

THE
INVESTMENT
ASSOCIATION

MEMBER GUIDANCE

EFFECTIVE REQUISITIONING OF SHAREHOLDER RESOLUTIONS

June 2023



ABOUT THE INVESTMENT ASSOCIATION (IA):

The IA champions UK investment management, supporting British savers, investors and businesses. Our 250 members manage £10.0 trillion of assets and the investment management industry supports 122,000 jobs across the UK.

Our mission is to make investment better. Better for clients, so they achieve their financial goals. Better for companies, so they get the capital they need to grow. And better for the economy, so everyone prospers.

Our purpose is to ensure investment managers are in the best possible position to:

- Build people's resilience to financial adversity
- Help people achieve their financial aspirations
- Enable people to maintain a decent standard of living as they grow older
- Contribute to economic growth through the efficient allocation of capital

The money our members manage is in a wide variety of investment vehicles including authorised investment funds, pension funds and stocks and shares ISAs.

The UK is the second largest investment management centre in the world, after the US and manages over a third (37%) of all assets managed in Europe.

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INTRODUCTION

THE INVESTMENT MANAGEMENT INDUSTRY PLAYS A MAJOR ROLE IN THE ECONOMY, HELPING MILLIONS OF INDIVIDUALS AND FAMILIES TO ACHIEVE THEIR LIFE GOALS BY HELPING THEM GROW AND RECEIVE AN INCOME FROM THEIR INVESTMENTS, INCLUDING THROUGH WORKPLACE PENSIONS. THE INVESTMENT INDUSTRY'S PURPOSE IS TO GENERATE SUSTAINABLE VALUE AND MEET CLIENTS' INVESTMENT GOALS. THESE ARE USUALLY FINANCIAL, FOR INSTANCE HAVING ENOUGH MONEY TO LIVE ON IN RETIREMENT, BUT CAN ALSO INCLUDE NON-FINANCIAL ELEMENTS, SUCH AS TO INVEST IN COMPANIES, GOVERNMENTS OR PROJECTS THAT HAVE SOCIAL OR ENVIRONMENTAL BENEFITS OR THAT "DO NO HARM". TO ACHIEVE THESE OBJECTIVES, INVESTMENT MANAGERS HELP TO ALLOCATE CAPITAL ACROSS THE ECONOMY, PUTTING IT TO WORK WHERE IT CAN BE MOST PRODUCTIVE ACROSS A RANGE OF DIFFERENT ASSETS. BUT INVESTMENT SHOULDN'T STOP THERE. TO CREATE LONG-TERM VALUE FOR CLIENTS, INVESTMENT MANAGERS SHOULD OVERSEE AND MANAGE THE ASSETS THEY INVEST IN TO ENCOURAGE, DEVELOP AND SUPPORT BEHAVIOUR THAT WILL LEAD TO SUSTAINABLE RETURNS. COLLECTIVELY, THIS WORK OF ALLOCATING, OVERSEEING AND MANAGING CAPITAL FALLS UNDER THE UMBRELLA OF 'STEWARDSHIP'.

In 2020, at the request of the City Minister, the Asset Management Taskforce Stewardship Working group produced a report analysing the current state of stewardship and provided recommendations as to how stewardship in the UK could continue to evolve and retain a world leading position. Shareholders have a number of tools to conduct stewardship from setting expectations, engaging with companies, voting on management resolutions at the AGM, collective engagement, to ultimately for some investors divestment.

Recommendation 5 of the Asset Management Taskforce Report on 'Investing with Purpose: Placing Stewardship at the Heart of Sustainable Growth' noted that "shareholders should use requisitioned resolutions more proactively as an escalation tool and develop model resolutions to escalate a range of critical concerns with investee companies, including on climate change. The industry should also develop guidance to overcome existing barriers to requisitioning resolutions".

