

The Continuing Evolution of Proxy Representation

By

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☞ Proxies; Shareholders; Voting by proxy

Introduction

While the UK and American corporate law systems are often characterised as providing shareholder democracy, this myth is frequently debunked by commentators who highlight obstacles in the path of shareholders wishing to involve themselves in corporate governance. The separation of ownership and control in public companies is long recognised as facilitating directors in having free rein over how company affairs are managed. Leaving aside geographic and time constraints in relation to shareholder attendance at general meetings, received wisdom in corporate governance theory is that dispersed ownership typically encompasses disaffected investors who are purely focused on the dividend and capital appreciation potential of their investment and disinclined to participate in company affairs. This is compounded by the common separation of legal and beneficial ownership of shares.

As every member of a company who is entitled to attend and vote at a general meeting of a company has a right to appoint a proxy on their behalf, proxy representation is sometimes trumpeted as a means of promoting shareholder democracy. The law relating to proxy representation has been evolving over the century and a half since provision for proxy voting in companies regulation began to be made in the mid-19th century. In truth, proxy representation is by no means a panacea to the democratic gap caused by the separation of ownership and control but it is a tool in the shareholder democracy toolbox and in its current state of evolution it provides some assistance to all but the most seasoned passive investor.

The objective of this article is to examine the evolution of proxy representation as a tool of shareholder democracy with respect to listed companies in the United Kingdom from procedural, substantive and commercial perspectives. The article begins with an outline of the historical development of proxy voting which provides a springboard from which to consider in greater detail how legal regulation of proxy voting has evolved. The development of the law in relation to the formalities surrounding the appointment of proxies, including the practice of proxy solicitation, is then examined. This is followed by a consideration of a proxy's right of

participation and a proxy's duty in relation to a shareholder's voting instructions. Finally, the future role of proxy representation considered against the backdrop of other means for shareholders to exercise their right of participation.

Overview of the historical development of proxy voting

Notably, the early adoption of proxy representation was largely market-led. Provision for proxy voting lay in the hands of drafters of companies' articles of association. There was neither a statutory nor a common law right to vote by proxy.¹ However, it was open to companies to make special provision for proxy voting in their articles of association and these would be upheld by the courts. This meant that there were no legal requirements imposed by the general law as to the means for appointing the proxy but a company's articles could impose certain requirements. The first legislative recognition of proxy representation occurred in s.39 of the Joint Stock Companies Act 1856, which recognised voting by proxy where a company's regulations specifically provided for it. This coincided with the enactment of the first prescribed form of the articles of association under the heading "Form B".² Prior to the creation of a statutory right of a member to appoint a proxy to vote on their behalf, the right was invariably provided for in companies' articles but was often subject to various limitations such as requiring that the proxy had to be a member. As in the 1856 Act, s.61 of the Companies Act 1862 recognised that votes could be made in person by proxy where the company's articles allowed it.

It was not until 1948 that the right to appoint a proxy was given statutory status. The Cohen Committee established to review the Companies Act 1929 reviewed practices in relation to proxy voting and recommended that it should be laid down in statute that a shareholder of any company (other than a company limited by guarantee and having no share capital) should be able to appoint anyone as a proxy, even if the proxy was not a fellow member of the company.³ To ensure that shareholders were aware of their rights in relation to the appointment of a proxy, the Cohen Committee recommended that companies "should be required to include in notices convening meetings a clear statement that shareholders may appoint proxies to attend the meetings on their behalf".⁴ With the enactment of s.136 of the Companies Act 1948, the right of a member to appoint a person to attend and vote on their behalf at company general meetings was given legislative standing. Following the recommendations of the Cohen Committee, s.136(1) provided that:

"Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him, and a proxy appointed to attend and vote instead of a member of a private company shall also have the same right as the member to speak at the meeting."⁵

¹ This was confirmed by the Court of Appeal in *Harben v Phillips* (1883) L.R. 23 Ch. D. 14 CA.

² The memorandum was subsequently moved into the body of the Companies Act 1862 and the articles then became "Table A", which naming convention continued in subsequent companies legislation.

³ *Report of the Committee on Company Law Amendment* (1945), Cmd 6659, para.133 (Cohen Committee Report).

⁴ Cohen Committee Report, 1945, para.133.

⁵ There was an exclusion for companies not having a share capital unless the company's articles permitted it.

Provision for proxy representation was carried through to s.372 of the Companies Act 1985. What was particularly important to the development of proxy representation was the contribution of technological advancement and legal facilitation of this. Electronic transmission of proxy appointments was provided for in 2000,⁶ and in 2003 an automated proxy voting service was introduced by CREST, which permitted proxy appointment and voting instructions to be given online.⁷ This was important in bringing convenience and ease of use to the proxy system and is widely credited as enhancing proxy voting as a mechanism for promoting shareholder democracy.

Proxy voting did not feature heavily on the agenda prior to the adoption of the Companies Act 2006 and such discussion as occurred was concise in nature, reflecting the ambitious breadth of coverage of the reform proposals. Significantly, the Company Law Review and the DTI endorsed proxies being permitted to speak at meetings of public companies as well as private companies and to vote on a show of hands, and shareholders being permitted to appoint a proxy in respect of each beneficial holding.⁸ These proposals were implemented in the Companies Act 2006, which elaborated on the pre-existing provisions relating to proxies in s.372 of the Companies Act 1985. Sections 324–331 contained provisions in relation to the appointment of proxies which to a large extent reflected the pre-existing s.372 of the Companies Act 1985. However, in terms of the evolution of the law on proxy voting, one of the major innovations of the 2006 Act was to ensure that all key rights and powers in relation to proxies were expressed in mandatory terms rather than requiring provision to be made for any of them in a company's articles. This involved giving a statutory setting to the content of the former Table A model articles concerning proxy voting.⁹ In effect a base line level of protection was established which could be increased but not diminished.¹⁰

The most recent innovations in relation to proxy voting in the United Kingdom coincided with the implementation of the Shareholders' Rights Directive¹¹ which was transposed into UK law by the Companies (Shareholders' Rights) Regulations 2009 (the 2009 Regulations).¹² The Shareholders' Rights Directive was designed to enhance shareholders' rights in a number of respects including the enhancement of proxy voting by introducing minimum standards relating to proxy voting across all Member States in relation to listed companies within the European Union. The implementation approach adopted by the United Kingdom built on the existing framework in place in relation to shareholders' rights by amending the Companies Act 2006.

As well as implementing the Shareholders' Rights Directive, the 2009 Regulations were also used as a tool to clarify uncertainties relating to the operation of the Companies Act 2006. Accordingly, some of the amendments to the

⁶ Companies Act 1985 s.372(2A) and (2B) inserted by the Companies Act 1985 (Electronic Communications) Order 2000 (SI 2000/3373) reg.19.

