to replace common law and equitable principles, the Act provides that 'regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general principles'.

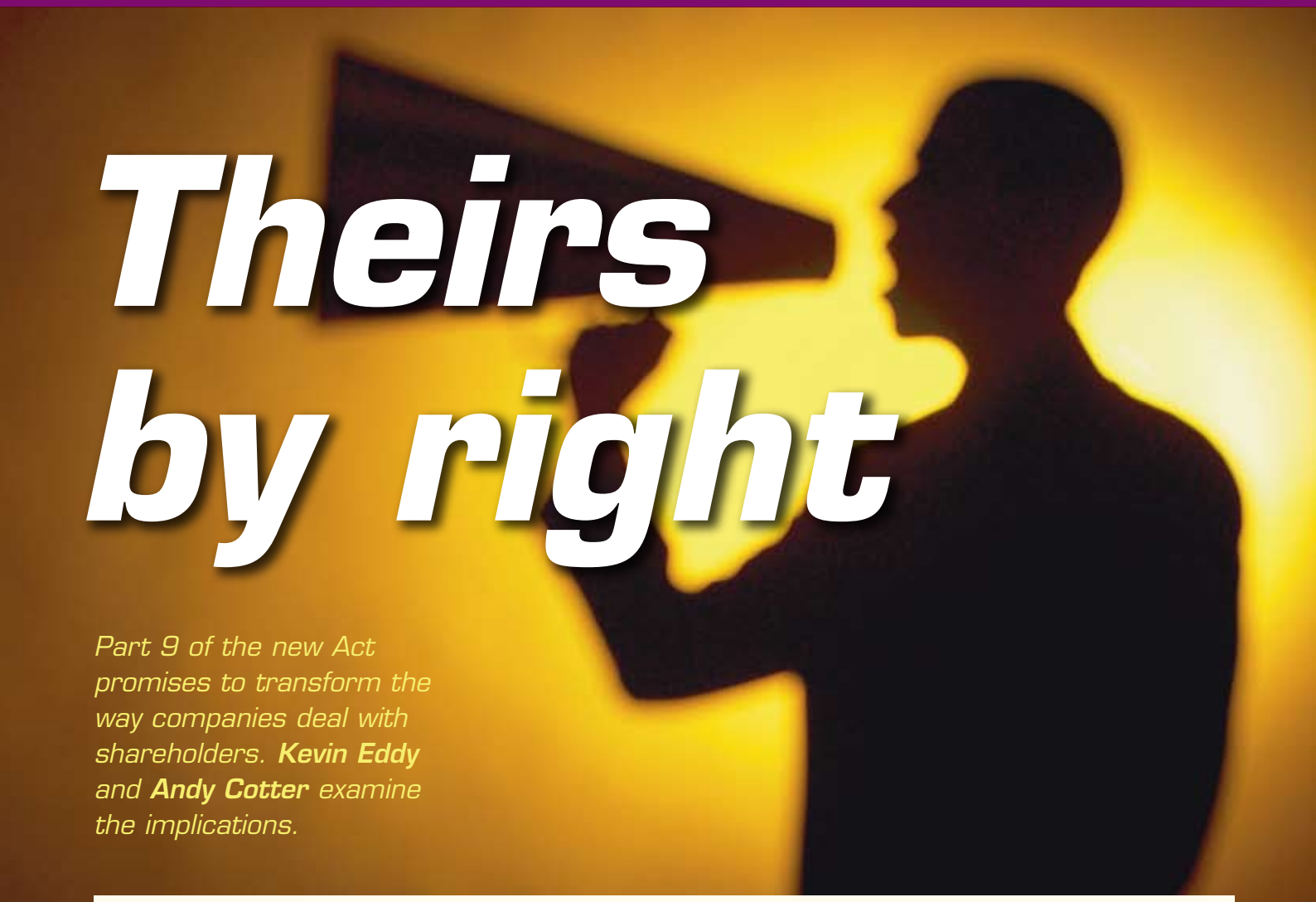
Ultimately, the most important preparations a company can make are to ensure that its directors are well-briefed on their statutory duties, and to review its policies and guidelines to ensure there are no gaps through which problems could emerge.

Being prepared: a checklist

There are a number of steps that companies can take to prepare for compliance with the new directors' duties. The exact procedures will, of course, vary according to the type and nature of the company and how it organises its board procedures.

- Educate the directors about the statutory statement of duties.
- Think about how the new requirements can fit into the company or group's existing decision-making arrangements and processes.
- Consider whether there should be a discussion of the new duties at a board meeting shortly before they come into force.
- Review the process for delegation to management to ensure that the consideration of the relevant stakeholder factors is built in, and educate management about the new duties.
- Think about whether some reference to consideration of the factors may appear in at least some board papers and minutes; the key point is to take a proportionate approach, depending on the nature of the decision and the importance of the shareholder factors to it, rather than just reciting the list of factors each time (which would encourage a 'tick box' approach).
- Build the existence of the stakeholder factors into the company's corporate social responsibility strategy.
- Remember that the purpose of the enhanced business review is to demonstrate to members the directors' performance of the duty to promote the success of the company. Therefore, treat the business review as a means of demonstrating compliance with that duty.
- Clarify with the company's insurance brokers if any amendments need to be made to the policy wording of the company's directors' and officers' (D&O) insurance in light of the new duties.
- In relation to conflicts of interest, review the company's articles in order to consider, before October 2008, whether they should include a specific provision enabling the directors to authorise any matter giving rise to a conflict – or, in the case of an existing private company, whether a shareholder resolution is needed under the transitional provisions.
- Consider introducing guidelines for directors on the acceptance of gifts or hospitality – including, for example, requiring clearance above a guideline limit and/or a general requirement to disclose any gifts or hospitality above a certain threshold.
- Review the procedures relating to disclosure of interests in relation to proposed and existing transactions with the company, and the provisions in the articles dealing with these, in order to comply with the new procedures in the Act from October 2008.

With special thanks to Carol Shutkever, Partner, Corporate Finance Group, Herbert Smith LLP



Theirs by right

Part 9 of the new Act promises to transform the way companies deal with shareholders. ***Kevin Eddy*** *and* ***Andy Cotter*** *examine the implications.*

Part 9 of the Companies Act 2006 is, surprisingly, one of the shorter sections of the Act: especially since the subject matter it covers is somewhat controversial. The clauses introduce a number of new rights for underlying investors. These fall into three main categories: information rights, the exercise of members' rights and other rights.