This IA member guidance responds to the second half of this recommendation by providing institutional investors with an overview of the key steps required to effectively file a resolution at a UK-incorporated company, where shareholders think it is an appropriate escalation mechanism. It also details the key considerations and legal and operational barriers that investors may face at each of these stages as well as providing some practical information on how these barriers might be overcome or mitigated. The guidance is centred around the key steps and actions that investors must take and the key considerations at various stages of the filing process:

1. Considering Escalation
2. Establishing a Route to Filing a Resolution
3. Drafting the Wording and Clarifying Objectives of the Resolution
4. Accessing and Confirmation of Holdings
5. Submission of the Request
6. Post-submission Engagements

We hope that the guidance encourages our members and other institutional investors who have not succeeded in effecting behavioural change from companies following standard engagement and escalation activities to consider filing a requisitioned resolution with the company where appropriate. As a result, institutional investors should be better able to coordinate and support the creation of long-term value for their clients, by more effectively requisitioning resolutions that bring about corporate change on issues that may adversely affect the long-term financial performance of investee companies.

BACKGROUND

The right to requisition a resolution allows shareholders to require the board to include a resolution (often referred to as shareholder resolutions) to be put to a shareholder vote at either an Annual General Meeting (AGM) or a General Meeting (GM). These resolutions can require companies to take certain actions or respond to the concerns of shareholders about the management and performance of the company that are not addressed through the standard resolutions that appear on the notice of meetings for AGMs.

Requisitioned resolutions are an important escalation tool for investment managers where engagement with company management and voting on standard resolutions have not resulted in the desired changes in company behaviour. Requisitioning a resolution should be considered a continuation of an investor's wider stewardship approach. They might be used when managers have exhausted other stewardship activities such as expressing concerns directly and in writing to the chair of the company and voting against other resolutions or, where appropriate, participating in a collaborative engagement.

As with all stewardship activities conducted by investment managers, they will be requisitioning a resolution in their capacity as fiduciaries on behalf of their clients, seeking to address issues that are material to the company's ability to realise long-term value creation. The FRC's definition of stewardship set out in the UK Stewardship Code, recognises that the central purpose of stewardship is to generate sustainable long-term value for clients and beneficiaries. This goal, to ensure the long-term quality and performance of the company, is essential to consider at all stages of requisitioning a resolution.

The important role that requisitioned resolutions can play in supporting investment managers in delivering long-term value for clients was recognised by the Asset Management Taskforce's Report 'Investing with Purpose: Placing Stewardship at the Heart of Sustainable Growth'. The report recognised that, despite their potential for significant impact, "historically, the use of requisitioned resolutions at UK listed companies has been relatively limited due to the resources required to requisition the resolution and rally other shareholders" and that the many legal and operational barriers and the costs involved in overcoming these barriers serve as a disincentive to

shareholders to coordinate this kind of activity. The Taskforce, therefore, recommended that the investment management industry should "prepare guidance to assist institutional investors to requisition and support requisitioned resolutions and ensure this tool is effective where shareholders think it is an appropriate form of escalation."

Principle 11 of the UK Stewardship Code states that the Signatories should "where necessary, escalate stewardship to influence issuers" and the following Principle 12 encourages investment managers to "use the rights and influence available to them to exercise stewardship". Amongst such rights available to investment managers to influence issuers are those to require the directors to call a general meeting and to circulate a resolution and statement.

Before presenting the guidance, the following sections introduce the legal threshold that must be satisfied for shareholders to exercise these rights and a key feature of the regulatory landscape which shareholders will need to be aware of before beginning the process.

THE LEGAL THRESHOLDS FOR REQUISITIONING A RESOLUTION

For shareholders in UK-incorporated companies to be able to requisition a resolution they must satisfy the legal thresholds set out in the Companies Act 2006¹. The Act empowers shareholders to require that a company "give notice of a resolution" provided that the shareholder, or group of shareholders, meet one of the two following thresholds:

- 100 members, who hold, on average shares with a nominal value of at least £100; or
- Members representing at least 5% of all voting rights

These thresholds refer explicitly to 'members of the company', this is usually the agent, whose name appears on the company's shareholder register, in most cases, this is the custodian bank. However, the Companies Act also makes provisions allowing for the intermediaries who control the voting rights, usually the investment manager, to exercise the right to requisition a resolution². Whilst the 100-member option has been favoured by NGOs, institutional investors have typically made greater use of the 5% of voting rights threshold.

