

UK Public Companies – Shareholder Proposals: Background and Process

This note was prepared on 5 March 2021. Your attention is drawn to the disclaimer at the end of this note.

Background

While shareholder requisitioned resolutions relating to climate change are increasingly prevalent in the UK, they are still relatively rare. That said, at least one resolution has already been proposed for a FTSE 350 company in the 2021 AGM season, with ShareAction proposing a resolution ahead of HSBC's April 2021 AGM, and further resolutions are expected to follow.

In November 2020, the Asset Management Taskforce recommended that shareholders should use requisitioned resolutions more proactively as an escalation tool and that the asset management industry should consider the use of model resolutions, in particular, on climate change.

Investors in the UK, in particular members of the Investment Association (the "IA"), expect that premium listed companies should comply with the Taskforce on Climate Related Financial Disclosures ("TCFD"). In its latest Shareholder Priorities, the IA notes that it expects all listed companies to report in line with TCFD in 2021 and will "amber top" the ESG report of any company in a high risk sector (being (i) financials, (ii) energy, (iii) transportation, (iv) materials and buildings and (v) agriculture, food and forest products) that does not address the four pillars of TCFD.

Whilst mandatory reporting in accordance with the TCFD is not yet compulsory in the UK (albeit more limited greenhouse gas reporting has been required since 2013), the Listing Rules were amended in December 2020 to require UK incorporated commercial companies which have a premium listing to state, in their annual reports for financial years beginning on or after 1 January 2021, whether they comply with the TCFD recommended disclosures and to explain any non-compliance. The UK Financial Conduct Authority ("FCA") is expected to launch a consultation in the first half of 2021 in relation to proposals to extend the application of the new listing rule (still on a comply or explain basis) to a wider scope of listed issuers, and is also considering consulting on guidance making clear that listed issuers should only take the 'explain' (rather than 'comply') route in limited circumstances. The UK government has also announced it intends to make TCFD disclosures mandatory across the economy by 2025, with a significant portion of mandatory requirements in place by 2023, going beyond the 'comply or explain' approach in the Listing Rules. Accordingly, the FCA is considering consulting (although it may not do so until 2022) on when listed issuers should be subject to mandatory TCFD disclosures.

English law provides an avenue through which shareholders of public companies can submit proposals, including proposals relating to disclosure of a company's greenhouse gas emission levels and any reduction plans relating thereto, to be voted on at annual meetings of public companies. Although these proposals are usually (though not necessarily) advisory or "precatory", they can still have a big impact on a company's business and operations. In the UK, even where the resolutions are not passed, they may lead to publicity as where such resolutions are not recommended by the board and receive 20% of more votes in favour, the company will be required to take certain actions under the UK Corporate Governance Code and will be noted in the Investment Association's public register.

Requisitioned Resolution

Members of a public company can require a company to give, to all members entitled to receive notice of the next AGM, notice of a proposed resolution (s.338 Companies Act 2006 ("CA 2006")). The resolution must not be:

- ineffective (for example, inconsistent with the company's constitution);
- defamatory of any person; or
- frivolous or vexatious.

Where a shareholder proposes a resolution to direct a company to take a specific action, this would typically be passed pursuant to a 'member reserve power' in a company's articles of association which requires the passing of a special resolution (meaning 75% or more of the votes cast at the AGM must be in favour of the resolution for it to be passed).

Members' statement

Under s.314 CA 2006, members can also require the company to circulate, to all members entitled to receive a general meeting notice, a statement of not more than 1,000 words relating to:

- a matter referred to in a proposed resolution to be dealt with at that meeting; or
- other business to be dealt with at that meeting.

The request may be in hard copy or electronic form, must identify the statement to be circulated, must be authenticated by the persons making it and must be received by the company at least one week before the meeting to which it relates. A document being 'authenticated' means that where it is:

- in hard copy, it is signed by the person sending it (where it is signed by an English company it must have been signed by a duly authorised officer or attorney or under seal); and
- in electronic form, the identity of the sender is confirmed in a manner specified by the company or, where no such manner has been specified, that it contains or is accompanied by a statement of the identity of the sender and the company has no reason to doubt the truth of that statement.

