

## **Consultation on the implementation of the directive on the exercise of certain rights of shareholders in listed companies**

### **Submission from the Association of Investment Companies**

The Association of Investment Companies (AIC) welcomes the opportunity to respond to the Department for Business Enterprise and Regulatory Reform's (BERR) consultation on the implementation of the EU Shareholder Rights Directive (EU Directive) into the Companies Act 2006.

The AIC is the trade body representing some 280 UK incorporated investment companies, the vast majority of which are listed on the London Stock Exchange. Our Members are closed-ended companies that invest in shares and securities of UK and overseas companies to generate a return for their shareholders. The AIC is therefore interested in shareholders' rights both from the perspective of its Members as issuers of shares and as shareholders who exercise those rights.

#### **General comments**

The AIC is generally supportive of initiatives which enable shareholders to exercise their full voting rights. The AIC also has a keen interest in measures which seek to encourage and facilitate the ability to vote by electronic means.

#### **Response to consultation questions**

##### ***Q1: Do you agree that this is an effective way of enabling the splitting of votes under the Companies Act 2006? (regulation 2)***

The AIC welcomes the clarification to the Companies Act with regard to proxy voting. The ability of a proxy to have one vote for and one vote against on a show of hands if their clients' views are divided is a better position than is currently the case. We **agree** that regulation 2 removes the uncertainty and makes it clear that a proxy can split their vote if a show of hands is required. It is also useful that regulation 2 is supported by regulation 7 which requires a proxy to act in accordance with any instructions given by the member by whom the proxy is appointed.

Despite the efforts to provide greater clarification to proxy voting and the use of corporate representatives (under regulation 6) in this consultation, the AIC expects to see an increasing number of chairmen adopting the fall back position of calling a poll. Although this route has time and cost implications, it produces more accurate results and thereby provides a greater degree of certainty, especially for the chairman. This may also have wider corporate governance benefits where companies publish the results of polls.

##### ***Q2: Do you agree that these changes permit corporate representatives for the same corporate shareholder to vote in different ways at company meetings? (regulation 6)***

The AIC welcomes the amendments to section 323 to confirm that corporate representatives can vote in different ways from one another in respect of different blocks of shares. This clarification is useful for investment companies whose shares are commonly held through nominee accounts. We **agree** that regulation 6 confirms that multiple corporate representatives representing different clients of a single nominee company can vote in opposing ways.

**Q3: Do you agree that the right to demand a poll should also be available by correspondence in advance? (regulation 5)**

The AIC **agrees** that the right to demand a poll should be available by correspondence in advance. This is in line with the proposed changes to allow shareholders to vote on a poll by correspondence in advance. The AIC is generally supportive of initiatives which encourage the development and use of electronic voting facilities, and the right to demand a poll by electronic means is another step in the right direction.

**Q4: Do you agree that the obligations of proxies need to be stated in this way? (regulation 7)**

The AIC **agrees** that this regulation provides useful clarification, particularly in conjunction with regulation 2 on splitting voting by proxies (see above).

**Q5: We would welcome your views on whether and if so how we should attempt to define “electronic means accessible to all shareholders”? (regulation 9)**

The AIC **recommends** that the term “*electronic means accessible to all shareholders*” should not be defined. Each company should have the flexibility to identify and adopt electronic systems and procedures which best meet the needs of the individual company, its shareholder base and the other parties involved in the voting process, such as the registrar. Any attempt to create a common basis of practice, or minimum standards of compliance, could restrict the ability of a company to maintain a facility which best reflects its individual circumstances.

If an attempt is made to produce a definition, it would be necessary to break the term down into three elements and to consider the meaning of “*electronic means*”, “*accessible*” and “*to all shareholders*” separately, each part having its own complications and in practice likely to raise more questions than are answered. Furthermore, it would be extremely difficult to produce a definition which is not so high-level that it serves a purpose, and not so detailed that it prevents a sufficient range of suitable practices from emerging.

