

Answers to AGM Questions Raised by the COVID-19 Pandemic

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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U.K. public companies preparing for this year's annual general meeting (AGM) season are facing a number of unprecedented challenges caused by the COVID-19 pandemic, as they seek to comply with their legal obligations while protecting shareholders' rights and ensuring their safety. In an announcement on 23 March 2020, Prime Minister Boris Johnson imposed unprecedented restrictions on public gatherings and travel in the U.K. in an effort to curtail the spread of the coronavirus. The government's lack of guidance on how companies should seek to satisfy their obligations relating to AGMs in these circumstances adds further uncertainty to an already complex situation.

While it is yet early days in a rapidly developing situation, the emerging trend, based on company announcements made in the wake of Prime Minister Johnson's announcement, appears to be that many U.K. public companies are proceeding to hold their AGMs where possible so that necessary business can be conducted, while also taking some combination of the following steps to account for the government's restrictions on travel and the size of public gatherings:

- limiting attendance at the meeting to the bare minimum necessary to satisfy the company's quorum requirements;
- changing the location of the meeting or providing for additional meeting places where proxy holders are located, in order to ensure no more than one shareholder or proxy holder will be in the same place, while satisfying the company's quorum requirements;
- strongly discouraging shareholders from attending the AGM and strongly encouraging them to vote via proxy;
- limiting the AGM to the formal business of the meeting and dispensing with corporate presentations, Q&As and refreshments;
- allowing shareholders to view meetings by livestreams or webcasts;
- restricting attendance of directors and nonshareholder employees and warning shareholders that there will be no board interaction at the meeting;
- limiting or prohibiting attendance by professional advisers;
- introducing mechanisms for shareholders to submit questions in advance or via telephone or electronic means, the answers to which may be posted on the company's website after the AGM (although this may not be practical for larger companies); and
- notifying shareholders of the need to monitor the company's website for further updates regarding any alternative arrangements.

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During the current situation, you should consider establishing a separate section of your website dedicated to responding to shareholder queries regarding COVID-19, including arrangements that are being made in relation to your AGM.

In addition, in light of the current public health emergency, other jurisdictions such as Luxembourg have recently introduced temporary measures to allow companies to hold shareholder meetings without participants attending in person. It is possible that the U.K. government may introduce legislation or issue ministerial guidance having similar effect. You should remain closely attuned to any such developments, which may impact arrangements for your AGM.

The Q&A below answers some of the key questions being asked by U.K. public companies in the course of their contingency planning. The Q&A is based on the requirements of the Companies Act 2006 and the provisions found in a typical set of articles of association for a U.K. public company; however each set of articles is different and may contain different requirements; you should review your articles carefully.

1. We have not yet sent the notice of our AGM, what is the deadline for sending the notice and holding the meeting?

You must give at least 21 clear days' notice of your AGM, although best practice guidance for premium-listed companies suggests giving 20 working days' notice. Deemed delivery dates in your articles should be factored into the timeline. In the absence of any express provision in your articles, the deemed delivery rules under the Companies Act 2006 apply (generally 48 hours after the notice was sent). Confirm with your registrar whether it is able to provide its normal services and, if so, the time required for posting the AGM notice and accompanying documents, in order to incorporate this into the timeline.

You must hold your AGM within six months of the end of your financial year, meaning companies with a 31 December year-end have until 30 June 2020 to hold their AGMs.

Bear in mind the expiry of existing shareholder authorities from last year's AGM when making contingency plans, which will typically expire 15 months after last year's AGM.

2. If we delay sending the AGM notice and holding the meeting, do we need to update our annual report, which has already been published?

Certain statements in your annual report pursuant to the Listing Rules and Disclosure Guidance and Transparency Rules must be made within a month of the date of the AGM notice. If you delay sending your AGM notice by more than a month after your annual report's date, you will need to update these statements.

The relevant statements include directors' interests and holdings of major shareholders.

3. What should we do if we are unable to print and deliver hard copies of the notice to our shareholders? Can we communicate with our shareholders solely by electronic means?

The Companies Act 2006 permits you to communicate with shareholders by electronic means (email or via a website) if you have obtained the consent of individual shareholders. Such consent can generally be deemed in respect of communications via a website if an individual shareholder's consent has been sought but such shareholder has failed to respond within 28 days.

You will still be required to send the notice and accompanying documents for the AGM in hard copy to all shareholders who have either not consented to receive electronic communications or who have chosen to receive all shareholder communications in hard copy.

In respect of website communications, bear in mind that a notification must be sent to each shareholder informing them that a document or notice has been posted on your website. You will need to send a hard copy notification if the shareholder has not expressly consented to email delivery. You should also review your articles for any additional restrictions.

4. Can we postpone our meeting if we have already sent the AGM notice?

Your board can resolve to postpone the meeting if permitted by your articles. Your articles may also specify the manner in which you must communicate any postponement and new arrangements being made for your AGM.

