On the agenda

The advent of the Companies Act 2006 and the Shareholder Rights Directive has meant changes for the way AGMs are run from 2010. **Julia Casson** explains.

Over the last couple of years, there have been a number of legislative changes which have had a cumulative effect on the business and conduct of AGMs, and which will need to be considered carefully for AGMs in 2010.

Changes in the last year include those affecting AGM business and procedures as a result of the introduction of the Companies (Shareholders' Rights) Regulations in August 2009, which amended provisions governing meetings in Part 13 of the Companies Act 2006, and the final implementation of the outstanding sections of the Act with effect from 1 October 2009.

In particular, the new provisions:

- make changes to AGM documentation and to information posted on the website before and after the meeting;
- clarify the rights of proxies and corporate representatives;
- allow shareholders – at least, those holding 5 per cent of voting capital or 100 members with an average of at least £100 paid up capital each – to require the company to place an item of business which they wish to see discussed on the agenda of the AGM; and
- codify a statutory right to ask questions at the meeting itself and, subject to certain exceptions, to receive an answer.

These changes are described more fully below, and I will also indicate which type of company each one applies to. It is worth noting that, while some of the changes made to the law of meetings in line with the Shareholder Rights Directive apply to all companies, most only apply to 'traded companies' – namely, companies with voting shares admitted to trading on a regulated market. In the UK this means companies listed on the London Stock Exchange main list and also on the listed element of PLUS, but not on AIM.

BE PREPARED

All public companies must now hold their AGMs within six months of the company's financial year end. The following practical issues need to be considered when planning the 2010 AGM.

AGM documents and practice

Company law changes effective since August 2009 need to be reflected in the AGM notice, proxy forms and website information. Revisions to the Companies Act 2006 also affect how the meeting is conducted, particularly voting procedures and shareholder questions.

AGM notice (for traded companies)

AGM notices in 2010 will need to include several new pieces of information. First, as usual, AGM notices must state the time, date and place of the meeting and the general nature of the business to be dealt with. However, notices of meetings must now also include:

- the address of a website which contains certain meeting information;
- a statement that the right to vote at the meeting is determined by reference to the register of members and of the time that right is determined;
- a statement of the procedures for members to be able to attend and vote at the meeting (including the date by which they must comply);
- details of proxy appointment forms; and
- a statement of the right of members to ask questions at meetings.

Shareholders' right to include a matter in AGM business

Shareholders of traded companies who own at least 5 per cent of voting capital, or if there are at least 100 of them owning an average of £100 each paid up voting capital, may include a matter in the business to be dealt with at the meeting (under Section 338A of the 2006 Act). This is in addition to their existing right to requisition a resolution or the circulation of a statement. The company can refuse to include the new item if it is defamatory, frivolous or vexatious. Details of the item must be received six weeks before the meeting or, if later, by the date the notice is sent out.

Proxy forms

Traded companies must now give an electronic address for the receipt of proxy documents and information relating to the AGM. The company may either give this address when it sends out instruments of proxy or invitations to appoint a proxy (for example, in the AGM notice) or make the address available on a website from the date when notice of the meeting is given until the end of the meeting. The company is deemed to have agreed that any document or information relating to proxies may be sent by electronic means to that address.

Calling meetings on 14 days' notice

The Shareholders Rights Regulations prescribe 21 days as the notice period for all general

meetings but traded companies may hold general meetings on 14 days' notice, provided that:

- they are not AGMs;
- that shareholders have passed an enabling special resolution each year; and
- that shareholders are offered the opportunity to 'vote by electronic means'.

Many companies are therefore proposing to pass enabling resolutions during the forthcoming AGM season.

However, the National Association of Pension Funds (NAPF)'s recent Corporate Governance Policy and Voting Guidelines states that the reduced notice should only be used in limited circumstances where it would clearly be to the advantage of shareholders as a whole. It asks companies to outline to shareholders the circumstances in which a meeting may be called at short notice when they propose the enabling resolution at their 2010 AGMs.

The NAPF guidance also states that investors should consider voting against resolutions proposed at meetings which have been called on short notice, where the use of the short notice period has not been adequately justified by the company or where the business proposed at the meeting is of such complexity that shareholders need more time to consider their voting decision.

Best practice in these statements will no doubt develop, but the challenge for companies will be to satisfy the NAPF guidance while not unnecessarily restricting their ability to call meetings other than AGMs on 14 days' notice (which was always the normal UK practice prior to the Shareholders Rights Regulations coming into force).

> The challenge for companies will be satisfying investor requirements while retaining flexibility.

WEB SIGHTS

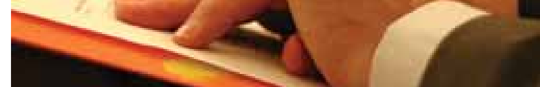
There are new requirements relating to the information that must be placed online both before and after the AGM takes place.