Information rights

Sections 146–153 bring in the new information rights obligations for companies traded on a regulated market. Under this part of the Act, underlying investors – such as those in a corporate nominee act, or whose shares are held on their behalf by a broker – will be entitled to receive communications from the company – the annual report and accounts, summary financial statements, and so on. It does not give member rights to these 'nominated persons', however – just the right to receive information.

The clauses also dovetail with the e-communications clauses already in force, in that nominated persons must actively request hard copy communications. This request must be made before a nomination is made, and must provide an address to which hard copies can be sent. If no notification is given, or an address is not provided, then the company can assume that the nominated person has agreed to e-communications as per Parts 3 and 4 of Schedule 5.

Another similarity that the provisions hold with the e-communications clauses is a 'deemed consent' clause. Companies can contact nominated persons directly to ask whether they wish to retain information rights. If the nominee does not reply within 28 days, then the company can deem that the nominee no longer wishes to receive information. As with the e-communications provisions, enquiries cannot be made more than once every 12 months.

Member rights

S.145, however, is a slightly different kettle of fish. This section allows members to give nominated persons full member rights – a move which has been applauded by shareholder groups, but could well prove to be complex to implement.

However, unlike the information rights clauses, companies will be able to choose whether to 'activate' this ability through their Articles, so the impact this section will have remains to be seen – although the consensus seems to be moving towards public companies, at least, choosing not to adopt the clause. However, if it is adopted by a number of companies, we could soon see the way that companies and registrars deal with investors alter profoundly.

Other rights

Under S.152 in Part 9, all companies will also be required to allow those who hold shares on behalf of others to split their voting rights so they can be exercised in different ways subject to the wishes of the beneficial shareholders. S.153 also introduces a procedure which allows indirect investors to take part in requests for circulation of AGM resolutions, independent reports on polls and website publication of audit concerns.

* * *

Indeed, as Andy Cotter comments opposite, much is still unclear about how exactly many of these clauses will work in practice – especially Section 145. Both registrars and ICSA are planning to issue guidance as soon as possible, but as these clauses are effective as of October, one would hope that clarity appears sooner rather than later.

Kevin Eddy, Assistant Editor, ***Chartered Secretary***

Information rights

The Act has, in many cases, reflected progressive thinking around members' rights, which is good news for issuers and shareholders alike. Sections 146–153, in particular, bring increased opportunity for an integrated and tailored communications strategy, with the potential to further engage investors and deliver new benefits to shareholders.

Sections 146–153 apply to traded companies, excluding those listed on AIM, and allows a member to nominate others to enjoy information rights.

Information rights are defined as the right to receive a copy of *all* communications that the company sends to its members.

This includes general communications and those sent to any class of its members that includes the person making the nomination. When planning for the changes, companies should be aware that the following types of communication are all covered by the new Act:

- summary financial statements
- requisition provisions
- all communications covered by the e-communications clauses
- proxy communications.

It also includes the rights under ss.431 or 432 to require copies of accounts and reports, and the right to require a hard copy version of a document or information provided in another form. The statement of members' rights in relation to the appointment of proxies does not apply to information rights nominees, however (s.325 – see pp.12–14 for more information on proxies). The company must either:

- omit the notice required by that section; or
- include it, but state that it does not apply to the person nominated for information rights alone.

Companies must be ready to carry out the basic changes covered in ss.146–153 from October 2007, with full impacts on mailings being felt from January 2008.

Nominations

Nominations can only be made by the registered shareholder, and the flow of information is shown in the diagram below.

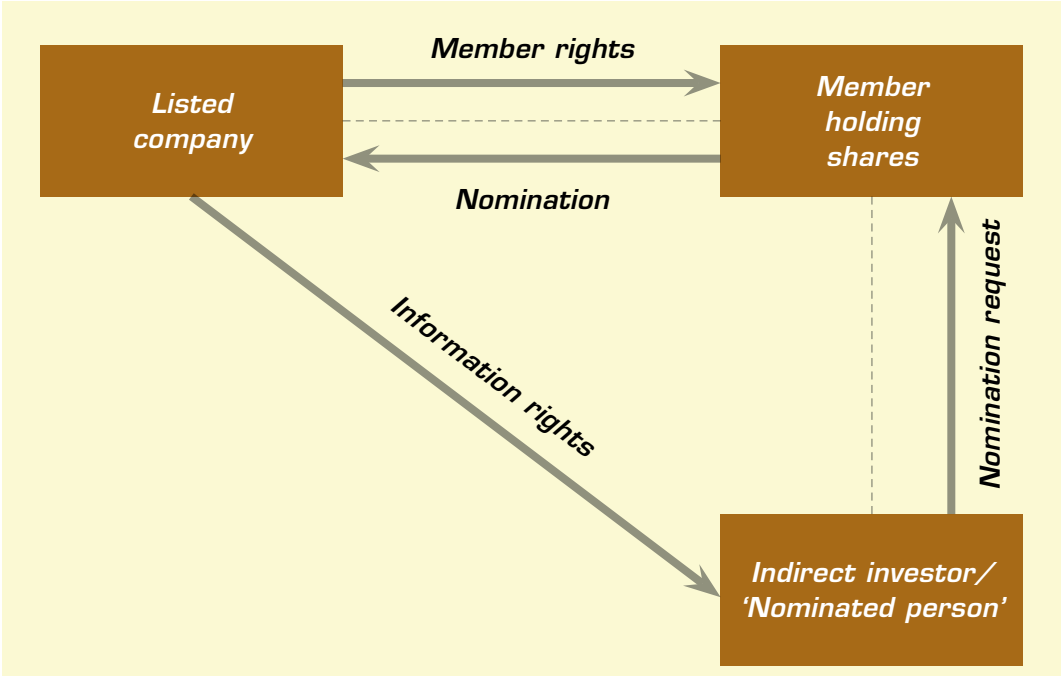
Nominations for information rights can be terminated by either the member or the nominee. It can also be terminated upon death or bankruptcy of the nominee (in the case of individuals), or dissolution and winding up of a body corporate. Information rights can also be suspended if, at any time, there are more nominees than a member has shares.