Eligible Shareholders

The request for a requisitioned resolution and/or a members' statement must be from either:

- members representing at least 5% of the total voting rights of all members who have a right to vote at the meeting to which the request relates (excluding voting rights attaching to any treasury shares); or
- at least 100 members who have a right to vote at the meeting to which the request relates and hold shares in the company on which there has been paid up an average sum, per member, of £100.

It should be noted that references in CA 2006 to members are to direct shareholders, being those persons who are listed in the register of members of a company. Investors who hold their shares through a nominee or custodian (which are referred to in this note as indirect holders) will not be a member of a company for the purpose of CA 2006 although they may be able to exercise rights as an indirect holder. S.153 CA 2006 permits indirect holders to make (or join in) a requisition under s.314 CA 2006 and s.338 CA 2006 as if they were a member, subject to the requisition meeting certain criteria which are set out below.

Proof of Eligibility

Where the request is made by shareholders representing more than 5% of the total voting rights or by more than 100 direct shareholders, the CA 2006 does not set out any particular requirements around confirming the eligibility of the requisitioners to make the request. However, the company will need to confirm that a valid request has been made so sufficient details should be included to enable them to do so, for example, the shareholder's full name and address, the number of shares they hold and their shareholder reference number.

Where the request is made by at least 100 people and some of those shareholders are indirect holders the following criteria need to be satisfied:

- (a) the request is made by at least 100 persons;
- (b) it is authenticated by all the persons making it;
- (c) in the case of any of those persons who is not a member, the following details are provided:
 - (i) the full name and address of the member who holds shares on behalf of that person;
 - (ii) that the member is holding those shares on behalf of that person in the course of a business;
 - (iii) the number of shares that member holds on behalf of that person;
 - (iv) that those shares are not held on behalf of anyone else or, if they are, that the other person or persons are not among the other persons making the request;
 - (v) that some or all of those shares confer voting rights that are relevant for the purposes of making the request; and
 - (vi) the person has the right to instruct the member how to exercise those rights;
- (d) in the case of members, it is accompanied by a statement that (i) it holds shares otherwise than on behalf of another person; or (ii) it holds shares on behalf of one or more other persons but those persons are not among the other persons making the request;
- (e) it is accompanied by such evidence as the company may reasonably require in respect of (c) and (d) above;
- (f) the total amount of the sums paid up on the shares held mentioned in (c) and (d) above, divided by the number of persons making the request, is not less than £100; and

- (g) the request complies with any other requirements of s.314 and s.338 CA 2006 as to content, timing or otherwise.

Sample letters for requisitioning a resolution and requesting circulation of a members' statement are set out at Appendix 1 (for shareholders holding more than 5% of the voting rights) and Appendix 2 (for requests made by at least 100 persons). Shareholders should coordinate any requisition for resolutions with competent legal advisers.

Submission Timeline

A request to include a resolution at an AGM should be received by the company not later than (i) 6 weeks before the meeting, or (ii) if later, the time at which the notice of meeting is given. A request to circulate a members' statement must be received at least one week before the meeting to which it relates. As these two requests are often used together, they would most commonly be submitted at the same time (at least 6 weeks ahead of the meeting) so that they can both be included in the AGM notice.

Expenses

Where a members' statement or requisitioned resolution relates to a public company AGM and a valid request is received before the end of the financial year preceding the meeting¹, the company is required to pay the expenses of circulating the statement, otherwise the members must pay the costs (unless the company resolves to do so). Where the members are required to pay for the circulation of the statement and/or resolution, a sum reasonably sufficient to meet expenses of circulation is required to be given to the company at least one week before the meeting (in the case of the statement) and the later of (i) 6 weeks before the meeting and (ii) the time at which the notice of the meeting is given (in the case of a requisitioned resolution).

Practical points

It may be helpful to discuss any proposed requisitions with the Company Secretary prior to submission to ensure the requisite formalities are met. While, from a legal perspective, CA 2006 often requires certain actions to be taken by members (rather than indirect holders) a company may nevertheless chose to accept a request signed by an indirect holder in lieu, cognisant of the fact that: (i) indirect holders will routinely have the ability to become a member of the company should they so elect; and (ii) almost every institutional investor will hold their shares indirectly² and the board may not wish to stifle the views of institutional holders.

