

UK AGM Season: How to Deal with Challenges Posed by COVID-19

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As the 2020 annual general meeting (**AGM**) season approaches, public companies incorporated in England and Wales need to consider what actions they can take to ensure their AGM is compliant with the law and how to facilitate shareholder participation in light of new challenges posed by COVID-19.

Recent updates

On 26 March 2020, the UK Government passed into law in England and Wales certain “Compulsory Measures” prohibiting, among other things, public gatherings of more than two people. This will impact public companies looking to hold their AGMs in the coming months.

On 26 March 2020, a guidance note (the **Guidance Note**) was published by several law firms and The Chartered Governance Institute, with the support of the Financial Reporting Council, the City of London Law Society Company Law Committee, GC 100, the Investment Association and the Quoted Companies Alliance setting out their views regarding how listed companies incorporated in England and Wales might implement contingency plans in light of the Compulsory Measures in the absence of any relevant legislative changes. The UK Government Department for Business, Energy and Industrial Strategy (**BEIS**) also reviewed the Guidance Note.

On 28 March 2020, BEIS announced the government’s intention to introduce legislation at “the earliest opportunity” to ensure that companies required by law to hold AGMs will be able to do so safely and in a way which is consistent with the Compulsory Measures. The BEIS and FRC have since released a Q&A providing more details.

Updates on proposed legislation from the Q&A

According to the BEIS and FCA, the legislative measures for AGMs are being developed urgently. Details are still to be finalised, but it is envisaged that the measures will temporarily permit companies to:

- Hold “closed” meetings with a minimum number of people by way of telephone or other equivalent means of communication (and in some cases, companies may be able to override the company’s articles to do so)
- Satisfy the quorum by telephone or electronic means
- Restrict the communication of notices and other meeting documentation to emails, websites and other electronic media rather than produce hard copies (even when requested)
- Produce annual reports and other documentation as lower quality publications (which are quicker and easier to produce), provided information is accurate and up to date

Virtual meetings will not be mandated for a number of reasons, including the limited number of service providers and the sheer

number of different companies (ranging from the smallest to the largest) that will need to hold meetings within a short timescale.

It is expected that the legislation will allow the deadline within which AGMs have to be held to be extended temporarily, although it is anticipated that the vast majority of companies will wish to hold meetings within their normal timeframes.

Although the legislation is being brought forward as soon as possible, many AGMs are imminent and the following considers how AGMs can be managed within existing restrictions.

Delaying the AGM

Currently, companies considering a delay to the AGM need to note the AGM timing requirement under the Companies Act 2006 (the **Companies Act**) and the expiry date of existing authorities:

- Under the Companies Act, a public company's AGM must be held within six months of its financial year-end. Those with December year-ends that typically hold their AGMs in April or May can consider delaying until June to take full advantage of the six-month period in the hope that COVID-19 impacts will be diminished by then. Those with March year-ends will have more time to see how matters develop.
- Companies also need to be mindful of the expiry of current shareholder authorities. A resolution displaying pre-emption rights, for example, will typically have expired if the AGM is held more than 15 months after the 2019 AGM.

In the circumstances, institutional investors are unlikely to object to the AGM being convened on less than 20 working days' notice (as required by the UK Corporate Governance Code for companies subject to the Code) and so generally, companies can convene the AGM on 21 clear days' notice absent any longer period in their articles of association (**articles**).

Changing the AGM date, time and location

If the AGM has already been convened and notice posted to shareholders, companies (whilst mindful of the time limits just noted) can check their articles for powers to postpone the AGM. A power to postpone must be exercised in good faith and for proper purposes. Directors should therefore always carefully consider and minute the reasons for postponement and what alternative steps were considered, which may include a hybrid or a wholly virtual meeting.

Where postponement is not permitted, companies can consider adjourning the meeting until the next practicable date.

Note that subject to the articles, adjournment requires the chair and sufficient shareholders for a quorum to attend the venue and pass an adjournment motion (however, the chair generally holds sufficient proxies for this to pass).

Venues may close or cease to be available. Companies should think about alternative options if the venue for a meeting has to change.

AGM arrangements

Do the articles allow for wholly virtual or hybrid meetings?

Companies hoping to increase the flexibility of their AGM can check whether virtual or hybrid meetings are permitted by their articles and whether they can support such meetings in practice.

A wholly virtual AGM allows the meeting to be held by entirely electronic means. A minority of companies may have specific

provisions in their articles which allow for this. Standard investor guidance recommends a physical meeting should be provided for governance reasons. Given current safety concerns, it is expected that investors will be more understanding. Nevertheless, when planning a virtual meeting, it would be sensible to have clear statements assuring shareholders that they will have the same participation opportunities as in a physical meeting.

A hybrid AGM, on the other hand, is a combination of a physical and virtual meeting – shareholders can attend physically or participate online. UK hybrid AGMs have been fairly rare, but increasing demand is expected in the coming months on a limited number of service providers. Therefore, arrangements should be made as soon as possible if a hybrid AGM is proposed. Note that a hybrid meeting also requires a meeting at a physical location, and so, the considerations set out in the following paragraphs below will still apply.

Is physical attendance of shareholders and proxies at the AGM permitted given the Compulsory Measures?