S.150 sets out the status of the information rights enjoyed under s.146. This provides that the rights can only be enforced against the company by the member, and that provisions in the company's articles relating to communications with members have a corresponding effect in relation to communications with the nominated person. The rights conferred by the nomination are *in addition* to the rights of the member themselves.

Further information

Registrars are currently working with ICSA, other industry bodies such as the Association of Private Client Investment Managers and stockbrokers who operate nominee shareholdings on behalf of investors to establish best practice and common procedures under which nominations, amendments and terminations of nominations are advised to issuers and registrars. These will be available by early autumn.

Andy Cotter, Head of Industry Relations, Computershare



Information flows: ***how information gets from nominated person to company and vice versa***

Exercise of member rights

Protest vote: ***Section 145 promises to give underlying shareholders a voice***

Section 145 of the Companies Act 2006 could present real practical issues for UK companies.

S.145 allows members of a listed company who hold shares on behalf of others to appoint member rights to those underlying investors – but only if the company's articles are drafted to allow it.

This means beneficial holders could benefit from nearly all the rights accorded to members. These include, in particular, the rights conferred by:

- SS.291 and 293: right to be sent proposed written resolution
- S.92: right to require circulation of written resolution
- S.303: right to require directors to call general meeting
- S.310: right to notice of general meetings
- S.314: right to require circulation of a statement
- S.324: right to appoint proxy to act at meeting
- S.338: right to require circulation of resolution for AGM of public company, and
- S.423: right to be sent a copy of annual accounts and reports.

However, anything required or authorised by the Companies Acts could, in theory, be performed by the nominated person. The difficulties, however, are due to the way UK share registers are structured: in particular, the fact that the identity of underlying shareholders is not visible to the registrar.

So, this section of the Act could potentially require a wholesale shake-up of how company registers are maintained. Existing processes are not designed to cater for the range of options provided by S.145, or for the exercise of those options by multiple nominees in respect of a single holding.

One solution put forward is to use a power of attorney model to accommodate the requirements. However, it is not as simple as just treating each nomination as the equivalent of a power of attorney, as members can specify particular member rights for a nominated person. For example, a shareholder with 1000 shares could nominate 10 people, each with a different number of shares and each allowed to exercise a different combination of member rights.

It might be possible for a private company with 40–50 members to put manual procedures in place to deal with a limited number of such nominations. A listed company with hundreds of thousands of shareholders, however, would be unable to meet these requirements without creating a sub-register for each shareholder's nominations. They would then still need to have to identify both the rights they could exercise, and the number of shares over which the rights could be exercised.

'I believe S.145 was introduced to cover a few distinct scenarios – for example, where companies want to give beneficial holders in ADR and corporate nominee programmes full member rights,' says Naz Sarkar, Director of Investor Services for Computershare UK. 'Giving rights to underlying holders, including ADR banks and custodial-based accounts, is a good idea.'

'However, my concern is that if a company enables S.145, then any member could split their member rights requiring a whole new array of sub-registers,' says Naz.

'At this stage, we have no idea just what volume of shareholders may be involved and how, practically, that could be done to a best practice standard.'

'I'd encourage any companies considering taking on S.145 to speak to their lawyers and registrars to investigate any legal implications and to see if it can be focused on particular groups of shareholders,' he adds. 'While I understand the reasoning behind the provision, I really do think it presents huge practical implications as an unintended consequence.'

'Of course, all registrars will help issuers to implement S.145, but the path to execution will not be a simple one.'

It will mean some in-depth work for the industry in working out how, practically, we can implement the changes described. Caution and consultation are absolutely essential when considering whether to adopt S.145 into a company's articles, as it could have potentially far-reaching implications.

Andy Cotter, Head of Industry Relations, Computershare

Forward with purpose

Historically, a company's register of members has been a public register, open to inspection by any member without charge and to any other person for a fee. That's about to change.

Among the provisions coming into force in October are new rules on access to a company's register.

The new regime appears in Part 8, Sections 116 to 119 of the new Act, and it – and, in particular the new 'proper purpose' requirement – is the subject of a new ICSA Guidance Note put together by a working party that includes representatives from ICSA, the Law Society, registrars and the UK Shareholders Association.

Section 116 stipulates that the register must be open to inspection by a member without charge, and that a copy of the register be made available to any other person on payment of the prescribed fee. A person seeking either inspection or a copy must make a request to the company which contains his name and address (whether that request is being made in his own right or on behalf of an organisation), the purpose for which the information is to be used, and whether it will be disclosed to any other person. If it is to be disclosed, again the application must include that person's name and address, plus the use to which the information will be put.

Under S.117, where a company receives a request, it must, within five working days of receipt, either comply or apply to the court – and if the latter, notify the person making the request. If the court is satisfied that the inspection, or copy, is not sought for a proper purpose, it shall direct the company not to comply, and may also direct that the company need not comply with similar requests. If the court does not direct the company not to comply with the request, the company must then immediately comply.

It is an offence under S.118 simply to refuse an inspection or to fail to provide a copy of the register without a court order, and both the company and every officer in default would be liable to a fine – a daily default fine, if that failure to comply continues.

Finally, under S.119 it is an offence for a person knowingly or recklessly to make a statement in a request that is in any material way misleading, false or deceptive. It is also an offence for a person who has obtained information to do, or fail to do, anything that results in its being disclosed to another person, if they know or have reason to suspect that that person may use it for an improper purpose.

ICSA best practice recommendations

- If an application is received which cites more than one purpose, at least one of which is considered improper, refuse the whole application and refer the matter to the court.
- If your register is requested for research purposes, impose certain conditions – for example, that no personal information be disclosed to a third party or that shareholders not be contacted directly.
- If past market practice has involved your providing data to certain types of organisations, and that data does *not* include individual addresses, you can continue to do so – this could include, for example, making data available to market/trading desks for the purpose of analysing movements in large shareholdings.
- If an organisation is using your register for a proper purpose, it should not then take the opportunity to promote to shareholders its own services – an explanation of its business plus contact details would, however, be reasonable.
- In the absence of any evidence that the purpose given in an application is not the purpose to which it will be put, you are entitled to rely on the information provided; but where any doubt does exist, you should make such further enquiries as are reasonably possible within the time available.
- Because there is only a five-day window within which you must respond to a request, think ahead to when the proper purpose provisions will apply to your company – which will be following the submission of your first annual return after 30 September 2007 – and have procedures ready and in place.
- Consult with your legal team to agree a process that enables the company secretary to make any necessary enquiries within the five-day deadline. That holds especially true if there is doubt as to whether a purpose is proper, in which case lawyers may need time to prepare for a court application.