If a company refuses to accept a requisition submitted by an indirect holder (on the basis that CA 2006 requires a member to request the same) there are a few options open to an indirect holder to pursue the requisition in that they could (i) ask the custodian/nominee, as the legal holder, to sign the requisition, or (ii) procure the transfer of sufficient shares into their own name, either by holding them in a sponsored CREST account or arranging for the shares to be materialised into certificated form and transferred to the requisitioner.

¹ A company may, in its articles, agree to bear the costs and expenses by reference to a later date (but not an earlier one) should it so choose. It is therefore advisable to check the company's articles of association.

² Most institutional investors will have a preference for holding their shares in dematerialised form (i.e. in CREST) which requires the legal holder to be a CREST member or alternatively have a sponsored CREST account. Institutions rarely have the infrastructure necessary to become a full CREST member - the most common way of holding interests in dematerialised shares is for a CREST member (usually a large financial institution) to act as nominee for the institutional investor.

The Company's website should also be checked as it may set out additional details or information to assist shareholders with requisitions.

Bases for exclusion

In order for the company to be required to include the resolution and members' statement in the AGM notice, it must meet the requirements under the CA 2006 (as set out above). Common reasons for the company querying the validity of the request or rejecting it are:

- it has been signed by the beneficial holder rather than the legal holder of the shares (frequently a nominee/custodian) as (other than where s.153 CA 2006 is being used or the articles expressly provide for member nominated rights to be afforded to non-members under s.145 CA 2006) the request should be signed by the legal holder of the shares, i.e. the person whose name is on the register of members;
- it has not been 'authenticated' (see above) by the requisitioners; and
- insufficient shareholding details have been provided and it is not clear how many shares the requisitioners hold, so the company cannot determine whether the thresholds are met.

Conclusion

The CA 2006 provides shareholders of public companies with a method to voice their concerns at annual general meetings, but the thresholds are higher than in other jurisdictions and are not always easy to satisfy. While the rules are relatively straightforward, shareholders are recommended to appoint their own legal advisers to ensure that their requests comply with the legal criteria. The earlier a request to propose a resolution and/or circulate a members' statement is submitted, the more time there is to ensure that it is correct and is accepted by the company ahead of the AGM posting date. As noted above, if the requests are submitted ahead of the financial year end, the requisitioner does not have to pay the costs associated with circulating them to shareholders.

Counsel

Investors considering taking any of the actions described in this note should seek independent legal advice in advance from their own counsel.

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APPENDIX 1 REQUISITION LETTER FOR REQUEST MADE BY HOLDERS OF 5% OF THE VOTING RIGHTS

Name of member:

Address:

In accordance with [s.314 and] s.338 Companies Act 2006 I/we hereby request [●] (the "**Company**") give to members of the Company entitled to receive notice of the 202[●] Annual General Meeting of [●], notice of the attached resolution, which is a resolution that may properly be moved and is intended to be moved at that meeting[, and supporting statement] ([both of] which I/we have signed for the purposes of identification).

I/we confirm that:

1. I/we is/are a member of the Company (that is the person whose name appears on the Company's Register of Members);
2. I/we hold: ordinary shares (the "**Shares**") (with shareholder reference number: [●]);
3. That the Shares represent over 5% of the total voting rights of all members of the Company who have a right to vote at general meetings (excluding any voting rights attached to shares in the Company held as treasury shares) on the basis of the Company's total voting rights disclosure as at [●] 202[●]; and
4. All the Shares confer voting rights that are relevant for the purposes of making requests under [s.314 and] s.338 Companies Act 2006.
5. [In the event that the Company does not resolve itself to pay the expenses of the Company in complying with [s.314 and] s.338 Companies Act 2006, I/we undertake to pay those expenses and I/we tender to you a cheque in the sum of £[●], being a sum which I/we believe is reasonably sufficient to meet the Company's expenses in complying with the relevant section[s]. If the actual expenses of the Company exceed such amount, I/we agree to pay such excess on demand.]³
6. Attached hereto is;
 - (a) a signed copy of the resolution to be requisitioned;
 - (b) [a signed copy of the members' statement to be circulated;] and
 - (c) if the shares are held by a corporate body, evidence of signing authority to execute the above and this form (e.g. power of attorney).

