

The 2009 AGM and Beyond

In planning for the 2009 AGM and annual report, there are a number of new company law developments to bear in mind - in particular as a result of the latest round of provisions under the Companies Act 2006 (the **"2006 Act"**) coming into force and the EU Shareholders' Rights Directive (the **"Directive"**).

This guide is focused towards UK- incorporated listed companies and aims to highlight key practical points, rather than provide an exhaustive list of action points for such companies.

1. Authority to Allot Shares

The Association of British Insurers (the **"ABI"**) (whose advice is aimed at FTSE listed companies) announced on 31 December 2008 that it intended to alter its guidance on listed companies obtaining authority to allot shares.

The ABI will now regard as routine proposals by a listed company to authorise the allotment of up to two-thirds of its existing authorised issued share capital (the previous recommended limit was one-third). However, the additional one-third headroom may only be allotted as part of a fully pre-emptive rights issue and the authority is only valid for up to one year.

To take advantage of these provisions in the near future (for example, as part of a capital raising exercise), a company should consider obtaining the authority at its 2009 AGM.

It should also consider whether to increase its authorised share capital at the same time. While the 2006 Act abolishes the requirement to have an authorised share capital from 1 October 2009, any existing provision will be treated as forming part of the articles, unless revoked or amended.

2. Notice Periods for Meetings

The 2006 Act permits a public company to call general meetings (other than its AGM) on not less than 14 days' notice. However, the Directive (to be implemented by 3 August 2009) will require listed companies (but not AIM-listed companies) to call all general meetings on not less than 21 days' notice (even if its articles expressly prescribe a shorter period).

To continue to take advantage of the 14 days' notice period, notwithstanding the current provisions of their articles, listed companies must:

- obtain shareholder consent; and
- offer shareholders the ability to vote by electronic means at general meetings.

While the Directive requires the consent of two-thirds of members, listed companies are being advised to pass a special resolution (since it is likely the 2006 Act will be amended to specify such a requirement).

The authority must be renewed annually. It is recommended that approval should be sought at the 2009 AGM (even if it occurs prior to the Directive's implementation in 2009) and at each subsequent AGM.

3. Timing for AGMs

A public company must hold its AGM within six months of its financial year-end. This is a change from the position under the Companies Act 1985 that entitled a company to hold its AGM not more than 15 months after the previous AGM.

4. Do companies need to change their Articles?

A number of new provisions of the 2006 Act came into force on 1 October 2008, however, the remainder will come into force on 1 October 2009 when the Companies Act 1985 will be almost entirely repealed.

Many companies have already amended their articles to take account of the 2006 Act and it is recommended that, subject to an immediate need to take advantage of the increased headroom to allot shares, listed companies should delay adopting new articles until their 2010 AGM.

The most likely changes that a listed company will seek to make to its articles as a result of the 2006 Act are:

- deleting the objects clause, which is no longer required;
- deleting the statement of authorised capital, which is also no longer required;

- including a power for the board to determine (at the time of issue) the terms, conditions and manner of share redemptions;
- deleting the company's power to consolidate, subdivide or reduce share capital and purchase its own shares (this power no longer needs to be expressly set out in the articles);
- replacing references to the Companies Act 1985 with the 2006 Act; and
- conforming the language of their articles to the Model Articles (the 2006 Act's equivalent to the Table A regulations).

5. Directors' Conflicts of Interest

Many public companies have already amended their articles to permit the board to authorise directors' conflicts of interest in accordance with the 2006 Act and best practice principles are now emerging. As a result, companies should consider:

- providing directors with a questionnaire to disclose conflicts and identify potential situations where their own interests conflict with those of the company;
- ensuring at any board meeting at which a director discloses his conflicts, he does not vote on the resolution to approve his own conflicts;
- establishing and maintaining a process to review conflict authorisations on a regular (for example, annual) basis;
- recording conflict authorisations in a register to be kept and maintained by the company; and
- reporting annually on procedures to monitor conflicts and their effectiveness.

6. Auditor's Liability Limitation Agreements ("LLAs")

Since 6 April 2008, auditors and companies have been permitted to enter into liability limitation agreements pursuant to the 2006 Act. They limit an auditor's liability to the company for negligence, default or breach of duty or trust in relation to the audit of the accounts.

While accounting firms are keen that companies enter into LLAs, it is important to note that there is no statutory obligation on any company to enter into this type of arrangement.

In deciding whether to enter into an auditor's LLA, directors must be satisfied that the agreement accords

with their duty to promote the success of the company for the benefit of its members.

It is equally important for a company to consider the entry into a LLA in the context of existing contractual engagement letters with their auditors. These agreements may already limit liability. The directors should fully understand the further limits that an auditor is proposing to its liability through a LLA.

Industry advice is that it is acceptable, and can be regarded as acting in the interests of a company and its members, to limit auditor's liability through a LLA to what is proportionate or 'fair and reasonable' but not by reference to a fixed cap amount.

An auditor's LLA is valid for only one financial year and the prior consent of members is required. In the case of a public company, the consent must be obtained at a general meeting. As a result, directors ought to consult and appropriately advise members in advance of seeking their consent to a LLA to ensure their support for it.

7. Annual Report Requirements

A listed company (but not an AIM-listed company) must publish its annual report within four months of its financial year-end under the Disclosure and Transparency Rules ("**DTR**"). The UKLA has stated that merely publishing preliminary results during this four-month period will not satisfy the obligation.

If a listed company is, or intends to use electronic means to communicate with its shareholders, the DTR requires that decision to be taken at a general meeting.

8. Enhanced Business Review Requirements

The 2006 Act requires companies (other than "small companies" e.g. annual turnover £5.6M or less, 50 employees or fewer) to prepare an enhanced business review as part of the directors' report for financial years beginning on or after 1 October 2007. The following information must now be disclosed:

- the main factors likely to affect the future development, performance or position of the company's business;
- information about environmental matters, employees and social and community issues; and
- information about persons with whom the company has contractual or other arrangements that are essential to the business of the company.

The intention of the final requirement is to ensure that significant relationships with major suppliers/customers (in terms of value/impact on the business) are disclosed, rather than impose an onerous disclosure obligation.

A listed company is not required to disclose details of future or impending relationships when to do so would be seriously prejudicial to the interests of the company e.g. confidential talks with a new potential customer.

9. New Remuneration Report Disclosure

For financial years starting on or after 6 April 2008, listed companies (but not AIM-listed companies) have a new obligation to disclose information in the remuneration report. It must contain a statement of how pay and employment conditions of employees of the group were taken into account when determining directors' remuneration for the relevant financial year.

In the current climate, it is likely that there will be expectation that disclosure is sufficiently detailed and transparent. Listed companies should seek to demonstrate that their remuneration committee acted in a sensitive manner when setting directors' pay and rewards, and having had regard to the wider interests of group employees.

10. Use of Company Website

The 2006 Act requires the annual accounts and reports of listed companies (but not AIM-listed companies) for financial years beginning on or after 6 April 2008 to be published on a website (and they must remain on the website until the next financial year's annual accounts and report are available on the website).

Subject to obtaining the consent of its members or having the express authority in its articles, any company may send information required under the 2006 Act to its members by means of its website e.g. annual accounts, notice of general meetings.

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like further information please contact:



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