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The Quoted Companies Alliance

David Styles
Corporate Law and Governance Directorate
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30 January 2009

Dear Mr. Styles,

BERR - IMPLEMENTATION OF THE DIRECTIVE ON THE EXERCISE OF CERTAIN RIGHTS OF SHAREHOLDERS IN LISTED COMPANIES – A CONSULTATION DOCUMENT

INTRODUCTION

The Quoted Companies Alliance (QCA) is a not-for-profit membership organisation dedicated to promoting the cause of smaller quoted companies (SQCs), which we define as those 2,000+ quoted companies outside the FTSE 350 (including those on AIM and PLUS) representing 85% of the UK quoted companies by number. Their individual market capitalisations tend to be below €500m.

The QCA is a founder member of European**Issuers**, which represents over 9,000 quoted companies in twelve EU member states.

RESPONSE

Thank you for giving us the opportunity to comment on the proposals contained in your paper. Please find attached a detailed response to the consultation questions prepared by the QCA's Legal Committee.

If you wish to discuss any of the comments, we will be happy to meet.

Yours sincerely,

John Pierce
Chief Executive

The Quoted
Companies Alliance

IMPLEMENTATION OF THE DIRECTIVE ON THE EXERCISE OF CERTAIN RIGHTS OF SHAREHOLDERS IN LISTED COMPANIES

Response to BERR consultation
from the
Quoted Companies Alliance

30 January 2009

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IMPLEMENTATION OF THE DIRECTIVE ON THE EXERCISE OF CERTAIN RIGHTS OF SHAREHOLDERS IN LISTED COMPANIES – A CONSULTATION DOCUMENT

1. RESPONSE TO SPECIFIC QUESTIONS RAISED

Question 1

Do you agree that this is an effective way of enabling the splitting of votes under the Companies Act 2006 (CA 2006)?

Introduction

We do not believe that the changes proposed by Regulations 2 and 3 have removed the confusion arising from the operation of the voting provisions in the CA 2006.

Overall, we have had difficulty in eliciting BERR's intentions as regards the splitting of votes on a show of hands.

Our response below assumes that, as indicated in paragraph 3.5 of the consultation paper, BERR has interpreted Article 13.4 of the Directive as requiring that a nominee has the ability to split votes both on a show of hands and on a poll (in each case, whether acting in person or by proxy).

If, instead, the Directive can be interpreted as simply requiring that there be a facility for the splitting of votes (ie, by demanding a poll) then, because of the difficulties highlighted in our response, our preference is very much for a straightforward approach when voting on a show of hands. Companies need to be able to establish the result of a vote on a show of hands quickly and easily. This would involve reverting to a "one member, one vote" rule for votes on a show of hands, whether in person or by proxy/ies. However, whilst this approach is one possible interpretation of proposed new section 285, the consultation paper does not indicate that it is the intention of BERR to alter the current position (explained in more detail in our response) whereby a member can appoint multiple proxies as long as they all represent different shares. If this is the intention, then this needs to be clarified. The issues highlighted in our response relating to the difficulties of applying section 285(2) in conjunction with section 285(1) remain relevant.

Response

As explained above, our response is given on the basis that the Directive has been interpreted as requiring that nominees have the ability to split votes both on a show of hands and on a poll. In this respect, our main conclusions are that:

- for a nominee acting in person, there is no clear provision enabling the splitting of votes on a show of hands. If this is intended to flow from the application of section 152, the drafting does not appear to be effective to achieve this;

- for a nominee acting by proxy, the position appears to be more restrictive than is currently the case. For example, under the current legislation a member (whether a nominee or not) holding 10 shares may appoint a proxy in respect of each of his shares – *ie* 10 proxies – to vote on a show of hands. The changes made to section 285 appear to mean that, going forward, all of those proxies will be taken together, permitting the member only one vote on a show of hands; and

- the policy as regards the operation of section 152 is unclear. Is it intended that, in any case where a member holds shares on behalf of more than one person, notifications to the company should always be made in accordance with that section? The consultation paper itself identifies that there has been confusion with regard to the

interaction between section 152 and section 322, but does not appear to clarify the issue.