⁷ See J. Tuckley and T. Lewis, "CREST Settlement System: New Proxy Voting Service" (2002) 14(1) P.L.C. 15.

⁸ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* URN 00/656 (2000), para.4.55.

⁹ Companies (Tables A to F) Regulations 1985 (SI 1985/805) Table A regs 59–73.

¹⁰ This is reinforced by s.331 of the Companies Act 2006, which provides that a company's articles "may confer more extensive rights on members or proxies" than those provided for in ss.324 to 330.

¹¹ Directive 2007/36 on the exercise of certain rights of shareholders in listed companies.

¹² SI 2009/1632.

Companies Act 2006 relating to proxies effected by the 2009 Regulations were of general application to companies whereas others followed the Shareholders' Rights Directive and were only applied to traded companies.¹³

Formalities in relation to the appointment of proxies

Although companies legislation gradually gave express statutory recognition to the right of members to appoint a proxy to attend and vote at general meetings on their behalf, on the whole it has not been prescriptive in relation to the formalities attaching to the appointment of proxies. Thus the manner of appointing a proxy and the manner of exercising the rights by a proxy have largely remained matters to be governed by a company's articles.

Eligibility for appointment as a proxy

As noted above, prior to the enactment of the Companies Act 1948, the right to vote by proxy had no statutory footing and was subject to express authorisation in the articles. This was almost always given, but the right to appoint a proxy was often made subject to limitations. One such limitation was that the proxy should himself be a member.¹⁴ This limitation aided the board of directors in their endeavours as a member would often find it arduous to attend and vote on behalf of another member in opposition to the motion favoured by the board. Concerns in relation to the constraints imposed by such a requirement were voiced by the Cohen Committee prior to the enactment of the Companies Act 1948.¹⁵ Consequently, statutory recognition of the right to appoint a proxy in s.136 of the Companies Act 1948 did not entail a requirement that the proxy must be a member being imposed and it was expressly stated that there was a right to appoint a person as a proxy "whether a member or not". This approach was also taken in s.372(1) of the Companies Act 1985. By contrast, s.324(1) of the Companies Act 2006 simply refers to a right to appoint "another person". However, this should be read in the context of s.331 which contemplates companies providing more extensive rights in relation to the appointment of proxies but not less extensive rights. Therefore it is not open to companies to add further restrictions concerning eligibility for appointment as a proxy.

It is notable that in the United Kingdom and much of the common law world including Australia, New Zealand, Hong Kong and Singapore, statutory recognition of the right to appoint a proxy did not lead to other restrictions being imposed in relation to the qualifications of proxies. Conversely, in Malaysia certain limitations on the types of person allowed to be a proxy who was not a member of the company were attendant on statutory recognition of the right to appoint a proxy. Under s.149(1)(b) of Malaysian Companies Act 1965, a statutory default rule was provided whereby the proxy was required to be "an advocate, an approved company auditor or a person approved by the Registrar in a particular case", unless otherwise

¹³ The amendments relating solely to traded companies can be found in the amended s.327 of the Companies Act 2006. Amendments to s.285 of the 2006 Act relating to voting by proxy and covering such issues as voting on a show of hands or on a poll as well as the amendment to s.324 dealing with the obligation of a proxy to vote as instructed are of general application.

¹⁴ This practice began with reg.43 of the model regulations in Form B of the Joint Stock Companies Act 1856.

¹⁵ Cohen Committee Report, 1945, para.132.

provided in a company's articles. It would appear that this was motivated by a desire to ensure that proxies were qualified professionals with a good understanding of the mechanics of a company.¹⁶ In the United Kingdom, the Company Law Review considered the issue of permitting persons other than the legal holder of shares to be granted the right to appoint a proxy in recognition of the fact the holder may have arranged to confer the right to attend and vote on another person¹⁷ but this proposal was not ultimately adopted.

The Shareholders' Rights Directive has also been relevant to issues surrounding the appointment of proxies. Although there were no restrictions in the United Kingdom in relation to persons eligible to be appointed as a proxy, restrictions existed in some Member States such as Portugal where proxies could only be granted to members of the board of directors, spouses, ancestors or descendants of the shareholder or to another shareholder. Accordingly, arts 10, 11 and 13 of the Directive which deal with proxy voting prohibit all limitations on the persons who may be granted a proxy other than a requirement that they have legal capacity.

Appointment of multiple proxies

The practice of a shareholder appointing multiple proxies is long established. Allowing for the appointment by a member of more than one proxy in respect of a meeting was designed to deal with the predicament of a nominee holding shares on behalf of two or more beneficial owners, thereby permitting split-voting through the use of separate proxies. When the right to appoint a proxy became a statutorily protected right in the Companies Act 1948, s.136(1)(b) provided a statutory default rule against the appointment of multiple proxies in relation to members of private companies unless the articles provided otherwise. This indirectly sanctioned the appointment of multiple proxies by shareholders of public companies. Subsequently, although the Jenkins Committee noted that a proxy was not under an obligation to cast all his votes in the same manner, given its recommendation of extending a right to speak to proxies, it recommended that a right to appoint up to two proxies be afforded in respect of all types of company.¹⁸ This was predicated on the member specifying the proportion of his shares that each proxy represented.¹⁹ However, rather than implementing this recommendation, the 1948 Act approach was carried over in s.372(2)(b) of the Companies Act 1985.

A more explicit legislative stance was taken on the issue in the Companies Act 2006 which involved giving an express legislative signal that multiple proxy appointment was acceptable and providing some legislative clarification in relation to the qualifying circumstances. This reflected the Company Law Review's endorsement of the shareholders being permitted to appoint a proxy in respect of each beneficial shareholding.²⁰ Section 324(2) of the 2006 Act provides that a member may appoint more than one proxy to attend a meeting provided that each

¹⁶ Malaysia's Corporate Law Reform Committee suggested that the suitability of proxy holders and the freedom of a shareholder to appoint a proxy should be balanced and on that basis removal of categorical limitations on the types of persons who can be appointed a proxy was recommended: Corporate Law Reform Committee for the Companies Commission of Malaysia, *A Consultative Document on Engagement with Shareholders* (2006), para.5.6.

¹⁷ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy*, 2000, p.87.

¹⁸ *Report of the Company Law Committee* (1962), Cmnd 1749, para.463 (Jenkins Committee Report).

¹⁹ Jenkins Committee Report, 1962, para.468(g).

²⁰ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework*, 2000, para.4.55, p.433.

proxy is “appointed to exercise the rights attaching to a different share or shares held by him, or (as the case may be) to a different £10, or multiple of £10, of stock held by him”.

