

Members' right to appoint a proxy

Statutory rights

Sections 284, 285 and 324 to 331 of the Companies Act 2006 (CA 2006) are the key sections which govern a member's right to appoint one or more proxies.

Section 324(1) gives members the right to appoint a proxy to exercise all or any of the member's rights to attend, speak and vote at general meetings. Section 324 overrides any contrary provision in the company's articles.

The articles will usually specify how a proxy should be appointed.

Statement of rights

Section 325, CA 2006 requires every notice of meeting to include a statement of reasonable prominence setting out the members' rights under *section 324* to appoint a proxy and any more extensive rights to appoint more than one proxy by virtue of the company's articles. The statement of the members' rights to appoint a proxy usually appears in both the notes to the form of proxy and the notice of meeting.

Failure to comply with section 325 does not invalidate the meeting or any resolutions passed at the meeting but officers in default are liable to be fined.

More extensive rights granted by articles

A company's articles may provide for more extensive rights regarding proxies than the minimum set out in the *CA 2006 (section 331)*.

Multiple proxies

In the case of a company having a share capital, a member may appoint more than one proxy (*section 324(2), CA 2006*). A proxy must, however, be appointed in relation to at least one share or different £10, or multiple of £10, of stock. This right sets a minimum standard which overrides companies' articles..

Choice of proxy

Section 324(1) of the CA 2006 does not specify who the proxy must be and therefore need not be a member of the company.

It is common practice for a company to issue express invitations to members to appoint a proxy. Where the company offers that a particular person (or persons), such as the chairman of the meeting, will act as a proxy (or proxies), that offer must be made to all members (*section 326, CA 2006*). The rationale for this is to prevent the directors of the company from only soliciting proxies from those members who they think will be in agreement to their proposals.

Until August 2007, LR 9.3.6(3) required the proxy form to state that a member is entitled to appoint a proxy of his own choice and provide a space for insertion of the name of such a proxy. It remains standard to continue to provide this option, even though this paragraph has been deleted from the Listing Rules.

Chairman as proxy

It is very common for companies to provide that shareholders can appoint the chairman as proxy. As noted above, s326 of the CA 2006 provides that, where the company offers that a particular person (such as the chairman) will act as a proxy, that offer must be made to all members.

The CA 2006 does not specify the chairman's duties in this role, nor the circumstances in which the chairman is obliged to call a poll.

When to call a poll

Common law provides that the chairman has a duty to ascertain the true sense of the meeting. This includes a duty to demand a poll (or join in a demand made by another shareholder) if the chairman has been appointed as proxy for shareholders and is aware that a poll vote may produce a different result to a vote on a show of hands.

ICSA states in its guidance note on the Chairman's obligations regarding polls and proxies (available only to members) that where a poll is correctly requested by the shareholders, the chairman is obliged to comply with the request. However, the guidance acknowledges that the chairman will often be aware that, in view of the number of proxies he holds instructing him to vote for or against the resolution, the poll would not make any difference to the result. In this case, the guidance suggests that it is acceptable for the chairman to ask the shareholders demanding the poll if they wish to continue. If they elect to proceed and the demand is validly made, the chairman must allow the poll even if he knows that the objective of the request is to disrupt the meeting.

How to vote

If the chairman, acting as proxy, does not have specific voting instructions (see on a particular matter he should consider the shareholder's intentions. For example, if an adjournment is proposed and the purpose of the adjournment is to defeat a resolution, the chairman should cast those votes of the proxies who instructed him to vote against the resolution in favour of the proposal to adjourn.

In the case of amendments to resolutions, the chairman, acting as proxy, should vote against an amendment if he was instructed to vote in favour of the resolution. The matter is more complicated if the chairman is instructed to vote against a resolution as there is no way of knowing what the shareholder's attitude would be to the amendment. In this case the chairman often abstains as regards those votes. If the chairman has been given discretion on how to vote on a resolution, this will also apply to any amendments to resolutions.