The ability to ascertain with relative ease the voting position on any given resolution is vital. Any ambiguity in this respect can put the chairman of the meeting in a difficult position, lead to doubts as to the effectiveness of resolutions and place companies at risk that shareholder decisions will subsequently be challenged. Any legislative changes that are made must therefore achieve clarity and certainty in this respect.

Detailed reasoning is set out in Appendix A to this response.

Question 2

Do you agree that these changes permit corporate representatives for the same corporate shareholder to vote in different ways at company meetings?

A person with background knowledge of the problems arising under the current section 323 would be able to interpret the revised provision as permitting corporate representatives to vote in different ways at company meetings. However, the drafting of new section 323(5) is somewhat opaque. The teams that have worked with ICSA on the Designated Corporate Representative (DCR) method will be best placed to comment on appropriate wording in this respect. However, at a minimum, it seems that the wording in ss(5) needs more clearly to reflect the idea of different parcels of shares.

Question 3

Do you agree that the right to demand a poll should also be available by correspondence in advance?

Yes. If the person(s) is/are a member(s) who would be entitled to call a poll if he/they were present in person or by corporate representative or by proxy at the meeting.

We do not believe that the additions to sections 282 and 283 permit the right to demand a poll also to be exercisable by correspondence in advance. In our view, the amendments made by Regulation 5(2) go no further than confirming whose votes count in determining whether a resolution has been passed by the necessary majority. A further amendment to the CA 2006 (probably in section 321) is required to achieve this result.

Question 4

Do you agree that the obligations of proxies need to be stated in this way?

Agreed.

We also think it would be helpful to clarify that any breach of this section does not prejudice the result of the vote and that there is no requirement on the company to verify such instructions.

Question 5

We would welcome your views on whether, and if so how, we should attempt to define "electronic means accessible to all shareholders".

As the requirement to offer *"electronic means accessible to all shareholders"* is a pre-requisite to the lower 14-day notice period for general meetings, we believe that this condition should be satisfied by companies simply offering a facility to appoint a proxy by electronic means. Nothing further should be required.

Most traded companies will not want to adopt a further system for electronic voting. We consider that any further system would be likely to be unwieldy and would not be conducive to the orderly conduct of general meetings or to easily and clearly determining the outcome of the meeting.

Accordingly, in order to confirm when this condition will be satisfied, we consider that the proposed new wording in section 307A(2) of the CA 2006: "*For this purpose the facility to appoint a proxy by electronic means is a facility to vote by electronic means"* should be amended to clarify that if a company offers any such facility (whether itself or through a third-party provider, including via CREST) this condition is deemed to have been satisfied. If this clarification is not given, a company that, for example, utilises the CREST proxy voting service will be unsure whether it can safely rely on a 14-day notice period.

Furthermore, we believe that this approach is consistent with the proposals of the Rights Issue Review Group to shorten the period for rights issues in the UK.

Finally, we believe that section 1168, which was drafted in relation to the electronic communications provisions of the 2006 Act, needs to be clarified (so that it clearly applies to voting by electronic means) if it is to be used as the source for the definition of "electronic means" for the purposes of proposed new section 307A.

Question 6

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 the other special resolutions?

Although the two-thirds majority introduces an additional level of shareholder approval under English law (which has previously been based on resolutions being passed by a simple majority or a 75% majority) this Committee agrees that, in order to facilitate traded companies holding general meetings on 14 days' notice, a lower threshold of two-thirds should be permitted.

Again, we would refer BERR to the recent proposals of the Rights Issue Review Group and the announcement by the ABI on 30 December 2008, both of which contain measures to facilitate the shortening of the timescale for UK companies to raise capital by way of rights issues.