The possibility of imposing further restrictions on the appointment of multiple proxies was contemplated by the Shareholders’ Rights Directive, art.10 of which permits Member States to place limits on the number of proxies to be appointed by a shareholder in certain circumstances. It is of interest to note that the United Kingdom opted out of the choice given to each Member State in art.10.2 regarding the limitation of proxy appointment to a single meeting or period and the limitation of the number of proxies that a shareholder may appoint.²¹

Form of appointment

The content of a proxy form has largely remained free from statutory regulation. In 1943 the Committee of the London Stock Exchange recommended that listed companies use two-way proxy forms allowing votes to be cast for or against a proposed resolution. The Cohen Committee did not recommend placing this requirement on a statutory footing on the basis that it would be best to leave flexibility by leaving regulation in this area to the Stock Exchange.²² Later the Jenkins Committee recommended that a proxy form should permit members to exercise freedom of choice through requiring two-way forms to be issued by the directors.²³

Despite the general agreement in relation to the desirability of facilitating choice, notably neither the Companies Act 2006 nor its predecessors prohibited the use of one-way proxies.²⁴ Instead this has remained a matter for regulation by the Listing Authority and under the UK Corporate Governance Code. The UKLA’s Listing Rules now require at least three-way proxies which allow a member to vote for or against a motion or to abstain to be issued on proposed resolutions other than procedural resolutions.²⁵ Accordingly, an appointing shareholder may tick a box indicating whether they wish to vote for or against a motion or to abstain. A power to abstain is regarded as allowing a shareholder to register reservations in relation to the proposed resolution. Three-way voting is also supported by the UK Corporate Governance Code which also requires both the proxy form and any announcements of the results of a vote to make it clear that a vote withheld is not a vote in law and will not be counted in the calculation of votes for and against a resolution.²⁶

One particular issue of statutory interpretation in relation to the manner in which an appointment should be made has been particularly significant in the evolution of proxy representation. Section 136(3) of the Companies Act 1948 indirectly contemplated the use of an “instrument” in relation to the appointment of a proxy. This approach carried through to s.372(5) the Companies Act 1985. It was therefore

²¹ See Department for Business Innovation and Skills, *Explanatory Memorandum to the Companies (Shareholders’ Rights) Regulations 2009* (2009), p.18.

²² Cohen Committee Report, 1945, para.132.

²³ Jenkins Committee Report, 1962, paras 464, 468(h).

²⁴ At a broader level, the Company Law Review decided against a statutory requirement in relation to the option to register an abstention: Company Law Review Steering Group: *Modern Company Law for a Competitive Economy: Developing the Framework*, 2000, para.4.50.

²⁵ UK Listing Authority, *Listing Rules*, r.9.3.6(2).

²⁶ Financial Reporting Council, *The UK Corporate Governance Code* (2010), Principle E.2.1.

widely accepted that the reference to an “instrument” meant that proxies must be appointed in writing. Furthermore, reg.60 in the Table A model articles stated that “[a]n instrument appointing a proxy shall be in writing, executed by or on behalf of the appointer ...”. The Listing Rules at this time also suggested that a form of proxy should be a tangible document.²⁷ When technology advanced there was confusion as to the legality of appointing a proxy by fax or electronic communication. While it was accepted in practice that a written instrument was required, there were fears that s.372 did not permit the use of electronic communications to appoint proxies and for a time some companies were unwilling to take the risk of allowing proxies to be appointed otherwise than by traditional written document with “wet signatures”.²⁸

The law relating to faxed proxies was also unclear. It was uncertain whether such a form would be regarded as “executed” for the purposes of reg.60. It was also questionable whether the form was “deposited with the company”, as was required by reg.62 of Table A, as the company was simply receiving a copy of the form. It would appear that in most cases it was left up to the chairman of the meeting as to whether a proxy form should be accepted or not and that chairmen invariably accepted faxed proxy forms so as to ward off an action by a disgruntled member disputing the validity of the meeting.²⁹

Subsequently, legislative clarification put paid to doubts regarding electronic communications. Sections 372 and 373 of the Companies Act 1985 were amended by the Companies Act 1985 (Electronic Communications) Order 2000³⁰ to ensure that it was clear that members of a company could appoint proxies using electronic communications.³¹ The inserted s.372(2A) clarified that the appointment of a proxy could be made by way of an electronic communication notwithstanding any provision to the contrary in a company’s articles.³² Changes were also made to reg.60 to remove the requirement of an instrument in writing.³³ Notice of company meetings, announcements, the appointment of and giving of instructions to a proxy, as well as the results of company meetings, are now routinely provided electronically. As well as being convenient, electronic appointments have the benefit of providing an audit trail which makes it easy to verify whether a proxy instruction was received before the relevant cut-off time.

²⁷ UKLA, *Listing Rules* (as at December 31, 1999), rr.9.26; 13.1(f); 13.2; 13.28; 13.29; Appendix to Ch.13, para.12.

²⁸ See Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework* URN 99/654 (1999), p.112 fn.125; R.C. Nolan, “The Continuing Evolution of Shareholder Governance” (2006) 65(1) C.L.J. 92, 108.

²⁹ D. Keenan, *Smith and Keenan’s Company Law*, 12th edn (London: Financial Times, 2002), p.394.

³⁰ SI 2000/3373. See further Department of Trade and Industry, *Electronic Communications for Companies: An Order under the Electronic Communications Bill* URN 00/626 (2000).

³¹ Electronic provision and registration of proxy forms has previously been endorsed by the CLR: Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: The Strategic Framework*, 1999, p.112.

³² For the avoidance of doubt, s.372(2B) added that even where a company’s articles were silent in relation to appointment by electronic communication, the appointment could be contained in an electronic communication in accordance with the provisions of Table A.

³³ Companies Act 1985 (Electronic Communications) Order 2000 (SI 2000/3373) reg.19(3) and (4). See further, P. Fidler, “Electronic Submission of Proxies for Creditors’ Meetings” (2001) 14(3) *Insol. Int.* 17, 18.

Notice of appointment of a proxy

It is still the case that to a large extent a company's articles may set the content of the proxy notice rather than this being prescribed as a matter of law. The model articles provide that any proxy notice must be in writing and must state the name and address of the member as well as identify the proxy and the meeting.³⁴ The notice must be executed by the member and must reach the company in the manner set down in its articles. There is common law authority to suggest that minor errors on a proxy form which do not seriously mislead will not invalidate a proxy. In *Oliver v Dalgleish*³⁵ it was held that a proxy form which contained the correct date of the meeting but stated it was an annual general meeting when it was in fact an extraordinary general meeting was still valid.

Section 136(3) of the Companies Act 1948 Act sought to assist shareholder democracy by rendering void any provision in a company's articles requiring the instrument appointing a proxy to be received by the company or any other person more than 48 hours before a meeting in order for the appointment to be valid.³⁶ This position in relation to the imposition of time limits has prevailed since then and is now seen in s.327(2)(a) of the Companies Act 2006 in relation to paper or electronic receipt of notice of appointment. A proposal of the Company Law Review to change the maximum notice period to 24 hours did not come to fruition.³⁷ An innovation of s.327(3) of the 2006 Act was to count only working days for the purposes of the notice requirement. This overrides any contrary provision in a company's articles.