In our view, whether a definition is introduced or not, companies should be able to use established electronic voting systems such as CREST or be permitted to develop their own company-specific facility, such as the ability to vote via the company’s own website.

***Q6: Do you agree that resolutions to permit companies to continue holding EGMs at 14 days' notice should be passed on the basis of two thirds of the voting rights of those who vote at the meeting or should it be 75% as for other special resolutions? (regulation 9)***

The AIC **agrees** that a resolution to permit companies to continue holding EGMs at 14 days' notice should be passed by two thirds of the voting rights of those who vote at the meeting. This is the minimum allowed under the EU Directive and the AIC can see little justification for increasing this limit. Typically EGMs are called to deal with 'emergency' decisions, and therefore there are benefits of having the lowest permissible threshold of approval to minimise the notice period.

***Q7: Do you agree that the answering of questions at meetings of traded companies requires implementation in this way? (regulation 12)***

The AIC does **not agree** that the company should be required by regulation to answer questions put by a member at a general meeting and **recommends** that section 319A is not introduced into the Companies Act 2006. Instead the chairman should be able to use his experience and judgement to ensure the smooth running of the meeting and a sensible dialogue of the issues at hand. The chairman should be free to exercise his discretion and skills to ascertain whether a question has been satisfactorily answered, taking into account the reaction of major shareholders and relevant media representatives. This approach is considered to be more effective than regulation in addressing what is an intangible issue.

The AIC is concerned that regulation 12 could lead to uncertainty and disruption during general meetings. One key issue is the difficulty of determining whether or not a question has in fact been 'answered'. For example which party would determine whether the company has provided a satisfactory answer to a question from a shareholder? This approach leaves the way open for a shareholder to repeatedly and vexatiously demand further explanation when in fact the company is satisfied that it has answered the question in full. A formal regulation would arguably require a procedure to be introduced to enable a third party to be nominated to judge whether the question has been satisfactorily answered. Such an approach would not be conducive to effective company meetings.

If section 319A is introduced into the Companies Act, which the AIC does not support, then the AIC recommends that the text is amended to include two points from Article 9 of the EU Directive. Firstly the Directive states that Member States may allow companies to take measures to ensure the protection of business interests. The AIC **recommends** that this provision is adopted in the UK to provide companies with increased security. Secondly the Directive states that Member States may allow companies to provide one overall answer to questions having the same content. Again the AIC **recommends** that this option is included in section 319A to give companies a degree of flexibility over how questions might be answered.

***Q8: Do you agree that the members of a traded company who exercise Article 6 rights should not have to pay the expenses of circulation? (regulation 19)***

Members of a traded company who exercise Article 6 rights should have to pay for the expenses of circulation in certain circumstances. The AIC **recommends** that regulation 19 is not adopted and that the position remains as is currently required under the Companies Act 2006. In other words the cost of circulation for all types of companies should fall to the company where requests are received before the end of the financial year preceding the meeting. Where requests are received after that date, the cost of circulation should be paid for by the member(s) concerned.

However, in the event that the cut-off date is missed and the expenses of circulation fall to the members, any costs demanded by the company should reflect the true administrative costs incurred. For example, where savings can be made by using the company's systems to distribute documents electronically, this benefit should be passed on. No punitive element should be charged by the company.

**Other comments**

The proposed insertions for regulation 11 (publication of information in advance of general meeting) and regulation 20 (company's duty to circulate members' items for AGM) include a statement that non-compliance results in an offence being committed by every officer of the company who is in default, and sets out the penalty which is imposed if a person is found guilty. It is unclear why these two regulations have been identified as requiring specific references to offences, and how the level of penalties have been determined. The AIC believes that it would be helpful if BERR could consider why these two issues have been singled out in this way, and provide an explanation. Pending this information the AIC's current recommendation is that these provisions are removed.

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