The Committee notes that members of the QCA's Corporate Governance Committee have expressed a preference for retaining the current UK practice of resolutions being decided by a simple majority and a 75% majority and would therefore prefer that the majority required to pass an enabling resolution should be 75% for the sake of simplicity.

This Committee would have no objection to the Government adopting this approach if this is supported by other representations.

Question 7

Do you agree that asking and answering of questions at meetings of traded companies requires implementation in this way?

We are concerned that the implementation of Article 9 of the Shareholders' Rights Directive by Regulation 12 of the proposed statutory instrument could lead to a charter for "pressure groups" and could disrupt general meetings or put the directors of traded companies in a difficult position.

Our preferred route would be for the matters in proposed new section 319A(2)(a) to be moved to section 319A(2)(c) so as to be at the discretion of the chairman of the meeting. We believe that this is consistent with Article 9 which permits Member States to allow companies to take measures to ensure the identification of shareholders, the good order of general meetings and their preparation and the protection of confidentiality and business interests of companies.

We also consider that proposed new section 319A(2)(c) should be amended to allow the chairman of the meeting to rule questions out of order where they would be against the business interests of the company (as permitted by the Directive but not currently reflected in the drafting).

In addition, we consider the proposed statutory instrument should include an extra exemption which would permit questions not to be answered if the answer would involve the disclosure of inside information (within the meaning of the Market Abuse Directive).

It is hard to see how a question put to the meeting could "*interfere unduly with the preparation*" (emphasis added) for the meeting, although it is accepted that this reflects the language used in the Directive.

Question 8

Do you agree that members of a traded company who exercises Article 6 rights should not have to pay the expenses of circulation?

No.

We consider that the costs should be met by the member(s) concerned. To legislate otherwise would be to impose an additional burden on smaller traded companies. An appropriate balance has already been struck in section 340 of the CA 2006 by requiring the company to pay the costs of circulation if the request is received before the financial year end. This approach is consistent with the requirements of the Directive.

Additional technical comments:

Regulation 2: Voting on a show of hands

- The amendment in Regulation 2(1) should refer to "a simple majority of" ("a simple majority" appears twice in the sentence).

Regulation 3: Voting by proxy

- The drafting of section 285(1)(b)(i) requires clarification, for example: "if instructed by all those members to vote for the resolution, has one vote for the resolution; if instructed by all those members to vote against the resolution, has one vote against the resolution". It would be clearer if this was divided into two sub-paragraphs.

- As substituted, section 285 no longer deals with proxy protection in a situation where the articles provide that a proxy has fewer votes on a show of hands than the appointing member would. A member benefiting from weighted voting would therefore have to attend the meeting in order to exercise their rights. Is this change intended?

Regulation 9: Traded companies: notice of general meetings

- We believe that the words "or in advance" need to be inserted after "by proxy" in proposed new section 307A(3)(b)(ii) to make it consistent with the changes proposed by Regulation 5(2).

- Any filing requirement with regard to a two-thirds majority resolution should also be clarified.

Regulation 11: Traded companies: publication of information in advance of general meeting

- Article 5(4)(b) of the Directive refers to the total number of shares and voting rights "at the date of convocation" of the meeting. It would be helpful to include this clarification in new section 311A.

- Is Article 5(4)(e) adequately reflected in new section 311A?

Regulation 13: Traded companies: appointment of proxy and termination of proxy's authority

- Companies commonly require evidence of proxy appointment (*eg* where the proxy is appointed under a power of attorney, a copy of the power). Although the current drafting reflects the Directive, it would be helpful to clarify in proposed new section 327(A1)(b)(i) that the ability to require such evidence is deemed to be included in the expression "reasonable evidence of… the identity of the member and of the proxy".

Regulation 17: Traded companies: members' power to include other matters in business dealt with at AGM

- It would be helpful to include a caveat for defamatory, frivolous and vexatious matters, as is the case for section 338 (currently, and as proposed to be amended).

