

## **CORONAVIRUS: UK GOVERNMENT PUBLISHES DRAFT LEGISLATION RELATING TO HOLDING OF COMPANY MEETINGS**

This year's AGM season has been anything but routine with listed companies resorting to extraordinary measures, both in relation to the manner in which they have been required to hold their AGMs and where they have held them – including in service stations, by golf courses and even in a car park in Hemel Hempstead! The need to comply with the UK Government's "stay at home measures" has resulted in most listed companies following the supplementary guidance issued by ICSA: The Governance Institute (**AGM Guidance**) in March 2020 which sets out guidance on how AGMs might be validly managed whilst the Government's restrictions are in place. Helpfully, the Government has now published draft legislation which, once it comes into force, will provide additional flexibility and certainty for companies on how they can hold and conduct general meetings in the period up to 30 September 2020. However, at a time when shareholders are unable to attend AGMs in person, companies are reminded of the need to consider how best to engage with shareholders and ensure their votes are counted and their questions answered.

In light of the "stay at home measures" put in place on 23 March 2020 and, in particular, the restrictions on public gatherings of more than two people, shareholders have been prohibited from attending AGMs in person. Adopting the approach recommended in the AGM Guidance, many listed companies have held their AGM with only the bare minimum of director/employee shareholders in attendance in person, balancing the need to satisfy the quorum requirements for the meeting against the need to protect the health of those attending and reduce the risk of spreading COVID-19. The AGM Guidance refers to this as holding the AGM "behind closed doors". Shareholders have been strongly encouraged to return their proxy card,

appointing the chair of the meeting, in order to ensure that their vote is counted at the AGM and to submit questions in writing or online. However, holding a valid meeting in this way still requires a quorum to physically meet (whilst maintaining social distancing) given the legal uncertainties relating to holding purely virtual meetings.

Recognising the difficulties that companies were facing, the Department for Business Energy and Industrial Strategy (**BEIS**), announced on 28 March 2020 that the Government would, as soon as possible, bring forward legislation to assist those companies for which COVID-19 restrictions were making it difficult to meet statutory obligations to hold company meetings. BEIS' intention was later confirmed in a Q&A entitled [AGMs and COVID-19](#) published jointly by the FRC and BEIS on 9 April 2020 and which set out further details of the intended legislation. This was supplemented by the publication on 14 May 2020 of a further Q&A entitled [Measures in respect of Company filings, AGMs and general meetings during Covid-19](#). The supplemental Q&A confirmed that the promised legislation was being developed urgently and that the additional Q&A was intended to provide companies with additional information on which to plan activities over the coming months.

On 20 May 2020, the Government published a draft of the Corporate Governance and Insolvency Bill (**Bill**). The legislation, when enacted, will apply to both AGMs and any other general meetings (including class meetings) held by a company (whether public or private)<sup>1</sup>, in the period from 26 March 2020 to 30 September 2020.

On 13 May 2020, new Government guidance "Staying alert and safe" took effect. This guidance confirms that the restrictions on public gatherings of more than two people remain in force. However, as the Government introduces a new "Covid alert system", whereby the level of danger is categorised by reference to ratings 1 to 5 (which will determine the severity of the social distancing measures that need to be adhered to), we are moving into a period where the extent of the required social distancing measures may vary over the coming months. On that basis, the legislation will provide some welcome flexibility and certainty on how general meetings to be held prior to 30 September 2020 can be convened and conducted.

### **New flexibility for conduct of general meetings**

The legislation is permissive and will enable companies, if they so choose, to temporarily override certain requirements in their constitutional documents and/or legislation relating to the holding of a general meeting. In particular, under the new legislation:

- a company will be able to hold a general meeting, and any votes may be permitted to be cast, by electronic or other means (i.e. there will be no need for any physical gathering even to establish a quorum); and
- members will not have the right to (i) attend the meeting in person; (ii) participate in the meeting other than by voting; or (iii) vote by a particular means.

As such, companies will still be able to hold a "closed door" AGM in the manner envisaged in the AGM Guidance if they wish, but the legislation

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<sup>1</sup> The legislation also applies to other bodies including registered societies, credit unions, friendly societies, building societies and charitable incorporated organisations.

provides some additional welcome flexibility - instead of those persons required to attend the general meeting in order to form a quorum having to attend in person (with the consequent need to travel and potential risks to health that this poses), they will be able to conduct the meeting by way of a closed telephone or video call. During the period covered by the legislation, it expressly prohibits shareholders from attending the general meeting in person. Accordingly, if a shareholder wishes their vote to be counted, they will need to complete and return their proxy appointing the chair of the meeting in order that he/she can vote according to the shareholder's wishes at the meeting.

The draft legislation expressly confirms that the meeting need not be held at any particular location and, as such, the notice of meeting will not need to specify the place of meeting. When enacted, these provisions will apply to meetings held between 26 March 2020 and 30 September 2020. The Secretary of State is to be granted powers to shorten or extend the 30 September 2020 deadline (although not beyond a long stop date of 5 April 2021) and is also granted powers to make further regulations about the means by which, the form in which, and the period within which, any notice or other document relating to a general meeting may be given or made available.

#### **Extension of deadline for holdings AGMs**

The legislation will enable a company to postpone the holding of its AGM until 30 September 2020 (notwithstanding that it would otherwise be required to hold its AGM on an earlier date as a result of a provision contained in legislation or its constitutional document). For a public company with a 31 December financial year end, this equates to a three month extension as the AGM would ordinarily be required to be held within 6 months of the financial year end. This may not however be a practical option for many companies as director appointments may expire before then and for such companies, it is likely that the share allotment and share capital authorities passed at the 2019 AGM also will have expired ahead of 30 September 2020. This is particularly relevant in a climate where many companies are looking to raise emergency capital quickly and will be reliant on such share authorities being in place in order to do so.