What constitutes a 'proper purpose' is not defined in the Act, and will ultimately be for the courts to decide. The chief purpose of the new ICSA guidance, however, is to help companies review whether a given purpose is proper or not, and among the situations it suggests would constitute *improper* purpose are the following:

- any purpose that could be unlawful, such as to commit identity fraud
- any purpose that might breach the Data Protection Act 1998
- any representation that would threaten, harass or intimidate members
- offers relating to securities
- credit or identity checks on shareholders (credit referencing, of course, is in itself perfectly proper, but the share register is not the vehicle through which to do it)
- commercial/marketing mailings
- any other purpose not connected to recipients' capacity as members.

Sections 116–119 will apply in 'tapered' fashion, according to submission of the company's first annual return made up to a date after 30 September 2007. If, however, companies want to enjoy the protection available under these sections sooner than they otherwise would, they could think about bringing their annual return date forward – to, say, 1 October 2007.

To download a copy of the ICSA Guidance Note, see online at *www.icsa.org.uk*.

Staking a claim

The new procedure for derivative claims takes effect in October, and even if US-style securities class actions remain an unlikely prospect, companies still need to be aware of the change.

Currently, in common law, a shareholder can bring an action on behalf of and for the benefit of the company in respect of a wrong done to the company – and this is what's known as a derivative action.

Historically, English company law in this area has been founded upon two key principles: the 'proper plaintiff' rule, which provides that it is for the company itself, not a shareholder, to bring proceedings to pursue an alleged wrong against it; and the 'majority rule' principle, which holds that a board decision which has been ratified by shareholders cannot subsequently be challenged by those who disagree with it.

Both of these principles are retained under the new statutory procedure for derivative claims, which comes into effect from 1 October. However, under the procedure, which appears in Part 11, SS.260–269, it will be easier for shareholders to sue directors and others on behalf of the company for a significantly wider range of conduct than under the present common law. Shareholders may sue in respect of an 'actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company' (S.260(3)).

It is immaterial, under S.260(4), whether that act or omission arose before or after the claimant became a member of the company, and nor – in a significant break from current law – is there any requirement that the directors being sued must be shown to have personally profited. Likewise, there is no need, as there is at present, for the claimant to show that the act amounts to a 'fraud on the minority', or that the wrongdoers are in control of the company.

The new procedure, then, does add a potentially significant litigation risk for directors, but in pursuing a claim the claimant will need permission from the courts to continue it. The Act outlines under S.261 a two-stage procedure:

- the claimant must demonstrate a *prima facie* case for permission to sue – the court will decide this on the basis of evidence filed by the claimant only, and if such a case cannot be shown the application will be dismissed, and an order (for costs, for example) may be made. It is not yet clear when the claimant will be required to notify the company of this first-stage application
- if a *prima facie* case is demonstrated, the court may adjourn the application to require the company to provide evidence; then, once the application has been heard, it may allow it to go ahead, or dismiss it, or adjourn again and give directions as it sees fit.

At this second stage, the court must dismiss the application if it is satisfied that a person seeking to promote the success of the company for the benefit of its members would not continue with it or if the act has been authorised or ratified.

In reaching its decision as to whether or not a claim should proceed any further, the court will have regard to the following considerations:

- whether the shareholder is acting in good faith
- the importance which a director, acting to promote the success of the company, would attach to continuing with the claim
- whether, where the claim arises as a result of an action or omission that is yet to occur, that action or omission could and is likely to be authorised (before the act) or ratified (after the act) by the company
- whether the company has decided not to bring a claim itself
- whether the shareholder could bring a claim in his own right (under S.994), rather than on behalf of the company.

In considering the above, the court will have particular regard to the views of any shareholders who have no personal interest in the matter.

Importantly, the likelihood of a derivative claim being successful is still only limited, and any fears that an increase in US-style securities class actions could result are unlikely to be realised. Nonetheless, the threat of litigation may become more frequent as more active shareholders test the boundaries.

The transitional arrangements for Part 11 have not yet been published and it is not clear whether all derivative claims after October 2007 will be brought under the new regime, or whether derivative actions in respect of conduct occurring before that date will be subject to the old regime.

William Booth, Editor, *Chartered Secretary*. With special thanks to Michelle de Kluyver and Jatya Gupta of Allen & Overy LLP.

Practical considerations

- Have the directors been briefed on their new statutory duties – and their potential liability exposures?
- Does the company's D&O insurance cover derivative claims (and what other forms of director indemnity are there in place generally)?
- Is the board following best practice in minute-taking and the recording of decisions?
- What kind of (non-frivolous) claims are likely to be brought?
- If a claim has been made, is there a *prima facie* case for the court to allow it to proceed?
- If a claim has been made, how might the board react to being asked to provide evidence – and does it have that evidence ready?
- How should the board handle any conflict that rises where it has to consider whether to sue the directors?
- As the claim is being brought on behalf of the company, should the company itself try and take over the proceedings? NB: the legislation does not specifically cater for this.

Reporting: a checklist

October sees the introduction of the expanded business review, which extends the current requirements in a number of ways. ***Tony Hoskins*** *looks at what has been added.*

Since the Act gained Royal Assent last November, the introduction of the enhanced business review has only increased the confusion as to what companies' corporate reporting responsibilities are. Therefore, the differences between the OFR, the 2005 business review, and the Companies Act business review are set out below.