Proxy solicitation

One of the most problematic aspects of proxy voting from the perspective of shareholder democracy is the long association of proxy representation with proxy solicitation by the board of directors. The practice of accumulating proxies has undoubted ramifications for shareholder democracy since it occurs at the behest of the directors. As such, proxy solicitation raises the spectre of the management becoming a "self-perpetuating body".³⁸ Berle and Means's identification of the agency problem created by the separation of ownership and control suggested that this was boosted by the control by directors of the proxy system for the nomination and election of directors. This was rationalised as follows:

"In the election of the board the stockholder ordinarily has three alternatives. He can refrain from voting, he can attend the annual meeting and personally vote his stock, or he can sign a proxy transferring his voting power to certain individuals selected by the management of the corporation, the proxy committee. As his personal vote will count for little or nothing at the meeting unless he has a very large block of stock, the stockholder is practically reduced

³⁴ Companies (Tables A to F) Regulations 1985 (SI 1985/805) Table A regs 60–62 as amended by the Companies (Tables A to F) (Amendment) Regulations 2007 (SI 2007/2541) and the Companies (Tables A to F) (Amendment) (No.2) Regulations 2007 (SI 2007/2826).

³⁵ *Oliver v Dalgleish* [1963] 3 All E.R. 330 Ch D.

³⁶ This implemented a recommendation of the Cohen Committee: Cohen Committee Report, 1945, para.134.

³⁷ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework*, 2000, p.434.

³⁸ A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (New York: The Macmillan Company, 1933), Book I, Ch. V, p.87.

to the alternative of not voting at all or else of handing over his vote to individuals over whom he has no control and in whose selection he did not participate. In neither case will he be able to exercise any measure of control. Rather, control will tend to be in the hands of those who select the proxy committee by whom, in turn, the election of directors for the ensuing period may be made. Since the proxy committee is appointed by the existing management, the latter can virtually dictate their own successors. Where ownership is sufficiently sub-divided, the management can thus become a self-perpetuating body even though its share in the ownership is negligible.”³⁹

Given the nature of such concerns, why is proxy solicitation legally permissible? The most plausible explanation is that, given the rational apathy theory in relation to investors, if the board were not to engage in proxy solicitation, it would prove difficult to progress corporate policies.⁴⁰ The practice of proxy solicitation trades on the enemy of shareholder democracy, shareholder passivity.⁴¹ Shareholders may not value their individual vote and may not believe that it is likely to make a difference. Therefore they are likely to suffer from rational apathy.⁴² On this view, proxy solicitation redresses the balance caused by shareholder passivity. However, it does so in a manner which unashamedly favours the perspective of the incumbent directors. As a consequence of opting for rational apathy, shareholders do not invest the limited resource which is their time in becoming informed and “instead adopt a crude rule of thumb like ‘vote with management’.”⁴³ The free rider problem is also generally acknowledged as a deterrent to shareholder activism. This is neatly captured by Easterbrook and Fischel as follows:

“Most shareholders are passive investors seeking liquid holdings. They have little interest in managing the firm and less incentive to learn the details of management. No one shareholder can collect all or even a little of the gains available from monitoring the firm’s managers. The benefits would be dispersed among all stockholders according to their investments, not according to their monitoring efforts. Because other shareholders take a free ride on any one shareholder’s monitoring, each shareholder finds it in his self-interest to be passive. He simply sells his shares if he is dissatisfied.”⁴⁴

Proxy solicitation gained legitimacy at common law courtesy of a judicial policy which was sympathetic to the position of the directors in seeking to promote their policies. In *Peel v London & North Western Railway Co*⁴⁵ there had been a disagreement between the directors and a body of shareholders in relation to a question of policy affecting the management of the company. Before general

³⁹ Berle and Means, *The Modern Corporation and Private Property*, 1933, Book I, Ch.V, pp.86–88 (footnotes omitted). See also R. Monks, “Shareholders and Director Selection” (1995) 19(3) *Directors and Boards* 9; S. Bainbridge, “Director Primacy: The Means and Ends of Corporate Governance” (2003) 97 *Northwestern University Law Review* 547.

⁴⁰ I. Omotayo, “A Critique of the Theories Underpinning Proxy Solicitation by the Board of Directors” [2001] *J.B.L.* 377, 381.

⁴¹ For a novel theory in relation to how shareholder passivity might be addressed see J. McConville, “The Separation of Ownership and Control under a Happiness-Based Theory of the Corporation” (2005) 26 *Company Lawyer* 35.

⁴² On the concept of rational apathy see J.N. Gordon, “The Mandatory Structure of Corporation Law (1989) 89 *Colum. L. Rev.* 1549, 1576; B.S. Black, “Shareholder Passivity Re-examined” (1990–91) 89 *Mich. L. Rev.* 520.

⁴³ Black, “Shareholder Passivity Re-examined” (1990–91) 89 *Mich. L. Rev.* 520, 527.

⁴⁴ F.H. Easterbrook and D.R. Fischel, “The Proper Role of a Target’s Management in Responding to a Tender Offer” (1980–1981) 94 *Harv. L. Rev.* 1161, 1171.

⁴⁵ *Peel v London & North Western Railway Co* [1907] 1 Ch. 5 CA.

meetings the board had previously sent each shareholder a circular setting the facts and view of the board together with a stamped proxy form containing the names of three of the directors as proxies as well as a stamped envelope for return of the proxy form. In addition, some employees of the company had called on some of the shareholders who had not returned the proxy form. The shareholders in question sought to restrain the company and directors from using the funds of the company for this purpose. However, the Court of Appeal held that it was the duty of the directors to inform shareholders of the facts concerning their policy and the directors had acted bona fide in the interests of the company and were entitled to seek support for their policy.

The practice of company funds being used to send out proxy forms with postage affixed for their return was regarded by Buckley L.J. as “a reasonable thing to do to get the best expression of the popular voice ...”⁴⁶ at a company meeting.⁴⁷ Vaughan Williams L.J. emphasised that the directors were under a duty to ensure that a sufficient statement of the facts which would have to be considered by the shareholders was placed before them. The practice of inserting the names of persons recommended by the board of directors as proxies was regarded as lawful since it would still be open to a shareholder to erase the name of one proxy and insert another’s name. Fletcher Moulton L.J. made the following influential statement in relation to proxy solicitation as supportive of shareholder democracy:

“The convening of a general meeting, the use of such machinery as is necessary to express the view of the corporation is, I think, as vital and important a corporate act as can be conceived. As a general principle it cannot be ultra vires to use the company’s funds bona fide and reasonably for the purpose of obtaining the best expression of the voice of the corporators in general meeting.”⁴⁸

However, Fletcher Moulton L.J. cautioned against reliance on *Peel* for a proposition which it did not support. Accordingly, he suggested that the decision would not justify directors acting in their own interests rather than acting bona fide in the interests of the company using proxy forms and company funds to serve their own interests. While acknowledging the prescient nature of this remark, the difficulty with a caveat of this nature is that traditionally the question of whether the directors acted in the best interests of the company has been subjectively tested⁴⁹ and this has not changed in relation to the statutory duty on director to promote the success of the company in s.172 of the Companies Act 2006.⁵⁰ Therefore, provided that the directors act in good faith in what they believe to be the company’s interests, it is irrelevant that their decision also has the effect of promoting their own interests.⁵¹

⁴⁶ *Peel* [1907] 1 Ch. 5 at 19.

