Electronic Communications with Shareholders

Introduction

In recent years the growth in the use of electronic communication has prompted considerable developments in the law relating to the use of electronic communications by companies with their shareholders. The main changes have been:

- **2000** – Changes to the Companies Act 1985 allowed specific documents (i.e. annual report and accounts, summary financial statements, general meeting notices and proxy forms) to be sent to shareholders electronically if they OPTED IN to receive them in this way. It also allowed shareholders to provide fax or email details to companies to facilitate the communication process. Most company’s shareholders however did not opt in, and the take up of electronic communication was generally well below 10%;

- **2003** – The Income and Corporation Taxes (Electronic Certificates of Deduction of Tax and Tax Credit) Regulations 2003 then enabled the use of electronic tax vouchers.

- **2007** – The Companies Act 2006 (the ‘Act’) and the Transparency Directive provisions extended the scope of documents which could be communicated electronically to include all those required by the Act. Importantly, shareholders now had to OPT OUT of if they did not wish to forgo hard copy documents for website communications. This is known as ‘deemed consent’.

- **2009** – Companies were required to provide an electronic address for the receipt of proxy votes.

Details of the relevant sections/rules of the 2006 Act and the Disclosure and Transparency Rules (DTR) are appended at the end of this briefing.

General Principles

To take advantage of this regime a company has specific tasks that it must perform to ensure compliance with the Act:

- It must pass a shareholder resolution and (if necessary) amend its articles of association, to provide the authority for the company to communicate with shareholders by posting documents on its website;

- Shareholders must be asked individually for their consent to receive website communications (unless such consent is already in place). If shareholders do not respond within 28 days of the
request they will be deemed to have consented to non-receipt of hard copies of documents if the company posts them on its website; and

- Shareholders must then be notified when a company posts new shareholder documents on its website. Such notifications must be sent in hard copy, unless the shareholder has previously consented to receive email or fax communications.

Wherever electronic communications are used, shareholders are still entitled to require the company to send a hard copy version of documents within 21 days, even if consent or deemed consent to receive electronic communications has been given. Hard copies must be provided free of charge and it is an offence to fail to provide them.

**Website Communications**

There are several issues that should be considered in relation to website communications:

**Alteration of the articles of association**

Where a company is subject to the Disclosure and Transparency Rules and wishes to use website communications, a shareholder resolution is required.

Schedule 5, paragraph 10 of the 2006 Act also requires that a company must be authorised by way of its articles or ordinary resolution to “send or supply documents or information to members by making them available on a website”.

**Invitations to shareholders**

Schedule 5, paragraph 10(3)(a) of the 2006 Act specifies that individual letters must be sent to shareholders inviting them to agree to the use of electronic communication by way of the company’s website.

**Managing the 12 month anniversary**

A shareholder is only deemed to have agreed to website communication if the invitation to agree to website communication is sent out more than 12 months after any previous invitation. A company can send other communications which offers or reminds shareholders of website communications, but a ‘deeming’ invitation can only been sent once in every 12 month cycle.

Many companies are treating this as an ongoing process and send out deeming invitations to all new shareholders.
Responses to the ‘deeming’ invitation

If a company does not receive a response to an invitation within 28 days of its receipt, Schedule 5, paragraph 10 the 2006 Act, allows for deemed consent to prevail. However, if a communication is received after 28 days requesting hard copies, best practice suggests that the ‘deemed’ consent should be cancelled and if a record date for posting has been recently missed, a hard copy of the document be sent to the shareholder.

Notification of material on a website

Shareholders who have agreed to website communications must be informed when a document is published on the website, Schedule 5, paragraph 13 the 2006 Act.

Shareholder participation and voting

Some shareholders may not realise that they have given deemed agreement to receive website communications if they have not read the deemed consent letter. Therefore, when sending the hard copy notification letter it may be expedient to give details of on-line voting facilities and telephone voting options.

Website Management

Schedule 5, paragraph 12 of the 2006 Act, specifies that a document or information on a website must be readable with the naked eye and be made available in a form that will enable the recipient:

a) To read it, and
b) To retain a copy of it.

Companies need therefore to consider the various forms of technology available to shareholders and offer appropriate links to download any specific software free of charge. Provision should also be made to allow for audited and non-audited information on a website and a robust archive option should be built into the website structure.