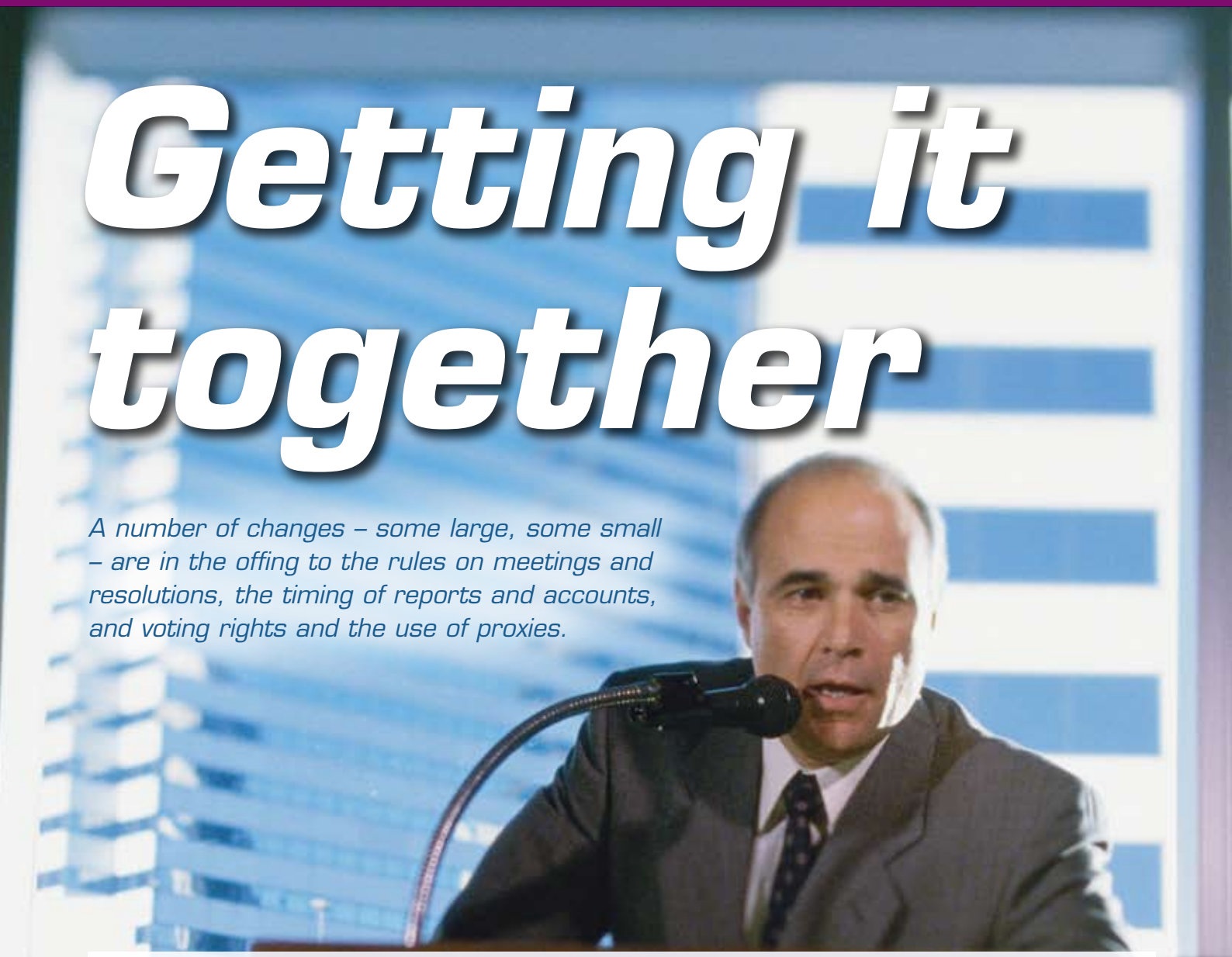
As a general note, it is important to remember that the new business review lines up in many respects with the voluntary OFR, meaning that listed companies will have more stringent requirements than under the current business review.

	OFR	Business review – SI 2005 3442	Companies Act business review
Status	Voluntary (except some public sector)	Statutory	Statutory
Companies affected	UK listed, plus any other organisations that purport to prepare an OFR	All large and medium UK registered companies; EU/EEA registered companies; small financial companies	Additional requirements for UK listed companies
Principles	• Directors' view • Matters material to members • Forward-looking • Complement financial statements • Comprehensive and understandable • Balanced and neutral • Comparable over time • No disclosures required if these are seriously prejudicial	• Balanced and comprehensive • Consistent with the size and complexity of the business	• Statutory purpose: to help members assess how the directors have performed the duty to promote the success of the company for the benefits of the members as a whole but having regard to long-term consequences and other factors • No disclosures required if these are seriously prejudicial
Content, with KPIs for financial and non-financial matters, to the extent necessary (TTEN)	• Nature of the business, including objectives/strategies • Development and performance of the business (current year and future) based on business segments • Resources available, principal risks affecting long-term value • Capital structure, treasury policies, cash flows and liquidity • **TTEN:** Information on environmental matters • **TTEN:** Information on employees • **TTEN:** Information on social/ community matters • **TTEN:** Information on persons with whom there are contractual/ other arrangements • **TTEN:** Information on receipts from/ returns to members re: their shares • Related to **TTEN,** describe related policies and extent to which successfully implemented	• A fair review of the business • Development and performance of the business – current year and position at year end • Description of principal risks and uncertainties • (Where appropriate) amounts included in the annual accounts • **TTEN:** Information on environmental matters • **TTEN:** Information on employees	• A fair review of the business • Development and performance of the business (current year and future); forward looking statements • Description of principal risks and uncertainties • (Where appropriate) amounts included in the annual accounts • **TTEN:** Information on environmental matters, plus KPIs; if none, state and justify • **TTEN:** Information on employees; if none, state and justify • **TTEN:** Information on social/ community matters; if none; state and justify • **TTEN:** Information about persons with whom there are contractual or other arrangements – suppliers, major customers, joint ventures – if none, state and justify • Related to **TTEN,** describe related policies and their effectiveness
Audit requirements	None; ASB recommends statement if completed as per Reporting Statement	Consistency between Directors' report and in annual accounts	Consistency between Directors' report and in annual accounts
Penalties for non-compliance	None	• Criminal: for all reports for financial years commencing on or after 1/4/05 • Civil: for all reports for financial years commencing on 1/4/06 and beyond	• Criminal: for all reports for financial years commencing on or after 1/4/05 • Civil: for all reports for financial years commencing on 1/4/06 and beyond
Enforcement	None	Financial Reporting Review Panel from 1/4/06 and beyond	Financial Reporting Review Panel from 1/4/06 and beyond

Tony Hoskins is the Chief Executive of The Virtuous Circle and author of *The ICSA Company Reporting Handbook* from ICSA Publishing, published in July 2007. He can be contacted on *thoskins@thevirtuouscircle.co.uk.*

Getting it together

A number of changes – some large, some small – are in the offing to the rules on meetings and resolutions, the timing of reports and accounts, and voting rights and the use of proxies.