⁴⁷ This involved overruling the position taken by Kay J. in *Studdert v Grosvenor* (1886) L.R. 33 Ch. D. 528 Ch D that providing a stamped envelope with a proxy form was not permitted.

⁴⁸ *Peel* [1907] 1 Ch. 5 at 18.

⁴⁹ *Smith and Fawcett Ltd, Re* [1942] Ch. 304; [1942] 1 All E.R. 542 CA.

⁵⁰ *Southern Counties Fresh Foods Ltd, Re; Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) at [53].

⁵¹ *Hirsche v Sims* [1894] A.C. 654 PC (Cape of Good Hope).

Peel was subsequently applied by the Court of Appeal in *Wilson v London, Midland & Scottish Railway Co.*⁵² The plaintiff shareholder objected to the act of the directors in sending stamped proxies only to shareholders holding stock to the value of £2,500 or over. As this was not regulated by statute, the Court of Appeal's view was that it was purely a matter for internal company policy to be decided by the directors provided "they honestly think it is in the best interests of the company and the economical administration of the company's affairs that this system should be adopted".⁵³ It was also intimated that if shareholders objected to this practice, it was open to them to alter the company's articles. Clauson L.J. noted that one of the duties of directors in relation to holding general meetings was to ensure that a quorum was present⁵⁴ and therefore the sending of stamped proxies to large stockholders was justified since the expense of sending proxies to all stockholders would have been very great. Greene M.R. emphasised that "[i]t is not the business of this court to consider questions of policy. It is the business of the court to administer the law".⁵⁵

The common law in this area was subsequently supplemented by statutory provision. When the right to appoint a proxy received statutory backing in s.136 of the Companies Act 1948, s.136(4) of the Companies Act 1948 dealt with proxy solicitation. It provided that if invitations to appoint a proxy were issued at the company's expense to some rather than all of the members entitled to vote at a meeting, every officer of the company who knowingly and willingly authorised or permits their issue was liable to a fine. However, it was permissible to issue a proxy form to a member, at the member's written request, which named a proxy or of a list of persons willing to act as proxy provided the form or list was available to every member with voting rights. It would appear that the purpose of this provision was to prevent directors from selectively approaching members who were unlikely to oppose the board and their policies. This statutory provision was carried through to s.326(2) of the Companies Act 1985 and subsequently to s.326 of the Companies Act 2006 under the heading "Company-sponsored invitations to appoint proxies". The question of the effect of a breach on the validity of a meeting was left open.

It has been noted that the provisions of the 2006 Act have not addressed the tactical advantages possessed by the board of directors.⁵⁶ A proxy fight occurs where an activist opposes how a company is being managed and seeks the mandate of shareholders by means of a proxy to support a position in opposition to that of the incumbent board. Remarkably, unlike the position in the United States, proxy fights are not very common in the United Kingdom. It is generally acknowledged

⁵² *Wilson v London, Midland & Scottish Railway Co* [1940] 2 All E.R. 92 CA.

⁵³ *Wilson* [1940] 2 All E.R. 92 at 94.

⁵⁴ However, the law came to require members to be personally present to constitute a quorum and this requirement continues to apply to companies which are not companies limited by shares or guarantee: Companies Act 2006 s.318(2). See further Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework*, 2000, p.429.

⁵⁵ *Wilson* [1940] 2 All E.R. 92 at 96.

⁵⁶ P.L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th edn (London: Sweet & Maxwell, 2008), p.457.

that the costs involved in engaging in a proxy contest, e.g. for the election of a rival board nominee, are prohibitive.⁵⁷ Moreover, legal regulation provides no solution to hurdles in the path of shareholder co-ordination.⁵⁸

The proxy's right of participation

Upon review of the evolving substantive and procedural legal framework governing proxy representation, the considerable extension of a proxy's right of participation by statutory accretion is a key finding. The proxy's right of participation has evolved over time from its origins as a simple representative right to vote so as to now encompass a multi-layered suite of rights at the disposal of the proxy so that today's proxy is truly an embodiment of the notion of a shareholder representative with all that entails. Originally entirely governed by a company's articles, the proxy's right of participation has been statutorily bolstered since the Companies Act 1948 where the right of a proxy to attend and vote at a meeting on behalf of a member was established by s.136(1) of the Companies Act 1948. Improvements and clarifications were effected to a proxy's right of participation as a result of both the enactment of the Companies Act 2006 and the implementation of the Shareholders' Rights Directive.

The right to speak

Prior to the adoption of the Companies Act 1948, the Cohen Committee stated that a proxy should:

“... be entitled to speak as well as vote; if not, the right loses a great deal of its value; moreover, in the absence of such a provision the chairman would experience great difficulty in the conduct of the meeting.”⁵⁹

Under s.136(1) of the Companies Act 1948 proxies were given the same right as a member to speak at meetings of private companies but not at meetings of public companies. The Jenkins Committee recommended the abolition of this distinction so allow proxies to speak at the meetings of all companies.⁶⁰ Nevertheless, this limitation on the right to speak persisted in s.372(1) of the Companies Act 1985 but was finally abolished by s.324(1) of the Companies Act 2006, which gave all proxies the right to speak.⁶¹ Article 10(1) of the Shareholders' Rights Directive clarifies that a proxy is to be given the same right to ask questions in the general meeting as that provided to members under art.9 of the Directive. Regulation 12 of the 2009 Regulations, which inserts a new s.319A into the Companies Act 2006 dealing with a shareholder's right to ask questions in relation to items on the agenda at a general meeting of a listed company, provides this right to members attending

⁵⁷ See, e.g. L.S. Machtiger, “Proxy Fight Expectations of Insurgent Shareholders” [1967–68] *Case Western Reserve Law Review* 212; L.A. Bechuk, “The Myth of the Shareholder Franchise” (2007) 93 *Virginia Law Review* 675, 688.

⁵⁸ On the difficulties of coalition formation see L. Roach, “CEOs, Chairmen and Fat-Cats: the Institutions are Watching You” (2006) 27 *Company Lawyer* 297, 299.

⁵⁹ Cohen Committee Report, 1945, para.133.

