

Proxies and Corporate Representatives

On 1 October 2007, changes to company law came into force regarding the appointment and rights of proxies and corporate representatives at general meetings.

The new provisions have brought with them some legal uncertainties and practical implications of which Members need to be aware.

The changes affect both the way in which shareholders of investment companies can be represented at company meetings, and how an investment company (or its manager) might wish to participate in the general meetings of companies in which it invests.

The relevant provisions of the Companies Act 2006 are covered in a guidance note produced by the Institute of Chartered Secretaries and Administrators (ICSA). This note:

- identifies areas where the law has changed
- highlights issues which require consideration by the board and/or its advisers and
- provides practical guidance and recommendations.

It also proposes a practical solution in respect of the current legal uncertainty where a single shareholder appoints a number of corporate representatives (as opposed to proxies) to attend, speak and vote at a company meeting on its behalf. This is particularly relevant where shares are held by a custodian nominee on behalf of a number of institutional investors.

The ICSA's guidance note which is available at <http://www.zoomerang.com/recipient/survey-intro.zgi?p=WEB227DLHUH6GE>. Some of the key points are summarised below.

Proxies

Under the new rules, members are entitled to appoint one or more proxies to exercise all or any of their rights to attend, speak and vote at a general meeting (on a show of hands as well as on a poll). Each proxy must be appointed to exercise rights over *different* shares held by the member.

Although the right to appoint multiple proxies is already contained in many companies' articles, the ICSA guidance note usefully collates a number of practical implications of this approach. For example, where voting is conducted on a show of hands, a shareholder could have more than one vote by appointing multiple proxies. This could disproportionately affect the outcome and creates the risk of disruption at meetings, particularly from activists. The ICSA recommends that where the chairman believes that the results have been unfairly influenced by the appointment of multiple proxies, a poll should be called for.

The ICSA guidance note also identifies a number of further company law changes relating to proxies, including:

- The 48 hour deadline for the receipt of proxy appointments may now exclude weekends and bank holidays.
- There are new provisions on the earliest deadline permitted in the articles to terminate a proxy appointment.

Given the issues the new rules create in relation to corporate representatives, the ICSA favours the use of proxies to secure representation at company meetings. It says *“investors are strongly recommended to appoint proxies to represent them at general meetings rather than corporate representatives”*. The AIC also favours the use of proxies, particularly as this will avoid the issues that arise through the use of corporate representatives.

Corporate representatives

An alternative approach is for a company to appoint one or more corporate representatives who have full powers to exercise all of the rights of that member at the general meeting. Prior to the rule change, nominee companies in particular used corporate representatives because of the increased flexibility they offer, for example a corporate representative can register at the meeting whereas a proxy appointment must be made 48 hours in advance.

The 2006 Act changes the situation where multiple corporate representatives are appointed, particularly where voting is concerned. Section 323(4) of the Companies Act 2006 says that, where more than one corporate representative of a single shareholder (e.g. the nominee company) seeks to vote, then *“if they do not purport to exercise the power in the same way, the power is treated as not exercised”*. This raises the question of whether multiple corporate representatives, representing different clients of a single nominee company, can vote in opposing ways.

One view reported by the ICSA is that, where multiple corporate representatives are appointed to exercise rights over particular blocks of shares, they are each exercising different powers and therefore can vote in different ways. Another view is that multiple corporate representatives can vote in different ways by relying on another provision which states that where shares are held on behalf of different underlying owners, the rights need not be exercised in the same way. However the ICSA reports that legal opinion is divided on these interpretations and many lawyers believe that the meaning of the law is such that votes made in different ways by multiple corporate representatives representing a single member are invalid.

This change therefore has consequences for nominee companies, who up until now may have used different corporate representatives to represent each designated account, or different corporate representatives to represent parts of a pooled account. The potential for different legal interpretations creates the risk that any decision arrived at where multiple corporate representatives

vote in different ways could be challenged in the courts, particularly where the vote is contentious or close.

The ICSA guidance proposes **two options** which potentially avoid the uncertainty surrounding the use of multiple corporate representatives.

- Both options require one corporate representative to act as a designated corporate representative (DCR).
- The other corporate representatives give their voting instructions to the DCR by completing a voting directions card but only the DCR completes the poll card which reflects the instructions of the other representatives.
- Under **option 1**, the shareholder who appoints multiple corporate representatives also appoints **the chairman** as a corporate representative, and the chairman is chosen as DCR.
- **Under option 2**, the **first corporate representative** to arrive at the meeting is appointed as DCR.

There are practical issues relating to both these options, which are discussed in detail in the ICSA guidance.

In the absence of any change to the law, the ICSA's preferred route is option 1 – the appointment of the chairman as the DCR.

Members should be aware that other investment bodies, such as the ABI, also support option 1 and are encouraging companies to adopt this route. We understand that, if a company were not to address the issue of corporate representatives in their meeting papers/arrangements - even if there are no contentious issues and the appointment of corporate representative is unlikely in practice - they may be viewed negatively by governance agencies.

We also understand that any deviation from option 1 may also cause concern to governance agencies, and possibly attract negative recommendations.

With this in mind, the AIC recommends that Members should consider what changes should be made to meeting papers/arrangements to recognise the issues raised by the possible appointment of corporate representatives. Also, in the absence of other complications, Members should consider option 1 as their preferred route to dealing with this matter.

Action points

Investment company boards and their advisers need to be aware of the changes affecting the rights of proxies and corporate representatives, both in terms of their own shareholder meetings and as institutional shareholders.

- Clear procedures should be set out for the appointment of proxies and corporate representatives, including the DCR.
- The wording of the articles needs to be carefully reviewed to ensure compliance with the new provisions.

- Meeting documentation, including proxy forms, should also be reviewed (the ICSA guidance paper includes a proforma proxy form in Appendix A which may assist with any redrafting proposal).
- Company secretaries should also ensure that meeting arrangements and registration facilities can deal with multiple proxies and corporate representatives.

Feedback

The AIC would be keen to hear further on any issues which arise in relation to the appointment of multiple corporate representatives. Please feel free to contact Guy Rainbird on 020 7282 5553 or at guy.rainbird@theaic.co.uk if you have any thoughts on these issues.

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