³ Include this wording where the request is submitted after the date which is the later of: (i) the end of the financial year preceding the company's AGM; and (ii) such later date as may be specified in the Company's articles after which the company will not bear the costs of circulation.

.....

Signature of Member

Date:

Appendix A: Resolution

[Appendix B: Supporting Statement]

APPENDIX 2 REQUISITION LETTER FOR REQUEST MADE BY AT LEAST 100 MEMBERS⁴

Name of member/indirect shareholder⁵:

Address:

In accordance with [s.153⁶,] [s.314] [and] s.338 Companies Act 2006 I/we hereby request [●] (the "**Company**") give to members of the Company entitled to receive notice of the 202[●] Annual General Meeting of [●], notice of the attached resolution, which is a resolution that may properly be moved and is intended to be moved at that meeting[, and supporting statement] ([both of] which I/we have signed for the purposes of identification).

I/we confirm that:

[For Indirect Investors]

1. [the full name and address of the member who holds shares on behalf of me/us (the "**Member**") is:

[insert name and address of the member]
2. the number of shares the Member holds on behalf of me/us is:

[insert number of shares] (the "**Shares**")
3. the Member is holding the Shares on behalf of me/us in the course of a business;
4. **EITHER** [the Shares are not held on behalf of anyone other than myself/ourselves] **OR** [the other person or persons on whose behalf the Shares are held are not among the other persons making this request];
5. some or all of the Shares confer voting rights that are relevant for the purposes of making requests under [s.314 and] s.338 Companies Act 2006;
6. I/we have the right to instruct the Member how to exercise the voting rights; and
7. the total amount paid up on the Shares is £[●].]

[For Direct Investors]

8. [I/we is/are a member of the Company (that is the person whose name appears on the Company's Register of Members);
9. I/we hold: ordinary shares (the "**Shares**") (with shareholder reference number: [●]);

⁴ This template assumes that some of the requisitioners hold their shares in nominee accounts and, therefore, refers to section 153 Companies Act 2006.

⁵ Not all requisitioners need to sign the same letter, the requests can be separate so long as they contain the same resolution and/or members' statement.

⁶ To be included for indirect shareholders only.

10. **EITHER** [I/We hold the Shares otherwise than on behalf of another person] **OR** [I/We hold the Shares on behalf of one or more other persons but those persons are not among the other persons making this request];
11. the total amount paid up on the Shares is £[●]; and
12. the Shares confer voting rights that are relevant for the purposes of making requests under [s.314 and] s.338 Companies Act 2006.
13. [In the event that the Company does not resolve itself to pay the expenses of the Company in complying with [s.314 and] s.338 Companies Act 2006, I/we undertake to pay those expenses and I/we tender to you a cheque in the sum of £[●], being a sum which I/we believe is reasonably sufficient to meet the Company's expenses in complying with the relevant section[s]. If the actual expenses of the Company exceed such amount, I/we agree to pay such excess on demand.]^{7]}
14. Attached hereto is;
 - (a) a signed copy of the resolution to be requisitioned;
 - (b) [a signed copy of the members' statement to be circulated;] [and]
 - (c) if the shares are held by a corporate body, evidence of signing authority to execute the above and this form (e.g. power of attorney)[;
 - (d) evidence of the custodian holding, including designation or CREST code and account details in which the shares are held, signed by the custodian; and
 - (e) evidence of signing authority by the custodian (e.g. power of attorney)]⁸.

.....
 Signature of Indirect Investor/Member

Date:

Appendix A: Resolution

[Appendix B: Supporting Statement]

⁷ Include this wording where the requisitioner is not responsible for bearing the costs of circulation (i.e. the requisition is received after the date which is the later of: (i) the end of the financial year preceding the company's AGM; and (ii) such later date as may be specified in the Company's articles after which the company will not bear the costs of circulation.

⁸ Paragraphs (d) and (e) are required for indirect shareholdings only.