⁶⁰ Jenkins Committee Report, 1962, para.463.

⁶¹ This was a proposal of the Company Law Review: Company Law Review Steering Group: *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication*, 1999, para.50; *Modern Law for a Competitive Economy: Competing the Structure*, 2000, para.5.36.

the meeting but does not specifically address the right of a proxy to ask questions. It is arguable that this right is inherent in the right to speak on behalf of a member under s.324(1).⁶² Pursuant to s.328 of the Companies Act 2006, a proxy may now also be elected as the chairman of a meeting provided that this is not prohibited by a company's articles.

Right to demand a poll

Originally, the courts held that a proxy had no right to demand a poll.⁶³ The Cohen Committee recommended that legislative provision be made for the right of a proxy to join in demanding a poll⁶⁴ and the right of a proxy to demand or join in demanding a poll was statutorily enshrined in s.137(2) of the Companies Act 1948 and carried through to s.372(2) of the Companies Act 1985 and s.329 of the Companies Act 2006.

Voting

The right of a proxy to vote on a poll was first given statutory recognition in s.136(1)(c) of the Companies Act 1948.⁶⁵ The poll voting mechanism is generally considered cumbersome but accurate. In large meetings it may not be practical to complete the poll during the meeting as proxy forms and votes will need to be checked especially in scenarios where there is multiple proxy solicitation. A vote taken on a show of hands has an advantage in terms of speed and the fact that uncontroversial decisions can be made with the minimum of bother. However, when voting by proxies was not permitted on a show of hands, voting in this manner did not reflect the weight of proxy opinion.⁶⁶ There was a common law obligation on a chairman to call a poll if he or she was aware from proxies lodged that calling a poll was likely to yield the opposite result to a vote on a show of hands.⁶⁷ Respondents to the Company Law Review did not favour statutory regulation of this.⁶⁸ Nevertheless, policy concerning whether a proxy could vote on a show of hands has changed over time. The position established in s.136(1)(c) of the Companies Act 1948 was that unless a company's articles provided otherwise, a proxy was not entitled to vote except on a poll. This position was maintained by s.372(2)(c) of the Companies Act 1985. The anomaly of a proxy not being able to

⁶² This was the Government's view: Department for Business Innovation and Skills, *Implementation of the Directive: Government Response to the Consultation* (2009), p.8.

⁶³ *R. v Government Stock Investment Co* (1877–78) L.R. 3 Q.B.D. 442 QBD; *Haven Gold Mining Co, Re* (1881–82) L.R. 20 Ch. D. 151 CA.

⁶⁴ Cohen Committee Report, 1945, para.136.

⁶⁵ On voting on a poll by multiple proxies appointed by a member see the Companies Act 2006 ss.285(3) and (4) inserted by the Companies (Shareholders' Rights) Regulations 2009 (SI 2009/1632) reg.3.

⁶⁶ Company Law Review Steering Group: *Modern Company Law for a Competitive Economy: Developing the Framework*, 2000, para.4.46.

⁶⁷ *Second Consolidated Trust v Ceylon Amalgamated Tea & Rubber* [1943] 2 All E.R. 567 Ch D.

⁶⁸ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework*, 2000, para.4.47.

vote on a show of hands was highlighted by the Company Law Review⁶⁹ and the Companies Act 2006 made statutory provision for the entitlement of proxies to vote on a show of hands.⁷⁰

Although this was a welcome addition to the powers of proxies, considerable commercial uncertainty surrounded the operation of these provisions in relation to multiple proxies who had been instructed to vote both for and against a resolution. Much of the confusion related to whether limitations existed as to a proxy voting on a show of hands in a split vote scenario. In particular there was confusion in relation to the splitting of votes and how many votes proxies had on a vote taken on a show of hands.⁷¹ This arose against the background of art.10.5 of the Shareholders' Rights Directive which provides that a proxy can hold a proxy from more than one shareholder without limitation and shall be enabled to cast different votes for different shareholders while art.13.4 expressly permits the splitting of votes. Consequently, it was considered necessary to legislatively address the confusion relating to voting by proxies on a show of hands.

The 2009 Regulations sought to provide legal certainty by allowing proxies to vote in different ways for different shares. In the substituted s.285 of the Companies Act 2006 inserted by reg.3, s.285(1) provides that on a show of hands every proxy present at a meeting has one vote. However, s.285(2) now provides that a proxy has one vote for and one vote against a resolution if "the proxy has been instructed by one or more of those members to vote for the resolution and by one or more other of those members to vote against it". This is the position irrespective of how many shareholders a proxy acts for and irrespective of the balance in favour or against a proposed resolution.⁷² It was felt that this approach would leave it open to the chairman to exercise his discretion to use the poll procedure if it was felt that a show of hands vote would not be representative of the views of the members.⁷³ It would also be open to shareholders to call a poll under s.326.

A proxy's duty in relation to a shareholder's voting instructions

It has been held that where a proxy is required to vote in a particular manner, he may also vote as appears appropriate on any other matter so as to facilitate the favoured outcome.⁷⁴ The Listing Rules provide that where a proxy is returned without an indication as to how the proxy should vote, a proxy is obliged to exercise his discretion "as to whether, and if so, how, he votes" and this must be stated on the proxy form.⁷⁵ This leaves the question of the duty of a proxy in relation to an instruction to vote for or against a resolution or to abstain. Clearly, if a proxy is not obliged to follow his appointer's instructions as to how he wishes to vote, this seriously undermines the use of proxies as a tool of shareholder democracy. Despite

⁶⁹ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication*, 1999, p.20.

⁷⁰ Companies Act 2006 s.284(2) and s.285(1). See Company Law Review Steering Group: *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication*, 1999, para.50.

⁷¹ Department for Business Enterprise & Regulatory Reform, *Implementation of the Directive on the Exercise of Certain Rights of Shareholders in Listed Companies: A Consultation Document* (2008), paras 3.4 to 3.7.

⁷² Companies Act 2006 s.285(5) provides that s.285(1) and (2) are subject to any provision in a company's articles.

⁷³ Department for Business Innovation and Skills, *Implementation of the Directive: Government Response to the Consultation*, 2009, p.5.

⁷⁴ *Waxed Papers Ltd, Re* [1937] 2 All E.R. 481 CA.

⁷⁵ UK Listing Authority, *Listing Rules*, r.9.3.6(4).

this being a fundamental litmus test in terms of shareholder rights, until recently this matter remained subject to some legal uncertainty which was resolved by the 2009 Regulations.