¹ <https://www.legislation.gov.uk/ukpga/2006/46/section/338>

² <https://www.legislation.gov.uk/ukpga/2006/46/section/153>

REGULATORY BARRIERS TO REQUISITIONING A RESOLUTION

In most cases, to meet the 5% threshold to requisition a resolution, shareholders will need to collaborate with other shareholders to file the resolution and garner support once it has been filed.

When collaborating with other investors, shareholders do have to be mindful of the regulatory framework for collective engagement and should obtain assurance on a case-by-case basis that their approach complies with regulations.

Legal and regulatory concerns could include the following (this is not an exhaustive list and the contents of this document does not amount to legal advice):

- **Market Abuse Regulation (MAR)** – Concerns relate primarily to the possibility that engaging with other shareholders and discussing concerns amongst filers amount to sharing inside information and therefore risk engaging in insider dealing.
- **Acting in Concert Laws & the Takeover Code** – Concerns relate to the possibility that working with other shareholders to co-file a resolution would amount to the formation of a Concert Party in a company which would be subject to the Takeover Code. The Takeover Panel will normally presume shareholders who requisition or propose to requisition the consideration of a “board control-seeking proposal” at a general meeting, together with their supporters as at the date of requisition or threat, to be acting in concert with each other and with the proposed directors. Such parties will be presumed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal, with the result that subsequent acquisitions of interests in shares by any member of the group could give rise to an offer obligation. Were the aggregate holding of such shareholders to be 30% of outstanding shares or more they would be required to make a mandatory cash offer to the other shareholders in the company.
- **Disclosure and Transparency Rules (DTR)** – Concerns relate primarily to the possibility that a group of shareholders co-filing a resolution would be considered to have indirect holdings of each other’s shares. They would then have to comply with the DTR requirements to notify the issuers and the market of this and any subsequent 1% change in the size of their holding.

Many recent examples demonstrate that in the UK context, it is possible to engage with other shareholders to file resolutions and this is permissible under these different regulations. Shareholders should take comfort from the FCA’s statement within its Feedback Statement 19/7: Building a regulatory framework for effective stewardship³. The FCA commented that it thinks “investors can comply fully with MAR and competition law while engaging individually and collectively with issuers, as long as they consider how to do this carefully, and adjust their approach if needed.” The FCA adds that it is willing to “discuss specific examples of problems that investors or issuers have found and will consider if it is appropriate to provide further guidance.” Notwithstanding the above comments from the FCA, shareholders will need to carefully consider if the fact that they intend on exercising their requisitioning rights constitutes insider information. If it is determined that the information does constitute information shareholders must not deal in the shares.

The Takeover Panel has been explicit in stating: “[it] does not believe that the relevant provisions of the Code have either the intention or the effect of acting as a barrier to co-operative action by fund managers and institutional shareholders or of constraining normal collective shareholder action”.

And that the requirement for a mandatory offer to be made would only be triggered by shareholders requisitioning a resolution that is “board-control seeking”^{4,5}. The Panel also clarify that a ‘board control-seeking resolution’ seeks to replace the existing directors with “directors who have a significant relationship with the requisitioning shareholders with the result that those shareholders would effectively be in a position to control the board”.