Before the AGM

Before a general meeting takes place, the 2006 Act now requires traded companies to publish certain information on a website. The information must be made available on or before the day on which notice of the meeting is given and kept available for two years.

This information includes:

- the matters set out in the notice of meeting;
- details of the total numbers of shares and voting rights in the company (as at the latest practicable time before notice of the meeting is given); and
- any members' statements, members' resolutions and members' matters of business which may be received, as soon as reasonably practicable.



After the AGM

Where a poll is taken at the AGM, the company will need to make sure that the following additional information is available on a website:

- the number of votes validly cast;
- the proportion of the company's issued share capital (determined at the time at which the right to vote is determined) represented by those votes; and
- the number of abstentions, if counted.

The law states the new information must be provided by the end of 16 days, beginning with the day the meeting takes place or, if later, by the end of the first working day after the day on which the result of a poll is declared. In both cases, the information must be kept available for two years.

Since these new requirements mean that certain information must be kept on the website for two years, companies will need to take care that it is not inadvertently deleted when the website is updated.

CAST YOUR VOTES

The changes made by the Shareholders' Rights Regulations have clarified the rules relating to corporate representatives and proxies.

The Regulations have confirmed that a proxy who has been appointed by more than one member can vote on a show of hands. The position is that a proxy has one vote on a show of hands in all cases except where he is appointed by multiple members who instruct him to vote in different ways: in this case, he or she has one vote for and one vote against the resolution. If a member appoints more than one proxy in respect of different shares within one holding, each proxy has one vote on a show of hands. However, the chairman should call for a poll if this would lead to an anomalous voting result.

> Companies should consider undertaking or completing the modernisation of their articles.

The Shareholders' Rights Regulations have also clarified that multiple corporate representatives can be appointed by one member and can vote validly in different ways, provided it is over different shares. This has dealt with the earlier confusion about this, which means that there is no longer any need to use the Designated Corporate Representative procedure (which was specifically formulated to deal with said confusion).

There are also new requirements regarding members' right to ask questions at the AGM – see box below for further details.

ANY OTHER BUSINESS

Most routine business can be conducted at AGMs in 2010 without any change. However, there are some new developments to be taken into account.

Changes to articles

The Companies Act 2006 has now been fully implemented, so companies should consider undertaking or completing the modernisation of their articles to bring them into line with current law.

It is recommended that companies update their articles to take account of the Shareholder Rights Regulations.

The guidelines of the Assocation of British Insurers (ABI) and the NAPF may also need to be considered.

Share allotment authorities

For public companies, the previous law in relation to allotment of shares is effectively restated by Sections 549–559 of the 2006 Act, which came into force on 1 October 2009.

Resolutions to give the directors authority to allot shares will need to be updated at the 2010 AGM to refer to the new section numbers. In 2009, companies were able to benefit from revised ABI guidance on authorities to allot shares, which was published in December 2008 in a move aimed at facilitating the implementation of rights issues.

The guidance provided that the ABI will consider as routine – in effect, its members will approve – a resolution to authorise the allotment of a number of shares equal to two-thirds of the company's issued share capital, rather than the previous one-third limit. The additional authority may only be used for a fully pre-emptive rights issue and both authorities should only last one year.

Where the further authority is used, the ABI expects all members of the board to stand for re-election at the next AGM if (i) the company makes allotments in excess of one-third of nominal value over the course of the year and (ii) the monetary proceeds exceed one-third of the pre-issue market capitalisation of the company.

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Admittedly, the new regime is unlikely to affect AGM practice significantly.

Even so, companies need to be familiar with the detail of the new requirements. Company secretaries should also ensure that the chairman and the rest of the board are briefed accordingly, in order to make sure that the AGM runs as smoothly as it has in previous years.

ANY QUESTIONS ANSWERED

THE SHAREHOLDERS' RIGHTS REGULATIONS amended the 2006 Act to provide for a new right for shareholders of traded companies to ask questions at meetings. The company must cause these to be answered unless one of the stated exceptions in Section 319A of the 2006 Act applies. These include:

- if it is undesirable in the interests of the company or the good order of the meeting;
- if to give an answer would interfere unduly with the preparation for the meeting (for example, where a question is posed in advance of a meeting);
- if it would involve disclosing confidential information; and
- if the answer has already been given on website FAQs.

Note that there is nothing in the Regulations which says a question must be answered at the meeting itself, so the chairman still has the flexibility to say that the question will be answered later.

The fact that answering questions is now a legal duty, subject to the above exceptions, puts a different complexion on things, however. Chairmen will need to be aware of the exceptions to the need to answer a question and be sure that, when they decide not to give an answer, one of these exceptions applies.

It will also be necessary to update meeting manuals and scripts. Stock answers, in line with the exemptions in the Act, should be prepared in advance so that if the chairman chooses not to answer a question he can properly explain the grounds on which he is doing this.

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

ABOUT THE AUTHOR

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