Shareholders should not attend the AGM in person as gatherings of more than two people are prohibited unless living together or for “essential work purposes”. The Guidance Note makes it clear that attendance at an AGM by a shareholder is not essential for work purposes unless attendance is specifically required to form the quorum.

The Guidance Note states that companies should make it clear in their notice of the meeting, or by announcement via a regulatory information service and updating their website (where details of the meeting have already been published), that public gatherings of more than two people are not permitted under the Compulsory Measures and that therefore shareholders are not allowed to attend the meeting in person. The wording should be unambiguous (i.e., stronger than merely recommending that shareholders do not attend) and should make it clear that anyone seeking to attend the meeting will be refused entry to the meeting and that the shareholders should vote by proxy. It should also note how shareholders can remain engaged through, for example, asking questions of directors, and it should note that the current situation is evolving and that further announcements may be required. See more on these points below.

Can companies prevent shareholders and proxies from attending an AGM?

The chair of any general meeting has broad common law powers to preserve order at that meeting, ensure the safety of the attendees and allow the business of the meeting to be transacted. Many companies’ articles back up these powers with express provisions to, for example, refuse entry to an AGM on security grounds.

As attendance of more than two people at an AGM (other than where this is essential for work purposes) would not be permitted under the Compulsory Measures, the Guidance Note recommends that the chair should exercise their powers to exclude excess attendees. This means that any of those whose presence is not essential for work purposes should be excluded, once two people (including the chair of the meeting) are present.

For some companies, it may be necessary to have additional personnel at the location of the meeting (if not in the room where it is held) to ensure its proper conduct and safe operation (such as technicians, if there is to be a webcast, and/or security staff), but this should be kept to the minimum and only where this is essential for work purposes.

How do you ensure the meeting is quorate?

Companies should check their articles to confirm the quorum needed to proceed. Otherwise, two members present in person or by proxy is required by the Companies Act.

The Guidance Note envisages that this quorum may be satisfied by two director and/or employee shareholders of the company attending the meeting, with resolutions being passed by the proxy votes of those who have not been able to attend in person (or by appointing one of those employees as a corporate representative under the Companies Act) and the votes of those in attendance.

The Guidance Note notes that this might be achieved by, for example, an executive director and the company secretary being present at the general meeting, provided that each is a member, a corporate representative or appointed as a proxy. The fact that their presence is necessary for a quorum to be formed means their presence is essential for work purposes (and therefore permitted), especially given they are both employees and the company needs to deal with the business of the meeting.

If the articles require more than two shareholders for a quorum, these members are typically able to be present in person or represented by proxy. If so, two natural persons can be present to constitute a meeting, but one of them (for example, the chair) might be appointed as proxy for the other members to fulfil the quorum requirement. If, though unlikely, more than two persons are physically required to be present, then additional members or proxies may be required to attend in person. This should be kept to a minimum and social distancing observed.

Who will chair the meeting?

This will usually be provided in the articles and is likely to be the chair of the board or, in his or her absence, another director. It may be helpful for a director to attend as part of the quorum so it is clear who will act as chair. The articles could also allow for a member to be elected by a resolution passed at the meeting.

To make sure the chair of the meeting can exercise all proxy votes submitted, companies should make sure the form of proxy appoints the chair of the meeting (and not the chair of the board or a specific director who may be unable to attend on the day). Shareholders should be warned that if they appoint someone other than the chair of the meeting as their proxy, such proxy will most likely not be permitted to attend the meeting and vote on their behalf.

Printing and posting of notices

Companies should check if previous specific consent has been obtained from individual shareholders to use electronic communication in accordance with the Companies Act. Companies that have not obtained this consent will need to send hard copy notices (and accompanying documents) for the AGM. These companies need to work with their registrars to manage possible disruptions so necessary documents are printed and sent in time.

If there is postal disruption, companies are likely to be able to rely on the deemed notice by law or in their articles that notice has been received by a certain time (usually 24-48 hours after posting). Companies however, should monitor the situation and take mitigation action if possible (for example, by using alternative postal services).

Steps to encourage shareholder participation

Companies should consider the following to encourage shareholder participation at the AGM.

Proxies

As noted above, shareholders should be encouraged to submit their votes by proxy. For companies that usually only allow proxies to be appointed via hard copy proxy forms, consider opening up other means for submission of proxies – for example, via the

registrars' website and/or CREST voting.

Observing the meeting and asking questions

Using technology such as a livestream webcast or recordings made available at a later date can enable shareholders to observe the meeting. Note that these shareholders will not count towards the quorum or be able to vote at the AGM (other than by proxy). In addition, it should be made clear that these facilities are provided for information purposes only and not as a formal part of the meeting.

Further, setting up online portals to enable shareholders to submit questions for management before the meeting can allow these questions to be addressed at the AGM or after the AGM on the company's website. If there is a live webcast, it may also be possible for the chair to exercise their discretion during the AGM to allow questions from observing shareholders.

Chair's covering letter

Companies can consider including additional language in the chair's covering letter in the notice. This could notify the issues caused by COVID-19 and that the company shall update shareholders through its website if there are further developments. This will allow some flexibility for companies regarding the arrangements as it is easier to update the website continuously than anticipate in advance what will be required. Further, the letter can explain the basis on which the AGM is being held and encourage the use of voting by proxy.

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