Proxies' rights

Section 324(1) of the CA 2006 gives members the right to appoint a proxy to exercise all or any of the member's rights to attend, speak and vote at general meetings. However, in the case of a company having a share capital, a member may appoint more than one proxy provided that each proxy is appointed to exercise the

rights attached to a different share or shares held by the member (*section 324(2), CA 2006*).

A proxy may also:

- Count towards the quorum, although two proxies appointed by the same member will not constitute a quorum of two in the case of a company having more than one member (*section 318(3)(c), CA 2006*).
- Ask questions at the meeting.
- Demand, or join in to demand, a poll (*section 329, CA 2006*).
- Propose a resolution or an amendment to a resolution.
- Act as chairman (subject to the company's articles) (*section 328, CA 2006*).
- Sign a written resolution on behalf of the member (*section 296(1), CA 2006*).

Section 324 overrides any contrary provision in the company's articles.

Attendance at the meeting

A member who has lodged a proxy may still attend and vote at the meeting in person. If such a member does attend and vote in person, any votes tendered by the proxy must be rejected.

Right to speak

If a member appoints a proxy and subsequently chooses to attend the meeting in person in addition to his duly appointed proxy, where the member exercises his right to speak at the meeting, the proxy's right to speak should be treated as abrogated. If this principle is not applied, the member would be exercising more than one right to speak at the meeting on a particular issue.

Where a member appoints more than one proxy, it would seem that each proxy has a separate right to speak (and later vote) in respect of the shares to which the proxy appointment relates, unless the member speaks first. In this instance it would be for the chairman to exercise his discretion as to whether the proxy or proxies should be allowed to speak in addition to the member.

Voting

A proxy is entitled to vote both on a poll and on a show of hands (*section 324(1), CA 2006*). Section 285 of the CA 2006 contains the rights of voting by a proxy.

Voting on a show of hands

Subject to a company's articles, on a vote on a resolution by way of a show of hands, every proxy present who has been duly appointed by one or more members entitled to vote on the resolution has one vote (*section 285 (1), CA 2006*).

However, a proxy has one vote for and one vote against the resolution if the proxy has been:

- duly appointed by more than one member entitled to vote on the resolution; and
- instructed by one or more of those members to vote for the resolution and by one or more other of those members to vote against it.

(section 285(2), CA 2006).

Where a duly appointed proxy is also a member, the question arises as to whether that proxy has two votes on a show of hands - one as a member present pursuant to section 284(2), CA 2006 and one as a proxy pursuant to section 285(1), CA 2006. There does not appear to be a definitive answer to this question and so the safest course would be for a poll to be demanded, such that the votes of the member and any members for whom they were proxy could all be cast.

Voting instructions

Traditionally, proxy forms simply provided the options to vote "for" or "against" each resolution (two-way voting) and this is still likely to be sufficient and appropriate for unlisted companies.

Proxy to vote in accordance with instructions

Section 324A of the CA 2006 (which was inserted to ensure compliance with the Shareholders' Rights Directive) states that a proxy must vote in accordance with any instructions given by the member by whom the proxy is appointed.

Proxy's discretion

Where no specific voting instructions are given, the proxy will have discretion as to how to vote on each resolution.

Re-election of retiring directors

LR 9.3.7 provides that if the resolutions to be proposed include the re-election of retiring directors and the number of retiring directors standing for re-election exceeds five, the proxy form may give shareholders the opportunity to vote for or against (or abstain from voting on) the re-election of the retiring directors as a whole but must also allow votes to be cast for or against (or for shareholders to abstain from voting on) the re-election of the retiring directors individually.

Allowing separate voting for each director is very much in line with corporate governance best practice.

Form of proxy

All companies

Neither the CA 2006 nor the model form articles for private or public companies specify any particular form of proxy notice. However, the model articles do give a company power to require that proxy notices be delivered in a particular form.

A company's articles will usually contain provisions prescribing the form of proxy to be used at a meeting of the company. If the appointment does not comply with the

mandatory requirements in the articles, it is invalid and the chairman must not allow the proxy vote. For example, if the articles specified that the proxy form must be witnessed, it would be invalid if it was not witnessed (*Harben v Phillips* (1883) 23 ChD 14). However, it seems that minor non-compliance will not invalidate the proxy (*Oliver v Dalglish* [1963] 1 WLR 1274).