Although the focus of *Second Consolidated Trust v Ceylon Amalgamated Estates*⁷⁶ was on the duty of chairman, the decision suggested that where directors were appointed proxies and instructed on how to vote they were obliged to vote in accordance with their instructions. There has not been a direct ruling on the matter by the English courts but *Second Consolidated Trust* was subsequently judicially relied on in Australia in *Hopkins Professional Services Pty Ltd v Foyster Holdings P/L*⁷⁷ in support of the proposition that where a proxy instrument contains a direction as to the manner of voting, this may impose a positive legal duty to comply with that direction. Support for this view can also be derived from the decision of Gzell J. at first instance in the Australian case of *ASIC v Whitlam*⁷⁸ where it was indicated that at common law a proxy (be they the chairman, a director or another person) is an agent of a shareholder and is under a duty to vote as instructed.⁷⁹ Again this analysis was founded on *Second Consolidated Trust*.

Somewhat surprisingly given the importance of the issue, the point was not dealt with in the Companies Act 2006, but a consequence of transposing the Shareholders' Rights Directive is that any uncertainty in relation to the position at common law regarding the obligations of proxies to follow the voting instructions of an appointing shareholder has been resolved. A definitive position on the duties of a proxy emerges from art.10.4 of the Shareholders' Rights Directive which unequivocally provides that "the proxy holder shall cast votes in accordance with the instructions issued by the appointing shareholder". In the consultation which preceded the adoption of the 2009 Regulations, it was noted that it was debatable whether a statutory provision was needed "given that the general law (of contract or fiduciary duties) may produce the desired result".⁸⁰ Nevertheless the need for commercial certainty appears to have prevailed as reg.7 of the 2009 Regulations inserted a new s.324A into the Companies Act 2006 which states that "[a] proxy must vote in accordance with any instructions given by the member by whom the proxy is appointed".⁸¹ While providing a clear statutory obligation on proxies to vote as instructed is undoubtedly an important step in the evolution of proxy representation, it is notable that no provision has been made in relation to enforcement of this obligation nor as to the consequences of non-compliance. Furthermore, companies have not been expressly required to ensure that proxies comply with this obligation.⁸² It remains to be seen whether these are matters on which the courts will pronounce in the absence of statutory guidance.

⁷⁶ *Second Consolidated Trust* [1943] 2 All E.R. 567.

⁷⁷ *Hopkins Professional Services Pty Ltd v Foyster Holdings P/L* (2001) 39 A.C.S.R. 519 at 522.

⁷⁸ *ASIC v Whitlam* (2002) 42 A.C.S.R. 407.

⁷⁹ See further J. McConville and M. Bagaric, "Ambiguities and Inconsistencies in relation to the Obligations of Proxies under Corporations Law: A Model for Reform" [2004] U.N.E.L.J. 4.

⁸⁰ Department for Business Enterprise and Regulatory Reform, *Implementation of the Directive on the Exercise of Certain Rights of Shareholders in Listed Companies: A Consultation Document* (2008), para.3.13.

⁸¹ This obligation not only applies to traded companies (as required by the ambit of the Shareholders' Rights Directive) but extends to all companies.

⁸² Shareholders' Rights Directive art.10.4 permitted Member States to choose whether to require proxies to keep a record of voting instructions for a minimum period and whether to require them to confirm on request that the voting instructions have been carried out. The UK did not avail of this option.

The future of proxy representation

Clearly both the proxy representation mechanism and regulation of it have progressed considerably over the last century and a half. To date proxy representation has been a success story for listed companies. In 1963 54 per cent of the shares in UK quoted companies were held by individuals but by 2006 this figure had fallen dramatically to just 12.8 per cent.⁸³ Thus the process of voting is complicated by the plethora of interested parties involved where institutional investors are concerned such as beneficial owners, investment managers and custodians of shares owned by nominee companies, proxy voting consultants and the issuers themselves.⁸⁴ Despite this, the level of shareholder voting at AGMs has increased, owing in part to the efforts of the Shareholder Voting Working Group and the ease of use of electronic proxy appointment and in 2008 shareholder voting at AGMs was estimated at just over 60 per cent.⁸⁵ This is excellent given the focus on overall corporate performance over micro-management which is typically associated with institutional investors. Looking to the future, the question arises as to whether proxy representation is likely to decline in importance as a tool for enhancing shareholder democracy given that a number of alternatives now exist for shareholder participation at general meetings, some of which do not require the appointment of an intermediary.

The corporate representative alternative for corporate members

A company which is a member of another company has two options open to it in relation to attendance and voting at meetings. A company holding shares has the same right to appoint a proxy as any other member.⁸⁶ Alternatively, a corporate member may be represented by means of appointing a corporate representative. The right of a corporation to appoint a human corporate representative received statutory recognition in s.24(3) of the Companies Act 1907, two decades before the right to appoint a proxy became a statutory right and the right to appoint a corporate representative is now recognised in s.323 of the Companies Act 2006.

In some cases the alternative corporate representative mechanism in s.323 of the Companies Act 2006 is more attractive than appointing a proxy for corporate members. Corporate representatives are not subject to any of the documentation and notice requirements applicable to proxies. Consequently the availability of the corporate representative option is useful if the proxy deadline is missed or if a new matter of concern arises after a proxy has been appointed to attend a general meeting. Following the enactment of the Companies Act 2006 there was some controversy in relation to the appointment of multiple corporate representatives

⁸³ Office for National Statistics, *Share Ownership, A Report on the Ownership of Shares at 31 December 2006* (2007), para.3.8.

⁸⁴ See further P. Myrers, *Review of the Impediments to Voting UK Shares: Report to the Shareholder Voting Working Group* (2004). The Shareholder Voting Working Group was established in 1999 as the first industry-wide group to act as an advisory body identifying and resolving the constraints, deterrents and logistical problems that impede the voting process.

⁸⁵ Department for Business, Enterprise and Regulatory Reform, *Implementation of the Directive on the Exercise of Certain Rights of Shareholders in Listed Companies: A Consultation Document*, 2008, para.2.2.

⁸⁶ *Indian Zoedone Co, Re* (1884) L.R. 26 Ch. D. 70 CA.

concerning how voting rights were to be exercised,⁸⁷ leading the ICSA to recommend the use of proxies instead of corporate representatives.⁸⁸ However, these difficulties were subsequently addressed by reg.6 of the 2009 Regulations.

Direct shareholder voting models

While proxy voting involves appointing another person to act as a representative on a member's behalf, there are now other more direct mechanisms for participation by shareholders which do not necessitate the introduction of an intermediary. Consequently the question arises as to whether the introduction of advance postal and electronic voting removes the rationale behind proxy voting.

Advance voting involves the member deciding how to vote in advance of the meeting and exercising their vote by postal or electronic means. This issue first came up for consideration in the United Kingdom in the course of the work of the Company Law Review where at an early stage the question of enacting enabling provisions to permit electronic voting was raised but did not result in a final proposal in this area.⁸⁹ The issue arose again in relation to the Shareholders' Rights Directive. In the first public consultation on the introduction of a Shareholders' Rights Directive, it was felt that Member States should allow for the possibility of companies giving shareholders the chance to vote by correspondence.⁹⁰ Nevertheless some felt that there was no real need to offer voting by correspondence as voting by proxy was a cheaper and valid way to exercise a shareholder's right to participate. However, art.12 of the Shareholders' Rights Directive requires Member States to permit companies to offer their shareholders the opportunity to vote by correspondence in advance of a general meeting. This facilitates the introduction of voting by correspondence but leaves the matter at the discretion of the individual company.