#### **Shareholder engagement is key**

The holding of AGMs behind "closed doors" has not been without criticism. In April 2020, ShareAction called on FTSE 100 companies to protect shareholder engagement at AGMs including by way of holding a "virtual AGM", permitting shareholders to ask questions in real-time and vote online. Similarly, ShareSoc, a pressure group for small investors, requested that companies broadcast their AGMs live to all shareholders and, if possible, allow them to participate through asking questions.

The AGM Guidance reinforced the need for boards to engage with shareholders and other stakeholders and suggested companies encourage the submission of questions for the board in writing with answers to be published by the company. In a similar vein, in the supplemental Q&A, BEIS states that it expects companies to consider the rights of shareholders and for directors to explore all options available to provide shareholders with the best level of engagement they can reasonably expect under the restrictions in place at the relevant time. In terms of measures that companies can consider to engage with retail shareholders, the supplemental Q&A references the use of conference calls, video calls and email questions. In the supplemental

Q&A, BEIS indicates its intention to publish guidance at the earliest opportunity on what it considers to be best practice.

To date, we have seen a variety of approaches adopted in terms of shareholder engagement this AGM season, including the submission of questions to the board, publication of Chair and CEO speeches on line, live streaming of the AGM and/or the publication online of a recording of the AGM. A number of companies have also published webcasts of directors answering a selection of questions submitted by shareholders but, as noted above, there has been criticism that directors have been able to duck engaging directly with shareholders, particularly smaller or retail shareholders. In response to investor pressure, Shell agreed to hold a live audio webcast ahead of its AGM on 19 May 2020 at which it will address questions submitted to it in writing in advance. Very few companies have however held an AGM which has included a virtual component - that is a meeting where shareholders can participate electronically by asking questions and casting their vote online at the meeting. This is in part due to the limited number of companies that have amended their articles of association to allow for the holding of hybrid AGMs (where there is both a physical meeting, coupled with the ability to attend electronically) and both the logistical challenges of introducing these arrangements at this already difficult time and concerns about the reliability of the necessary technology.

However, it is perhaps ironic, in an AGM season where we have seen investors repeatedly call for companies to consider holding virtual or hybrid AGMs, that at its AGM on 12 May 2020, Standard Life Aberdeen saw its resolution to amend its articles of association to allow for the holding of general meetings to be held electronically voted down by shareholders due to concerns that it might hold a virtual AGM in the future, despite its assurance that it had no plans to do so.

Absent the proposed new legislation, there is still legal uncertainty over the validity of holding an entirely virtual shareholder meeting.

#### **Temporary extension of deadline for public companies to file accounts**

The new legislation will also provide for a temporary extension for public companies to file their financial year end report and accounts with the Registrar of Companies. In particular, it will enable a company with a 31 December financial year end to file its report and accounts not later than 30 September 2020, as opposed to the current 30 June 2020 deadline.

It is worth noting that on 25 March 2020, the Registrar of Companies announced that businesses would be able to apply for a 3-month extension for filing their accounts. Currently, companies have to apply for the 3-month extension to be granted, although those citing issues around COVID-19 will be automatically and immediately granted an extension.

#### **New powers to extend the Companies House filing deadlines**

The new legislation will empower the Secretary of State to make regulations which extend the deadline for filing certain documents with the Registrar of Companies. This could include, by way of example, an extension to the deadline for filing a change in director or the annual confirmation statement. If exercised, these power would enable the Secretary of State to extend the filing deadlines by not more than 42 days, in a case where the existing period is 21 days or fewer, and 12 months, in a case where the existing period is 3, 6 or 9 months. This power is temporary in nature and will expire on 5 April 2021.

## **Timing**

It is not currently expected that the Bill will become law until early June 2020, nor can there be any certainty that the text of the Bill will not be amended during the Parliamentary process. As such, whilst it is anticipated that the legislation will apply retrospectively from 26 March 2020, there can be no guarantee that this will be the case. With this in mind, until the Bill is passed, companies may prefer to continue to adopt the measures advocated in the AGM Guidance, rather than take the risk that the legislation does not come into force as anticipated which may then raise questions about whether the meeting and the business undertaken at it has been validly conducted. In reality, the legislation may simply come too late to be of much assistance to the many publicly listed companies that are required to hold an AGM prior to 30 June 2020.

## **Insolvency reform measures**

The draft legislation will also introduce a number of insolvency reform measures. The aim of these measures is to provide distressed businesses and their directors with relief during these unprecedented times and to enhance the options available to restructure going forward, whilst also balancing the rights of other stakeholders in safeguarding their investments and credit provided. The measures comprise of temporary emergency measures and permanent measures aimed at protecting business.

The temporary measures are intended to protect business during the COVID-19 pandemic, such as a suspension of directors' personal liability for wrongful trading, and measures to safeguard the UK high street against aggressive debt recovery actions by implementing a prohibition on certain statutory demands and winding up petitions. In addition, the legislation will introduce permanent protective measures to enhance the UK's offering for restructuring, which include a moratorium for viable companies, a new restructuring process which includes the ability to bind dissenting classes of creditors who vote against it (commonly referred to as a 'cram down'), and certain restrictions on enforcement by suppliers of termination clauses based on insolvency events in contracts for the supply of goods and services. More detail on the UK insolvency reform is to be included in a separate briefing note to be published shortly.

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