The retention of a copy of the document also provides its own problems. Very often what can be read on a screen, perhaps via the zoom button, cannot be run off in paper format. It will be necessary for companies therefore to consider the provision of pdf’s as well as, or instead of html web pages, this method will also provide better access under the Disability Discrimination Act.

Companies’ registrars will usually offer an on-line facility for shareholders to change their electronic preferences or change their email address.
Communications in Electronic Format

When considering electronic communications, a company must treat all shareholders equally (Disclosure and Transparency Rules (DTR6.1.8 (2))). Therefore companies’ articles can no longer specifically exclude the serving of notices to overseas addresses.

Schedule 4 of the 2006 Act, deals with communications to a company. This section provides that if a company issues any documentation with an address, email address, fax number or telephone number, it has been deemed to allow the use of any of these means to communicate with the company. For instance where a company has given an electronic address in a notice calling a meeting (Section 333) or in an accompanying proxy form, the company is deemed to have given permission for correspondence or proxies to be sent to that electronic address. It is usual to see in an AGM or general meeting notice therefore a statement to the effect that the shareholder may not use any electronic address (within the meaning of sections 333(4) of the Companies Act 2006) provided in the notice for any purpose other than those expressly stated.

Indirect Investors

The 2006 Act also recognises ‘indirect investors’ and gives them rights that normally only apply to registered shareholders. Registered shareholders can now nominate another person on whose behalf they hold shares to receive copies of all communications sent to members (these can be in hard or electronic format). This is not an automatic right however, it is necessary for the indirect investor to request the registered shareholder to nominate him and to provide an address for that purpose. If no address is given the nominated person will be deemed to have agreed to website communication. As with direct shareholders, the company can ask an indirect shareholder to agree to receive electronic communications. A company also has the right to send the annual request to the nominated person regarding information rights and if no response is received the rights will cease.

Companies should therefore consider indirect investors when setting a communications strategy and developing a new system. It is not necessary for articles to specifically provide for the information rights of these investors as Section 150 of the 2006 Act provides that the communication provisions will apply to them.

E-Communications – Considerations

The Transparency Directive and the communication regulations of the 2006 Act, are aimed at improving communications with both direct and indirect shareholders. Under the 1985 Act, companies were able to assess how many printed documents they required thus budget accordingly, but these rules introduce an element of uncertainty as to how many hard copies of documents will be required.
Companies need to discuss with their registrars a mailing matrix for shareholders and indirect investors. Similarly a dialogue should be held with the major nominee companies, e.g. will the nominee companies maintain the indirect investor records or will this be another burden for companies?

Prism Perspective

Since the regime for electronic communications with shareholders came into force, it is clear that there is a trend away from the use of paper-based communications among many shareholders. Equiniti Registrars estimated that in 2015, the split between paper, web and email communications was approximately as follows:

- 80% of shareholders default to website communication;
- 15% of shareholders opt to retain paper-based communication by post;
- 5% opt for communication by email.

Companies need to take a pragmatic view as to whether it is in the best interests of shareholders to introduce an electronic communications regime and whether such a system will add value to the business. Where companies have a low number of shareholders, the benefits of adopting electronic communications may be minimal. However, for larger FTSE100 companies, we have seen that the new regime has accommodated the requirements of small retail shareholders, and as such it has become accepted as best practice. As the technological revolution in communications marches on, we expect to see further developments in the way in which companies communicate with their shareholders.

A summary of the relevant sections/rules of the 2006 Act and the DTR is contained in the Appendix below.

Useful Sources

ICSAn Guidance Note – Electronic communications with shareholders 2013
FSA: Disclosure and Transparency Rules
http://fsahandbook.info/FSA/html/handbook/DTR
List! Issue No.14 Updated – April 2007

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| Part 13 (Resolutions and meetings): | • Sections 308–309 the manner in which notice is to be given and the publication of a notice on a website,  
• Section 333 on sending documents relating to meetings etc. in electronic form. |
| Part 37 (Companies: supplementary provisions): | • Sections 1143–1148 on ‘sending or supplying documents or information’. |
| Part 38 (Companies: interpretation): | • Section 1168 for definitions of ‘hard copy and electronic form and related expressions’,  
• Section 1173 for the definition of working day. |

Schedule 4: on documents and information sent or supplied **TO** a company.

Schedule 5: on communications **BY** a company.

**DTR 6.1.8**
Companies trading on a regulated market are also subject to the electronic communications requirements of the FSA’s Disclosure and Transparency Rules.