In the United Kingdom, respondents to the consultation which preceded the implementation of the Directive generally felt that advance voting was unnecessary in the United Kingdom as a remote system of voting was already in place in the form of the proxy system.⁹¹ This perspective is supported by Watters and Shutkever, who contend that the established use of proxies, and the flexibility that the proxy system creates, mean that there is no need for an advance voting system.⁹² Advance voting is nonetheless now provided for in s.322A of the Companies Act 2006⁹³ which permits advance voting on a poll where provision is made for this in a company's articles. This facilitates making provision for a right of shareholders

⁸⁷ Institute of Company Secretaries and Administrators, *ICSA Guidance on Proxies and Corporate Representatives at General Meetings* (2008), paras 4.4. to 4.5.

⁸⁸ Institute of Company Secretaries and Administrators, *ICSA Guidance on Proxies and Corporate Representatives at General Meetings*, 2008, para.4.6. See further C. Shutkever, "Corporate Representatives" (2008) 31(25) *Company Secretary's Review* 198.

⁸⁹ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication*, 1999, p.27.

⁹⁰ Internal Market DG of the European Commission, *Fostering an Appropriate Regime for Shareholders' Rights* (1st Public Consultation) (September 6, 2004), para.7.4.1, at http://ec.europa.eu/internal_market/company/docs/shareholders/consultation_en.pdf [Accessed January 12, 2011].

⁹¹ Department for Business Innovation and Skills, *Implementation of the Directive: Government Response to the Consultation*, 2009, p.6.

⁹² S. Watters and C. Shutkever, "Shareholders' Rights Directive: All Change for Company Meetings" (2009) 20(8) *P.L.C.* 6.

⁹³ Inserted by the Companies (Shareholders' Rights) Regulations 2009 (SI 2009/1632) reg.5.

to vote in advance either electronically or by post. Sections 282 and 284 have also been amended to facilitate the right to demand a poll being exercisable in advance in a similar manner.

It is too early to make an assessment in relation to take-up concerning advance voting. However, a number of observations may be made. First and foremost, advance voting enhances shareholder democracy by permitting direct shareholder participation. This allows shareholders to directly ensure that their wishes are implemented rather than having to rely on a proxy as a conduit. However, one of the benefits of proxy representation is the ability of the proxy to speak at the meeting. Advance voting of itself does not allow for this type of third-party representative function. That being said, while ideological discussion about proxy voting often focuses on the individual shareholder, in reality any discussion of the issue must take cognisance of the factual matrix in the United Kingdom where the majority of shareholders are institutional investors for whom the democratic right to speak or ask questions holds little appeal.

As has been remarked, with advance voting:

“The fiction is preserved that the result is determined after oral discussion at a meeting, although everybody knows that in the case of public companies the result is normally determined by the proxies lodged before the meeting is held.”⁹⁴

Indeed, while attendance at general meetings is sparse, the advent of advance voting gives rise to the spectre of physical general meetings being almost redundant.⁹⁵ This implication is reinforced by s.360A(1) of the Companies Act 2006⁹⁶ which implements art.8 of the Shareholders’ Rights Directive and permits companies to choose to hold general meetings so that “persons who are not present together at the same place may by electronic means attend and speak and vote at it”.⁹⁷ As observed by the Company Law Review, “[t]he AGM is not the debating, information exchanging and decision taking body which it purports to be”.⁹⁸

Advance voting can be regarded as more fully a tool of shareholder democracy than proxy representation which is tainted by proxy solicitation. It may be that proxy representation will one day be judged to have had its day. However, that will depend on companies as well as institutional and individual investors embracing the opportunities presented by advance voting. Tactically, it is plausible that boards will consider it worthwhile to continue to support proxy representation and to engage in proxy solicitation as a means of promoting board policies.

⁹⁴ *Gower and Davies’ Principles of Modern Company Law*, 2008, p.461.

⁹⁵ On the impact of dwindling attendance see R. Stratling, “General Meetings: A Dispensable Tool for Corporate Governance of Listed Companies?” (2003) 11(1) *Corporate Governance* 74.

⁹⁶ Inserted by the Companies (Shareholders’ Rights) Regulations 2009 (SI 2009/1632) reg.8.

⁹⁷ While the Company Law Review considered whether to provide for voting at AGMs to be deferred until a two-week window after the AGM, ultimately this proposal was not proceeded with: Company Law Review Steering Group: *Modern Company Law for a Competitive Economy: Developing the Framework*, 2000, para.4.49.

⁹⁸ Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication* 1999, para.20. For a discussion on whether public companies should be enabled to dispense with the AGM see paras 24–30.

Conclusion

While of use to busy and disaffected individual and institutional shareholders and a lifeline for company boards in the adoption of corporate policy, as noted at the outset of this article, proxy representation is best regarded as a tool of shareholder democracy rather than as a panacea to the consequences of the separation of ownership and control in listed companies. Proxy representation provides a means for shareholder participation at general meetings via an intermediary of their choosing but it will not solve the democratic deficit caused by deep-seated shareholder apathy. Furthermore, while hailing proxy representation as a tool of shareholder democracy, due account should be taken of the counterbalancing effects of proxy solicitation.

Proxy representation has evolved significantly over time. It took nearly a century for policy in relation to the appointment of a proxy to move from being a matter for the individual company to a statutory right. The incremental development of the law in this area has been facilitative in relation to the appointment of proxies and multiple proxies. At a substantive level, a proxy's powers in relation to voting have been extended to encompass the right to demand a poll and the right to vote on a show of hands. In addition, proxy representation has been expanded from a basic right to attend and vote to encompass a right to speak and to ask questions at general meetings. It is fair to say that the advent of the electronic era heralded the golden age of proxy representation by adding expediency to the process of appointing and instructing a proxy and this has encouraged greater numbers of shareholders to appoint proxies rather than opting out of participation in general meetings. Recent legislative confirmation of the duty on proxies to follow an appointing shareholder's voting instructions is particularly welcome given the uncertainty which existed on this point in the absence of a direct authority on the issue. This reinforces the role of the proxy as agent of the shareholder.

The latest reforms to proxy representation are complemented by the introduction of advance voting or e-enfranchisement for shareholders which raises the question of the need for proxy representation (or vice versa). At this stage it is too early to assess the impact of this innovation and it will be interesting to observe what impact advance voting tools for promoting shareholder democracy will have on the use of proxy representation in the United Kingdom.