Regulation 22: Traded companies: share dealings before meetings

- The drafting of proposed new section 360B(1), whilst intended to be general, is ambiguous and could lead to challenges against articles which are not intended to be caught by the provisions. This is an instance where it may be preferable to more closely follow the wording of the Directive to achieve the desired result.

- Any final wording on standardising the record date process should satisfy the requirements of clearing houses, such as Clearstream & Euroclear, who currently apply blocking in the absence of formal procedures.

Response to question 1 of consultation: detailed reasoning

Votes on a poll

There does not appear to be any problem with the splitting of votes on a poll. However, the impact of section 152 on the process needs to be clarified:

- *Individual nominee (IN) acting in person* – IN can use section 322 to split votes. However, the question arises whether IN needs make a notification under section 152(2)/(3). The consultation raises this as an issue but does not appear to resolve it. The proposed addition of new section 284(5), whilst providing that the effect of section 152 is not restricted, does not make it clear how section 152 operates in conjunction with that section or section 322.

- *Individual nominee (IN) acting by proxy* – again section 322 applies. The IN can appoint different proxies to represent different shares (section 324(2)). New section 285(3) confirms that proxies can exercise members' rights in this respect. It is not clear whether section 152(2)/(3) notification is required where an IN exercises rights via one or more proxies. If such notification is required then, in addition to clarifying the point, it would be helpful to confirm that submission of an appropriate form of proxy will satisfy the notification requirement.

- *Corporate nominee (CN) acting by one or more corporate representatives* – the CN can use section 322 to split votes. Where there are multiple corporate representatives, the effectiveness of their votes is confirmed by the changes to section 323 (needs drafting clarification – see our response to Question 2). Is notification under section 152(2)/(3) required?

- *Corporate nominee acting by proxy* – same comments as for an individual nominee acting by proxy (see above).

Votes on a show of hands

The changes do not appear to enable the splitting of votes on a show of hands and arguably restrict this by comparison to the current position. As discussed above, any application of the notification requirement under section 152(2)/(3) also needs to be clarified.

- *Individual nominee (IN) acting in person* – it is not clear which section permits the IN to split votes. The legislation contains no equivalent to section 322, which applies only to votes on a poll. Section 284(2) provides that a member's right is to one vote on a show of hands (unless articles provide otherwise (section 284(4)). There is no provision stating that this one vote is divisible. Section 152 refers to the exercise of the "rights attached to the shares" – each share may carry the right to vote but unless the member is expressly entitled to more than one vote (as set out in section 322 as regards a poll) this does not seem to help. It appears that an extra step is needed to enable the splitting of votes on a show of hands, *ie* express provision that votes on a show of hands can be split if a member represents more than one person.

- *Individual nominee (IN) acting by proxy* – Under the current law, a member can appoint more than one proxy to represent different shares (section 324(2)). Every proxy duly appointed by a member has one vote (section 284(2)(b)). This has been interpreted to mean that a member can appoint multiple proxies, each of whom has a vote on a show of hands. New section 285(1)(a) provides that every proxy duly appointed by one member has one vote. However, if the member decides to appoint multiple proxies to represent different shares, new section 285(2) provides that references to the proxy in section 285(1) are to all the proxies taken together. This appears to mean that,

between them, the multiple proxies only get one vote and so, whilst a member can appoint different proxies to represent different parcels of shares, this does not lead to the effective splitting of votes.

Matters are complicated where, for example, two or more members each want to split their votes and appoint the same two proxies to vote different parcels of their shareholding. The effect of section 285(2), treating the proxies as taken together, appears to be to cancel out the effect of the split votes.

The confusion partly arises from the fact that, for the purposes of section 285(1), it is necessary to assess the position from the point of view of the proxy whilst section 285(2) requires analysis from the point of view of the member. In a situation requiring both sets of provisions to be applied, it does not appear possible to identify the voting entitlements with any certainty.