Part 13 of the new Act deals with resolutions and meetings and makes a number of changes to the position under the Companies Act 1985.

The aspects of Part 13 which take effect in October appear in Sections 281 to 307, 310 to 332, and 334 to 361. These cover general provisions on ordinary, special and written resolutions; members' powers on the calling of meetings; rules on the timing, manner and contents of notices for meetings; meetings procedures – including voting, polls and proxies; record keeping; and supplementary requirements for public and quoted companies. SS.308–309 and 333 relating to electronic communications came into force back in January.

Key changes under Part 13 include S.324, which gives a member of a company the right to appoint another person or persons as his or her proxy, who will for the first time enjoy full rights to attend shareholder meetings, speak and vote on a show of hands or poll. Multiple proxy appointments are permitted.

Elsewhere, quoted companies will be required under S.341 to publish 'as soon as reasonably practicable' on their websites the results of polls taken at their general meetings – which should include the number of votes cast 'for' and 'against' – and the information must remain available for up to two years. Shareholders representing at least 5 per cent of voting rights of quoted companies, or numbering not less than 100 members holding shares on which the average amount per member is at least £100, also enjoy a new right at SS.342–351 to obtain an independent report on any poll taken at a shareholder's meeting. The request must be made within one week of the date of the poll.

Deadlines

AGM held

- Public companies – within six months of year-end
- Private companies – AGM no longer required (although shareholders can demand a meeting if at least 10 per cent so wish).

Notice of meetings

- Public companies – 21 days AGM; 14 days other general meetings (unless longer specified in Articles, or shorter by members' agreement)
- Private companies – 14 days other shareholder meetings (unless specified otherwise in Articles).

Notice of special resolutions

- Public and private companies – 14 days (i.e. as per minimum notice period for shareholder meetings above).

Filing of reports and accounts

- Public companies – within six months of year-end
- Private companies – within nine months of year-end
- Listed companies – within four months of year-end (Transparency Rules).

There are also complex arrangements regarding timing of proxies and polls, and these are discussed in more detail opposite.

William Booth, Editor, *Chartered Secretary*

Proxy matters

The new Act's arrangements on proxies and the taking of polls promise to make matters unnecessarily complex, says ***Naz Sarkar.***

For issuers and registrars, the changes relating to proxies are of particular interest. However, before we get on to those, I would respectfully suggest that if you haven't seen *Monty Python's The Meaning of Life,* now is the time to go out and get the DVD – one particular sketch, set in a schoolroom (and abridged below), sets the scene admirably for S.327(2):

HUMPHREY: *All right, settle down. Settle down.*

Now, before I begin the lesson, will those of you who are playing in the match this afternoon move your clothes down onto the lower peg immediately after lunch, before you write your letter home, if you're not getting your hair cut, unless you've got a younger brother who is going out this weekend as the guest of another boy, in which case, collect his note before lunch, put it in your letter after you've had your hair cut, and make sure he moves your clothes down onto the lower peg for you. Now,

WYMER: *Sir?*

HUMPHREY: *Yes, Wymer?*

WYMER: *My younger brother's going out with Dibble this weekend, sir, but I'm not having my hair cut today, sir.*

So, do I move my clothes down, or—

HUMPHREY: *I do wish you'd listen, Wymer. It's perfectly simple. If you're not getting your hair cut, you don't have to move your brother's clothes down to the lower peg.*

You simply collect his note before lunch, after you've done your scripture prep, when you've written your letter home, before rest, move your own clothes onto the lower peg, greet the visitors, and report to Mr Viney that you've had your chit signed.

Amusing in print, and even funnier on film, but it serves here to illustrate the complexity of S.327(2). Computershare has written to the Department for Trade and Industry to ask for confirmation that given the changes introduced under S.327(2) our understanding of the situations described below is correct.

The problem

For a meeting at 12.00 on a Wednesday, proxy appointments must be lodged by 12.00 on Monday. Let's assume a poll is demanded at 13.30 during the Wednesday meeting:

- If the poll is taken there and then, at 13.30, according to S.327(2)(c) the time limit for appointing proxies for a poll taken not more than 48 hours after it *is demanded is the time it is demanded* – in other words, 13.30 on Wednesday
- If the poll is taken more than 48 hrs later, at 15.00 on Friday, according to S.327(2)(b) the time limit for appointing proxies for a poll taken more than 48 hours after it is demanded *is 24 hours before the poll* – in other words, 15.00 on Thursday
- If the poll is taken less than 48 hours later, prior to 12.00 on Friday, according to S.327(2)(c) the time limit for appointing proxies for a poll taken not more than 48 hours after it is demanded *is the time it is demanded* – in other words, 13.30 on Wednesday
- If the meeting was adjourned at 14.00 on Wednesday until 14.30 on Friday, according to S.327(2)(b) the time limit for appointing proxies for a poll taken more than 48 hours after it is demanded *is 24 hours before the poll* – in other words, 14.30 on Thursday.

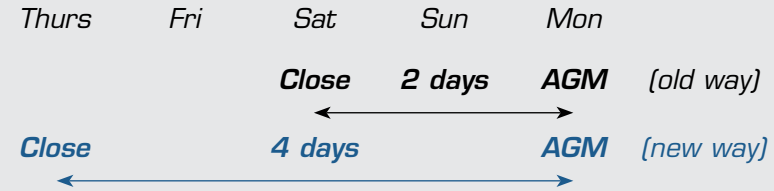
The impact appears to be that a company's articles cannot require the appointment or document to be received by the company earlier than (a) 48 hours before the time for holding the meeting or adjourned meeting; (b) in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll; and (c) in the case of a poll taken not more than 48 hours after it was demanded, the time at which it was demanded.