³ <https://www.fca.org.uk/publication/feedback/fs19-7.pdf>

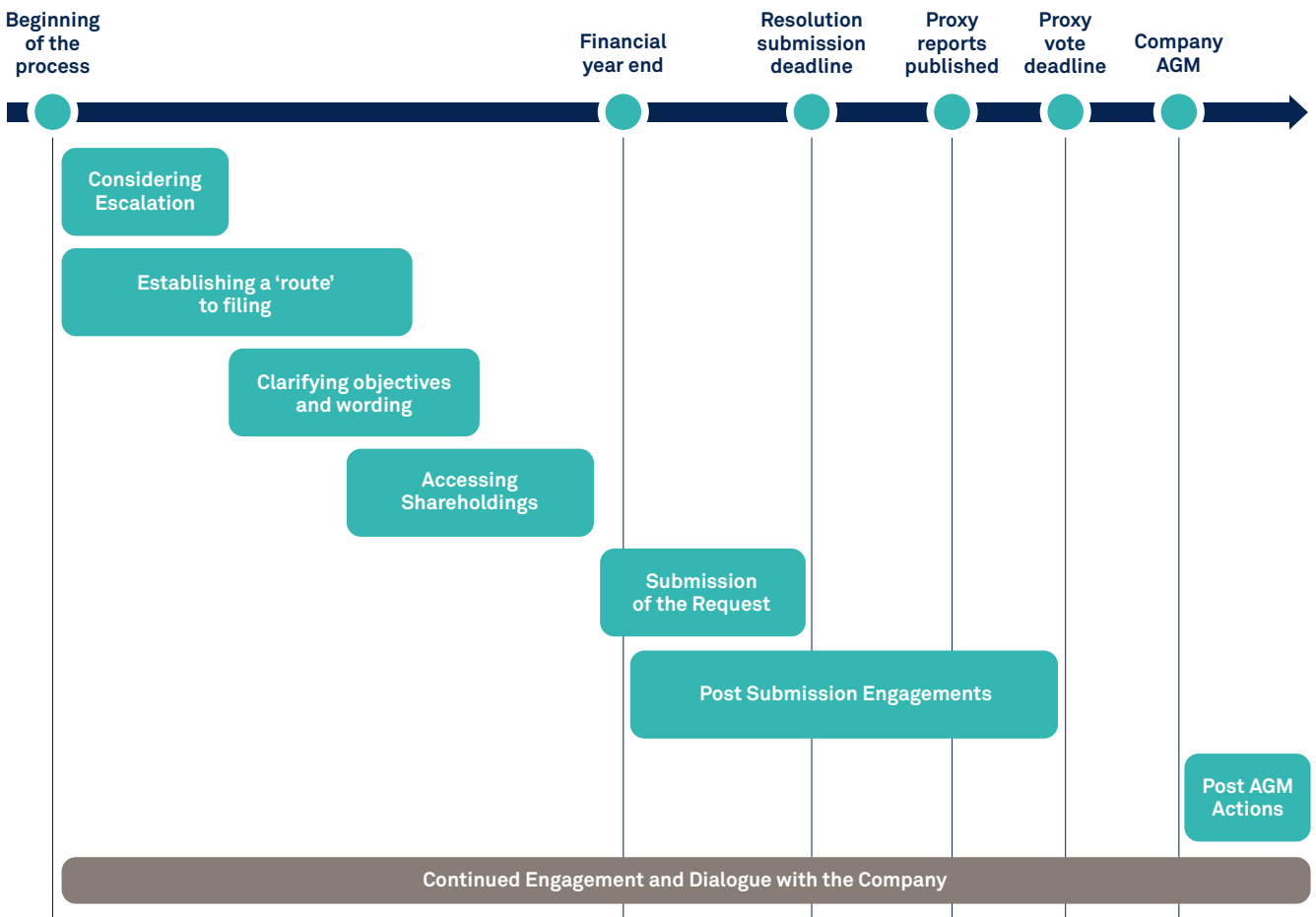
⁴ https://www.thetakeoverpanel.org.uk/wp-content/uploads/2021/08/567845_005_The-Take-Over_Bookmarked_02.08.21.pdf?v=28Jun2021

⁵ <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2009/02/2009-181.pdf>

TIMELINE FOR REQUISITIONING A RESOLUTION

The guidance provides shareholders with a chronological “walk-through” of the key stages that they will have to undergo as they seek to file a requisitioned resolution and the major considerations at each of those stages. Whilst there are legal deadlines that must be adhered to, these deadlines are not always practical and not conducive to a requisitioned resolution which affects the desired corporate change and so we recommend that filers embark on activity well ahead of the deadlines.