- *Corporate nominee acting by one or more corporate representatives* – similar issues arise as with an individual nominee acting in person (discussed above). There is no provision permitting the splitting of votes on a show of hands. New section 323(5) clarifies the effectiveness of split voting by corporate representatives. But no provision gives the power to split votes – as already discussed, section 152 does not appear to extend this far.

- *Corporate nominee acting by proxy* – same comments as for an individual nominee acting by proxy (see above).

We consider that the obvious difficulty in amending existing provisions of the CA 2006 to reflect, clearly and unambiguously, the respective voting entitlements of different categories of person merits consideration of a different approach. There could be no confusion if the provisions relevant to each category (*ie* individual acting on own behalf; individual acting as nominee for one person; individual acting as nominee for more than one person; company acting on own behalf, company acting as nominee for one person; company acting as nominee for more than person; proxy) were dealt with in separate, self-contained sections.

APPENDIX B

THE QUOTED COMPANIES ALLIANCE LEGAL COMMITTEE

Nicholas Narraway (Chairman)	Fasken Martineau LLP
Chris Barrett	Bird & Bird
Richard Beavan*/Martin Finnegan	Nabarro LLP
Matt Bonass	Denton Wilde Sapte
Jennifer Carter-Shaw	Curtis, Mallet-Prevost, Colt & Mosle LLP
Andrew Chadwick*	Bircham Dyson Bell LLP
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APPENDIX C

THE QUOTED COMPANIES ALLIANCE (QCA)

A not-for-profit organisation funded by its membership, the QCA represents the interests of SQCs, their advisers and investors. It was founded in 1992 and originally known as CISCO.

The QCA has nearly 400 members. 75% of these are smaller companies quoted on the stock market, or companies with aspirations to join. 25% are drawn from the full range of professional advisory firms whose business is either wholly or significantly derived from servicing smaller companies.

The QCA is governed by an elected Executive Committee, and undertakes its work through a number of highly focussed, multi-disciplinary committees and working groups of members who concentrate on specific areas of concern, in particular:

- taxation
- introduction of, or changes to, legislation affecting SQCs
- corporate governance
- share schemes for employees
- trading, settlement and custody of shares
- structure and regulation of stock markets for SQCs; Financial Services Authority (FSA) consultation
- political liaison – briefing and influencing Westminster and Whitehall, the City and Brussels
- accounting standards proposals from the Accounting Standards Board
- company law reform

The QCA is a founder member of European**Issuers**, which represents over 9,000 quoted companies in twelve EU member states.

QCA's AIMS

As the only organisation dedicated solely to the particular interests of the SQC sector, the QCA has three primary goals:

Identification

To create a distinct identify for the SQC sector, and demonstrate its value to the stock markets and the UK economy.

Representation

To pro-actively pursue and represent the interests and requirements of the SQC sector to enable it to increase its contribution and ensure that its specific needs are addressed.

Affiliation

To build a strong and vocal collective body of support from within the SQC sector, among corporate directors and securities industry leaders.

DEFINITION

The Quoted Companies Alliance definition of Smaller Quoted Companies (SQCs) is:

- all fully listed companies – excluding the top 350 ie with market cap of £340m+
- plus companies quoted on AIM
- plus companies quoted on PLUS

The QCA also represents companies planning to float.

SQCs contribute to the economy:

- there are approximately 2,000 SQCs
- they represent around 85% of the total of quoted companies by number
- they employ 2 million people
- this figure represents around 10% of total private sector employment
- every 5% growth in the SQC sector could reduce UK unemployment by a further 100,000
- They generate:
  - corporation tax paid of £2.0 billion pa
  - income tax paid of £5.0 billion pa
  - social security paid of £2.0 billion pa

  The tax figures exclude business rates, VAT and other indirect taxes.

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