There is concern over how the last of these should be interpreted. The current practice is to include proxies received 48 hours before the time of the meeting. Part (c) of S.327(2), however, appears to require that where a poll is demanded and held during a meeting, proxy appointments received right up until the time of the demand for the poll should be included. Given that a poll can be demanded at any time during the meeting, companies face the prospect of being required to receive, date, time stamp and validate proxies for the duration of the meeting, rather than being able to establish the proxy position 48 hours before the meeting.

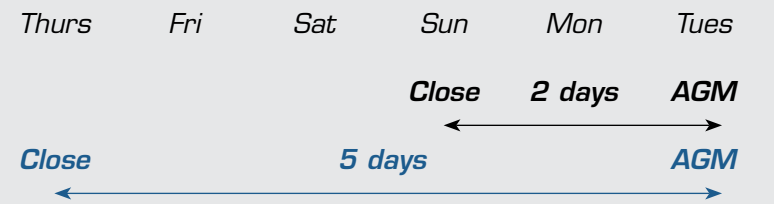
Potentially, there are additional complications in terms of the company's obligations under the Disclosure

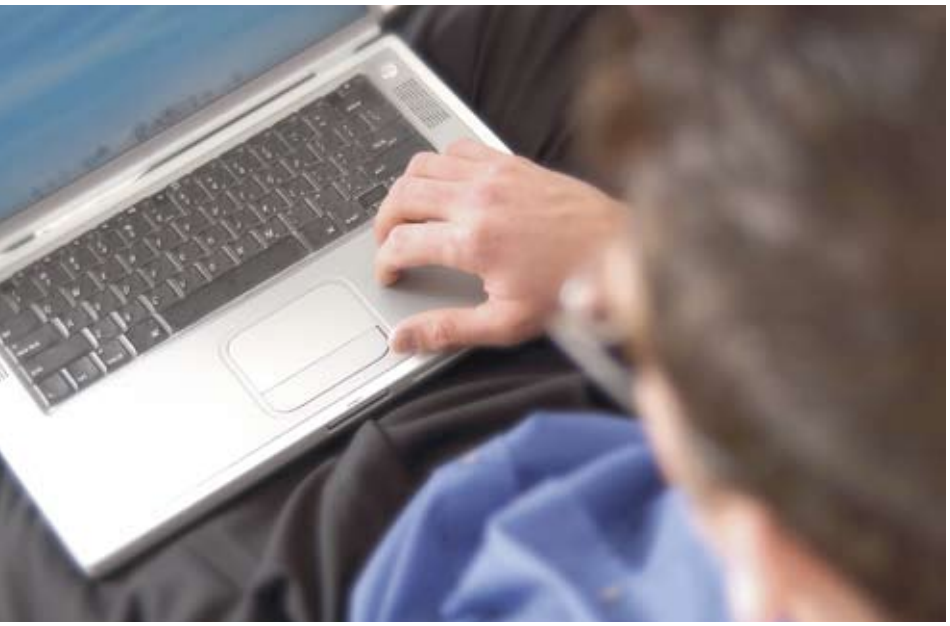
Proxy appointments: ***bank holidays and weekends have been removed from notice periods***

Example without *a bank holiday Monday*



Example with *a bank holiday Monday*





***Absolute power:** could multiple proxies give undue influence to pressure groups?*

and Transparency Rules relating to discretionary proxy appointments over certain thresholds. Rather than being able to report the final position for discretionary proxies 48 hours before the meeting, proxies received less than 48 hours before the meeting may now need to be included. We await a reply from the DTI.

Holiday periods

One of the many positive effects of the Companies Act concerning meetings and resolutions can be found in S.327(3), which has removed weekends and bank holidays from the calculation of the periods mentioned above in S.327(2).

The illustrations on page 13 show the impact of these changes on the 'last' time for the appointment of proxies. Once these changes are in force it will be important that company secretaries incorporate the new dates into the notice of meeting and that IR professionals and the wider market are made aware of the amended deadlines. If investors or their agents operate on the basis of previous timescales, companies might well experience a significant reduction in the number of shares voted at meetings after 1 October 2007.

Voting rights

Under S.324, a member has the right to appoint more than one proxy in relation to a meeting, provided each proxy is appointed to exercise the rights attached to a different share or shares.

Beneficial owners holding shares via PEPs, ISA's and other types of nominee will be able to participate fully in future meetings. Where a resolution is voted on by means of a poll, the aggregate of the beneficial owners' proxy votes will be equal to or less than the total holding of the member. However, where a resolution is voted on by a show of hands, multiple proxies have the potential to increase a member's voting power. If a member with 100 shares attends and votes on a show of hands, they have one vote. If the same member were to appoint 100 separate proxies, each for one share, they would have 100 votes on a show of hands. It is open to the chairman of the meeting or other shareholders to demand polls if they wish to ensure resolutions are passed on the basis of one vote per share.

Given the potential for a pressure group with even a small shareholding to sway a vote by appointing multiple proxies, it is important to monitor such appointments and for the chairman of the meeting to be clearly briefed. Companies could also consider changing their articles to require all resolutions to be voted on by a poll.

Paul Myners is shortly to release to the Shareholder Working Group an update on his *Review of the Impediments to Voting UK Shares,* and that should make interesting reading for all company secretaries involved in meetings.

Naz Sarkar, Director, Investor Services UK, Computershare

Electronic voting in practice: HBOS

The HBOS Group provides business, corporate and retail banking, insurance and investment services to 23 million customers in the UK and internationally. The Group was created through the merger of Halifax and Bank of Scotland in September 2001, and has the industry's largest share register at just over 2.23 million holders. HBOS also has the distinction of having the largest percentage of retail investors in the FTSE, with 2.2 million retail shareholders on its Register.

'Retail shareholders are very important to us – 80 per cent of them are also customers of the Group, so we value them highly,' says Robert Moorhouse, Head of Shareholder Services for HBOS. 'We also want them to feel valued and to actively engage with the company. We put a great deal of effort into our shareholder communications strategy, using Plain English and graphics that are designed to increase clarity of message. We actively encourage our retail shareholders to take an interest in the company, and to vote.'