The model articles for both private companies limited by shares and public companies each contain just two articles relating to proxies (*articles 45 and 46 in the case of the model articles for private companies and articles 38 and 39 in the case of the model articles for public companies*). These cover the content and delivery of proxy forms. In both cases the model articles adopt an approach of requiring certain information to be included in proxy forms and permitting the company to require use of a particular form, rather than prescribing the actual wording of forms.

The model articles prescribe that a proxy may only be appointed by a notice in writing and must be signed by or on behalf of the member appointing the proxy (or is authenticated in such manner as the directors may determine). The articles further prescribe that the proxy form must be delivered to the company in accordance with the articles and any instructions contained in the notice of meeting to which the proxy relates.

Delivery of proxy appointments

The notes to the notice of meeting will usually provide instructions for lodging the completed proxy appointment, including lodging a hard copy of the appointment with the company's registrars by a specified time and date. Traded companies are required to provide an electronic address for lodging proxies as an alternative to lodging a hard copy and for those companies whose shares are traded through CREST, members will be given the option of appointing a proxy through the CREST electronic proxy appointment service.

Time limits for appointing a proxy

Companies are permitted to set a cut-off point by which time a member must have lodged his proxy appointment in order for it to be valid. Legal commentary suggests that any proxy that is lodged outside that prescribed time limit has to be treated as invalid.

Companies are likely to include a cut-off period in their articles for administrative convenience. In the case of a private company where its articles are silent and where no instructions are given in the notes to the proxy form, there is no time limit for lodging a proxy which means that the proxy may be delivered at any point in time before the vote.

Any provision of the company's articles which requires any appointment of a proxy to be received by the company earlier than 48 hours before the time of the meeting (or adjourned meeting), is void (section 327(2), CA 2006). When calculating this time, section 327(3) provides that no account must be taken of any part of a day that is not a working day. However, to take advantage of section 327(3), the articles should be amended to include an express provision to this effect.

If a company's articles contain a provision requiring a deadline for proxy appointments to be received earlier than the 48 hour maximum period prescribed by

section 327(2), it seems that the CA 2006 renders the deadline void such that the company would have to accept all proxies notified prior to the vote.

Note that section 327(2) specifies different cut-off periods for proxy appointments where a poll is taken. Where a poll is taken more than 48 hours after it was demanded (this would be unusual), the cut-off period for appointment of a proxy must not be earlier than 24 hours before the poll is taken.

Of more concern was section 327(2)(c) which states that, where a poll is taken not more than 48 hours after it was demanded, the cut-off period for appointing proxies cannot end before the time the poll was demanded. This was likely to cause problems for companies and their registrars as it appeared to mean that where a poll was demanded at a general meeting and taken at (or immediately after) the meeting, the 48-hour cut-off period was rendered ineffective and any proxies received after the 48-hour cut-off period would be valid. However, section 327(c) (along with section 330(6)(c)) was not brought into force on 1 October 2007. The Deregulation Act 2015 omitted sections 327(c) and 330(6)(c) from the CA 2006 with effect from 26 May 2015.

Terminating a proxy appointment

The authority of a proxy to attend and vote at a meeting may be revoked by the appointing member. Under section 330 of the CA 2006, unless notice of termination of a proxy's authority is received by the company before the meeting (or adjourned meeting) starts, the proxy's actions at a meeting are valid. A longer period, of up to 48 hours before the meeting (excluding any part of a day that is not a working day), can be specified by the company's articles.

Like section 327(2), CA 2006 relating to cut-off periods for proxy appointments, section 330(6) CA 2006, alters the maximum cut-off period where a poll has been demanded. Under section 330(6)(b), where a poll is taken more than 48 hours after it was demanded the cut-off period for terminating a proxy appointment must not be earlier than 24 hours before the poll is taken. Section 330(6)(c), CA 2006 provides that, where a poll is taken not more than 48 hours after it was demanded (for example at the meeting itself), the cut-off period for terminating a proxy appointment cannot end before the time the poll was demanded. However section 330(6)(c), CA 2006 (along with section 327(2)(c)) was not brought into force on 1 October 2007 and the Deregulation Act 2015 omitted these subsections with effect from 26 May 2015.