The timeline provides an indicative timeline for the legal deadlines that would need to be followed for a hypothetical company with a financial year end of 31 December.



STEP 1 – CONSIDERING ESCALATION VIA REQUISITIONING A RESOLUTION

Before beginning the process in earnest and committing resources to file a resolution there are several preliminary steps investors should take to assess the feasibility of successfully filing the resolution. These include:

- Establishing wider investor appetite to requisition a resolution
- Conducting internal governance and gaining approvals
- Engaging with non-investor external stakeholders

ESTABLISHING WIDER INVESTOR APPETITE TO REQUISITION A RESOLUTION

It is likely that concerns about the company are shared by other institutional investors. Successfully filing a resolution will typically require the support of other institutional investors to meet the 5% of voting rights threshold. Filers will need to make an assessment of the likelihood that other shareholders share similar concerns and would be willing to support efforts to requisition a resolution. Alternatively, other shareholders (or a group of shareholders) may have also initiated the process and filers may wish to consider joining these efforts.

Some shareholders may also try to increase their voting power (and thereby increasing the number of shares in favour of the shareholder resolution) by “borrowing” the shares of other shareholders under a stock lending agreement. While this is commonly used to facilitate short-selling, a typical stock lending agreement involves a lender transferring legal title of the stock to the borrower who is entitled to vote the stock and then transfer back equivalent stock at the end of the arrangement.

Consulting with Investor Networks

One way to understand wider market sentiment on specific issues and companies and ascertain the appetite amongst other shareholders for escalation will be to consult existing investor networks.

Some of these established networks may include:

- ***UN PRI*** – The network works to promote responsible investment and active ownership. The PRI attempts to facilitate collaborative stewardship initiatives, and provides a ‘Collaboration Platform’, and a ‘Shareholder Resolution Database’, which may provide members with an overview of any resolution ‘in the pipeline’.
- ***Investor Forum*** – The Investor Forum is one of the primary mechanisms through which investors can work collectively to facilitate dialogue and escalate material issues within UK listed companies, which in turn helps to safeguard long term value and promote well functioning markets. Whilst the Forum principally facilitates collective engagement with companies and will not directly facilitate filing a requisition resolution, it is a medium through which potential co-filers can be identified if escalation is required after collaborative engagement has failed.

There are also established networks that focus on specific thematic areas, especially climate change:

Climate Action 100+ and IIGCC – A European-based membership organisation for investor collaboration on climate change. The organisation has established a shareholder resolutions sub-group to incorporate the use of shareholder resolutions as part of meaningful and effective dialogue.

Alternatively, shareholders may wish to make use of more informal networks such as those facilitated by the UK’s Corporate Governance Forum, or simply through reaching out to colleagues at other investment management firms.

Engaging With Non-Governmental Organisations (NGOs)

Whilst this guidance is principally aimed at helping institutional investors to exercise their requisitioning rights, the current reality in the UK is the majority of requisitioned resolutions are driven by NGOs and charities. Organisations such as ShareAction have been successful in co-ordinating institutional and retail investors to file shareholder resolutions at high-profile FTSE Companies to promote social and environmental progress. Other organisations such as Follow this and Market Forces target specific sectors such as Oil & Gas or the Financial Sector by organising retail shareholders.

Some NGOs will seek to contact institutional investors while preparing the resolution and invite them to co-file. Where there is clear alignment between the objectives of the shareholder and the NGO and the proposed wording and its effects are consistent with the long-term success of the company and so investors' fiduciary duty to their clients, then supporting an NGO-led resolution can be an effective way of achieving stewardship objectives.