HBOS took the decision to promote Electronic Proxy Voting (EPV) to shareholders at this year's AGM. 'We spent considerable time working with Computershare,' says Moorhouse, 'to redesign our proxy form to ensure that it was easy to understand and clearly outlined the voting options available to shareholders. We also decided to offer an incentive for voting online.'

For every shareholder who used EPV, HBOS committed to donating £1 to the HBOS Charitable Foundation, which this year is raising funds for the British Heart Foundation. The amount raised by shareholders was matched by the Foundation, resulting in a total donation of £43,000.

The efforts to communicate clearly and offer a financial incentive to vote online certainly worked: online voting increased – from just 0.9 per cent of shareholders electing to use EPV in 2002 (HBOS' first AGM) to more than 11 per cent of shareholders voting online in 2007 (EPV and via CREST). One in 10 shareholders who voted did so using EPV. The overall percentage of issued share capital being voted also saw an upswing – from 42 per cent in 2002 to 51 per cent in 2007. In addition, an extra 2000 e-mail addresses were collected during the period.

Moorhouse has a clear vision for the future of electronic media in HBOS' shareholder communications. 'It's great that we've been able to increase Electronic Proxy Voting; but the bigger win is to be able to communicate with our shareholders electronically. We'll be rolling out an integrated e-comms programme to our shareholders by the end of 2007 and have plans to amend our articles to include deemed consent – bringing both environmental and financial benefits to the business.'

The next steps

1 October 2007 does not mark the end of the Companies Act implementation, of course. ***Kevin Eddy*** *looks at what else lies ahead.*

While the business community has been preparing for the first major tranche of Companies Act clauses, the Department of Trade and Industry (DTI) has been working to prepare for the 2008 implementation dates.

This process began in March, with the publication of the secondary legislation consultation alongside the implementation timetable. The consultation closed on 31 May, and some pieces of secondary legislation have already appeared. These are:

- The Companies (Political Expenditure) exemption order 2007
- The draft Companies (Shares, Share Capital and Authorised Minimum) Regulations 2007
- The Companies (Fees for Inspection and Copying of Company Records) draft Regulations 2007
- The draft Companies (Registration) Regulations 2007.

The DTI is planning to issue the remainder of the secondary legislation – which will also contain details of transitional arrangements – by the end of summer 2007.

The consultation also included draft Model Articles for public companies, private companies limited by guarantee and private companies limited by shares. No date has yet been specified for the publication of the final Model Articles.

The other key piece of documentation due this summer is Companies House's consultation on the Registrar's Rules, which is likely to be published in July alongside the agency's plans for implementation. However, as the bulk of the clauses affecting the Register do not come into force until October 2008, there should be at least 12 months between the close of the consultation and the implementation of said sections.

2008

The general schedule remains identical to that announced by the Minister for Trade and Industry back in February. The main difference is that the 'proper purpose' clauses are now being implemented in 'tapered' fashion from October 2007.

A breakdown of which sections are coming in when can be found opposite.

WHERE TO FIND IT:

Secondary legislation, Model Articles, implementation timetable:
www.dti.gov.uk/bbf/co-act-2006

Consultation on Registrar's Rules:
www.companies-house.gov.uk

From hereon in...

Summer 2007 Consultation on Registrar's Rules (from Companies House)
Publication of secondary legislation

1 October 2007 First phase of implementation

6 April 2008 Second phase of implementation, including:

Part 12, SS.270-280	*Company secretaries*
Part 15, SS.380-416, 418-474	*Accounts and reports*
Part 16, SS.475-484, 489-539	*Audit*
Part 19, SS.738-754	*Debentures*
Part 20, SS.755-767	*Private and public companies*
Part 21, SS.768-790	*Certification and transfer of securities*
Part 23, SS.829-853	*Distributions*
Part 26, SS.895-901	*Arrangements and reconstructions*
Part 27, SS.902-941	*Mergers and divisions of public companies*
Part 42, SS.1209-1264	*Statutory auditors*

1 October 2008 Third phase of implementation, including:

Part 1, SS.1-6	*General introductory provisions*
Part 2, SS.7-16	*Company formation*
Part 3, SS.17-38	*A company's constitution*
Part 4, SS.39-52	*A company's capacity and related matters*
Part 5, SS.53-85	*A company's name*
Part 6, SS.86-88	*A company's registered office*
Part 7, SS.89-111	*Re-registration as a means of altering a company's status*
Part 8, SS.112-115, 117-144	*A company's members*
Part 10, SS.154-259	*A company's directors**
Part 17, SS.540-657	*A company's share capital*
Part 18, SS.658-737	*Acquisition by limited company of its own shares*
Part 24, SS.854-859	*A company's annual return*
Part 25, SS.860-894	*Company charges*
Part 31, SS.1000-1034	*Dissolution and restoration to the register*
Part 33, SS.1040-1043	*UK companies not formed under companies legislation*
Part 34, SS.1044-1059	*Overseas companies*
Part 35, SS.1060-1120	*The registrar of companies*
Part 40, SS.1182-1191	*Company directors: foreign disqualification etc*
Part 41, SS.1192-1208	*Business names*

**provisions relating to directors' conflict of interest duties, directors' residential addresses and underage and natural directors in Section 358 CA 1985, which provides a power for companies to close the register of members, will be repealed with effect from 1 October 2008 (subject to further consultation).*

Parts 36 (Offences under the Companies Acts, SS.1121-1133), 37 (Companies: supplementary provisions, SS. 1134-1157), 38 (Companies: interpretation, SS.1158-1174) and 45 (Northern Ireland, SS.1284-1287), as well as Schedule 16 (Repeals) should all come in with the relevant provisions.

A SWITCHED ON APPROACH TO REGISTRY

At Computershare, we pride ourselves on thinking differently. As we enter the implementation phase of The Companies Act 2006, we're navigating clients through the many opportunities and risks, clarifying the potential effects on both you as an issuer and your shareholders. We offer:

- Regular email updates and online seminars on current legislative and 'best practice' issues
- Specially created 'deemed consent' letter templates, to maximise the take-up (and potential cost-savings) from the eCommunications section of The Act
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