

Electronic Communications – The New Regime

February 2007

The law has enabled companies and their shareholders to communicate electronically in certain contexts for a number of years, principally enabling companies to send annual accounts and reports, summary financial statements and AGM notices to their shareholders by e-mail, fax or via website. These provisions have been superseded by more expansive provisions in the Companies Act 2006 ("2006 Act"), which came into force at the beginning of this year (ahead of most other parts of the 2006 Act). These new provisions permit, but do not require, private or public companies and their shareholders to use e-mail, fax and websites to communicate electronically in a wider set of circumstances, although again, subject to shareholder consent. In order to make use of the new regime, a company must ensure that it has authority to communicate electronically, either through the insertion or amendment of an appropriate article in its articles of association, or by the passing of a shareholders' resolution expressly permitting electronic communication. Once a company has such authority, it must attempt to procure the individual agreement of each shareholder to communicate electronically.

Website communication

Where a shareholder agrees to electronic communication by website, a company can commence publishing notices of meetings, proposed resolutions, accounts and reports, summary financial statements and other documents on its website. The company must notify each consenting shareholder of the fact that the relevant information is available on the website and provide information on how to access it.

If a shareholder fails to respond to a company's invitation to communicate electronically by website within 28 days, the shareholder will be deemed to have agreed to such method of communication, and the company can commence publishing relevant information on its website.

Companies communicating electronically by website also need to bear in mind that since the beginning of the year, they are also under a separate obligation to ensure that their websites display their company name, number, place of registration and registered office.

E-mail or fax communication

Where a shareholder agrees to electronic communication by e-mail or fax, and provides a current e-mail address or fax number, a company may commence sending documentation via e-mail or fax as the case may be.

One of the key features of the new regime is that once a shareholder has agreed to communicate electronically by e-mail or fax, the company can provide its own e-mail address or fax number in the documentation that it sends to the shareholder (for example, in a notice of general meeting or in a proxy instrument), which enables the consenting shareholder to begin responding to the company electronically.

Hard copy communication

Where a shareholder does not agree to electronic communication, whether by website, e-mail or fax, the company will need to continue sending information to that shareholder in hard copy form. Even a shareholder who has agreed to communicate electronically by e-mail or fax, and has received an electronic version of a document, retains the right to require the company to send him a version of the document in hard copy form. The company must send the document, free of charge, within 21 days of receipt of the request. Finally, a shareholder who has declined a company's invitation to communicate electronically by website has a period of 12 months grace during which a company cannot again seek its agreement to communicate electronically in that way.

Listed companies

Companies listed on the main market of the London Stock Exchange will need to read the new electronic communications provisions of the 2006 Act in conjunction with the Financial Services Authority's new Disclosure and Transparency Rules on electronic communication, which came into force on 20 January 2007 pursuant to the UK implementation of the EU Transparency Obligations Directive. Amongst other things, a decision to communicate information electronically by a listed company must be taken in general meeting.

A listed company that does not currently communicate electronically may wish to use its 2007 AGM to begin taking the necessary steps to permit such communication. Where a listed company has express agreement already in place with its shareholders regarding electronic communication, the Financial Services Authority has provided informal guidance that it can rely on that agreement to continue communicating electronically, although it should ensure that any pre-existing agreement is wide enough to cover the additional flexibility provided by the new electronic communications regime.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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If you would like any further information regarding any areas covered in this Alert! or any Corporate issues please call the person at D&W with whom you normally liaise, or the following specialist:

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Further information is also available at the following weblinks:

Institute of Chartered Secretaries and Administrators Guidance on Electronic Communications with Shareholders 2007

http://www.icsasoftware.com/dl/ICSA_Electronic_Communications_with_Shareholders.pdf

Companies Act 2006 with the DTI's explanatory notes

<http://www.Opsi.gov.uk>

Financial Services Authority Disclosure and Transparency Rules

<http://www.fsa.gov.uk>

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