Even if your articles do not permit postponement, they will generally allow for adjournment, which achieves the same practical effect of the proposed resolutions being approved by shareholders at a later date. Articles often permit the chair to adjourn the AGM in the following circumstances:

- if the quorum is not satisfied;
- with the consent of the meeting by way of an ordinary resolution; or
- if it appears to the chair that an adjournment is necessary to protect the safety of any person attending or to ensure that the meeting is conducted in an orderly manner.

In any event, the postponed or adjourned meeting should be held within the same deadline as the initially scheduled meeting, *i.e.*, within six months of the end of the financial year.

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5. If we postpone the meeting, we will not be able to pay our final dividend on the expected date. Can we pay an interim dividend instead?

If you have sent the AGM notice proposing a final dividend but have decided to postpone your AGM, subject to any restrictions in your articles, your board may resolve to pay an interim dividend instead (assuming available distributable reserves, as shown in your latest annual or interim accounts). In such circumstances, you will need to make an announcement withdrawing your board's recommendation to pay a final dividend.

If you have not yet sent the AGM notice and are concerned about a potential change in your company's financial position prior to the payment of the proposed final dividend, it may be more prudent for your board to approve an interim dividend (clarifying its intention to pay such dividend subject to it being in the interests of the company) rather than a final dividend. Unlike a final dividend, which would become a debt enforceable against your company when the resolution is passed at your AGM, the decision to pay an interim dividend may be retracted by your board at any time prior to it being paid, which may allow for greater flexibility at this time of uncertainty.

6. Our AGM notice sets out details of a final dividend to be approved at the meeting. If our directors decide before the AGM not to pay any dividends until further notice, does the chair have discretion not to propose the resolution approving the final dividend at the meeting?

If between the date of the AGM notice's publication and the date of the meeting your board decides that paying a final dividend is no longer appropriate, you will need to announce via the London Stock Exchange's Regulatory News Service (RNS) that your board no longer recommends paying a final dividend and that accordingly it withdraws the proposed dividend resolution. At the AGM, the chair cannot unilaterally withdraw the resolution. Instead, the chair should explain the reasons for withdrawing the proposed dividend resolution and seek the consent of the meeting or propose a motion not to move the resolution set out in the notice.

7. Can we change the venue of the meeting and other arrangements that are set out in the AGM notice? If so, how do we communicate such changes to our shareholders?

Your articles will usually grant the board discretion to resolve to change the place, time or means of holding the meeting if it determines that holding it as originally intended is impracticable or unreasonable. Check your articles for any restrictions or additional procedural requirements.

You should notify shareholders of any change in venue by publishing an RNS announcement as soon as possible. Several companies have already made such announcements following the enhanced restrictions on travel announced by Prime Minister Johnson on 23 March 2020, often with a view to changing the venue to a location (or locations) readily accessible by a small number of proxy holders sufficient to satisfy the company's quorum requirements (please see below), and simultaneously discouraging other shareholders from attending the meeting in person.

8. The venue for our AGM is closed or inaccessible due to travel restrictions. Can we hold the meeting in another additional location?

Your articles may permit the board to allow for persons to attend the AGM by simultaneously attending and participating in satellite meetings at additional locations. The locations should be specified in the AGM notice. The satellite facilities must enable shareholders to participate, be heard and speak.

9. How do we ensure our meeting is quorate?

U.K. company quorum thresholds are usually relatively low and can therefore be satisfied by a small number of director or employee shareholders' attendance. The default quorum under the Companies Act 2006, in the absence of a relevant provision in your articles, is just two qualifying persons. In order to satisfy the quorum requirement in light of the recent travel and public gathering restrictions, some companies have chosen an AGM venue that the chair can access and added one or more other satellite meeting places (to the extent permitted by their articles). This will satisfy the quorum requirement by enabling attendance of a small number of additional shareholders (most likely other director or employee shareholders) while discouraging the physical attendance of other shareholders.

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10. Can we hold a meeting using electronic means? If so, how do we ensure the meeting is quorate and that shareholders are able to ask questions and vote?

While English law permits hybrid meetings, involving a simultaneous physical meeting and meeting by electronic means, there remains some debate surrounding whether wholly virtual meetings are permissible under the Companies Act 2006. There is only one example to date of a U.K. public company successfully holding a wholly virtual meeting (Jimmy Choo in 2016).

To hold a meeting using electronic means, you must check your articles to ensure such arrangements are permitted. You must also ensure that shareholders can speak, vote and, if required by your articles, see the chair. Shareholders will not count toward the quorum if they view the meeting by livestream webcast; you should therefore encourage them to submit a proxy ahead of the meeting instead. You will be required to plan and liaise with your registrar and any other relevant service provider ahead of time to ensure the availability of necessary technology for online shareholder identification, voting and Q&A. Your electronic provider will determine the voting logistics used to host the AGM.

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