In the case of a traded company, notice of termination of the authority must be in writing (*section 330(A1)*, CA 2006).

The CA 2006 does not expressly state that appointment of a proxy does not preclude the shareholder from attending and voting in person at the meeting. This means that a member may attend and vote at a meeting, despite having appointed a proxy, provided the member votes before the proxy. The votes cast by the member in person will be valid even if the articles require advance notification of termination of the authority.

Electronic communications

All companies

Where a company has given an electronic address either in a proxy form sent out by the company in relation to the meeting, or in the accompanying material (such as the notice of general meeting), it is deemed to have agreed that any document or information relating to proxies for that meeting may be sent by electronic means to that address, subject to any specified conditions or limitations that may be set out in the notice of meeting (333(2), CA 2006).

An electronic address is an address or number used for the purposes of sending or receiving documents by electronic means and includes an email address and fax number (section 333(4), CA 2006).

Documents or information sent or supplied to or by a company (including notices) must be sent or supplied in accordance with Schedule 4 and Schedule 5 respectively (section 11144, CA 2006).

Traded companies

A traded company is required to provide an electronic address for receipt of any document or information relating to proxies for a general meeting (section 333A, CA 2006).

Documents relating to proxies include:

- A proxy appointment.
- Any document necessary to show the validity of, or otherwise relating to, the appointment of a proxy (such as a copy of a power of attorney showing authority to appoint a proxy on behalf of the member).
- Notice of the termination of the authority of a proxy.

(section 333(4)(a), CA 2006).

The electronic address must be provided either:

- when sending out the relevant proxy appointment;
- in a separate invitation document; or
- by ensuring that it is made available on the website, throughout the period beginning with the first date on which notice of the meeting is given and ending with the conclusion of the meeting. This should be the same website on which the information required by section 311A(1) of the CA 2006 is made available.

The company is deemed to have agreed that any document or information relating to proxies for the meeting may be sent by electronic means to the address provided (subject to any limitations specified by the company when providing the address) (section 333A(2), CA 2006).

Section 333A, CA 2006 overrides any contrary provision in a company's articles.

ICSA guidance on electronic communications

ICSA's Guidance on Electronic Communications with Shareholders 2007 Guidance recommends:

- Blank electronic proxy forms should not be posted on a company's website as proxies with unclear signatures are often rejected by registrars.
- Electronic proxy forms should contain clear instructions as to the address to which the proxy form should be returned. The design of proxy forms should be considered carefully, and any electronic address (which extends to phone numbers) that appears in the proxy but is not intended for use by shareholders in communications back with the company (such as lodging proxies) is specifically limited in its application. ICSA suggests that a solution to this may be to ensure that such addresses (or phone numbers) do not appear on the proxy form.
- The company should alert shareholders that elect to receive communications electronically that the company's obligation is satisfied when it transmits an electronic message and that it cannot be held responsible for a failure in the transmission beyond its control. It also recommends that where the company is aware of a delivery failure (and subsequent attempts do not remedy the situation), it should revert to sending a hard copy of the proxy by mail to the recipient's last known postal address within 48 hours of the original attempt.

For further information on electronic communications, see

Disclosing proxy votes

Quoted companies are required to disclose poll results on their websites (Section 341, CA 2006). A traded company is subject to additional requirements regarding disclosure of poll results under sections 341(1A) and 341(1B) of the CA 2006.

Section 353 of the CA 2006 sets out further requirements regarding website publication.

For companies with a premium listing, provision E.2.2 of the UK Corporate Governance Code provides that a company should ensure that all valid proxy appointments received for general meetings are properly recorded and counted. For each resolution, where a vote has been taken on a show of hands, the company should ensure that the following information is given at the meeting and made available as soon as reasonably practicable on a website which is maintained by or on behalf of the company the number of:

- Shares in respect of which proxy appointments have been validly made.
- Votes for the resolution.
- Votes against the resolution.
- Shares in respect of which the vote was directed to be withheld.