CONDUCTING INTERNAL GOVERNANCE AND GAINING APPROVALS

Identifying the Correct Role According to Available Resources

Requisitioning a resolution can be a time and resource-intensive process. These demands will differ depending on the exact role the shareholder takes through the process. The two primary roles being:

- **Lead-filer:** The lead-filer(s) is the primary point of contact for the company and the shareholders behind the resolution. They may also be required to co-ordinate the group of shareholders and organise the various documents in addition to leading with engagements the filers have with the company or any third-parties such as other shareholders, the media, or proxy advisers.
- **Co-filer:** They take a less active role, however, will still be required to undergo the various steps outlined in this guidance, albeit without having to commit as much resource to the organising of efforts.

Communicating with Internal Stakeholders

In addition to establishing wider shareholder support, it will also be necessary to engage with internal stakeholders ahead of progressing with the process.

Depending on the internal governance, size, and structure of the business, there are likely to be several different internal stakeholders who need to be consulted when considering requisitioning a resolution. These may include:

- **Central Stewardship/Corporate Governance function** – Many firms will have a Central Stewardship or Responsible Investment Committee comprised of senior representatives from different divisions within the firm e.g. CEO, CIO, Head of Responsible Investments or ESG, Heads of Compliance and Legal. These committees will often have responsibilities for setting stewardship and escalation strategies and policies for managing any conflicts of interest that arise. As a significant stewardship escalation step, it will be necessary to consult and gain approval from such bodies.
- **Legal & Compliance departments** – Legal and Compliance Teams may have some concerns about the various regulations and requirements that govern



a firm's activities. They may be concerned by Market Abuse Regulations and Acting in Concert and require assurance on the steps being taken to manage any risks associated with this. In addition, the firms' legal department may be required to confirm whether only specific personnel (such as the CEO, CIO, or COO) are able to undersign the request to resolution. Filers may also wish to consult external legal advice, especially where they have little previous experience of requisitioning a resolution.

- Portfolio managers – Investment teams will be critical to the success of filing the resolution. Their views and concerns regarding the company will help identify the need to escalate an engagement and requisition a resolution and identify the key objectives which will help to shape the resolution wording. Filers will also require their input as they seek to identify holdings of the company across different funds to meet the 5% threshold. Differing fund governance structures may require a close dialogue with the investment teams in order to identify the relevant paperwork for filing the resolution.
- Public relations and communications teams – The process of requisitioning a resolution will often attract significant attention from media and other external stakeholders. This can be an important part of the process in engaging wider shareholders and maintaining pressure on the board. However, it may also bring increased scrutiny to the filer firm's own practices. Public relations teams will be an important stakeholder throughout the process.
- Client relations departments – Clients are also likely to take an interest in their managers potentially filing a resolution and may have even encouraged their managers to escalate an engagement in this way. It will be helpful to engage with clients on the intention to requisition a resolution and seek their views. In segregated mandates, filers may need to identify authorities from clients to file the relevant paperwork for the resolution, depending on the nature of the contractual relationship.
- Investment operations departments – These departments will often have overall responsibility for the manager's relationship with custodians and so will be in the best place to navigate the intermediated security chain. The daily reconciliation exercise between the custodian and the asset manager also means that the investment operations team mean that the investment operations teams will be crucial in verifying beneficial ownership.

ENGAGING WITH NON-INSTITUTIONAL INVESTOR EXTERNAL STAKEHOLDERS

There are a range of parties who will be relied upon at various stages of the process and filers may wish to initiate engagement with them during the initial stages:

- Custodians (or any other intermediary) – Filers will need to notify custodians that they intend on requisitioning a resolution as soon as practical as the process of verifying beneficial ownership that is required to satisfy the threshold can be time consuming.
- Proxy advisers – Institutional shareholders use the services of proxy advisors and their reports to inform of upcoming resolutions at company AGMs and will be informed by their vote recommendations.
- Media – Utilising the press can be an effective means of not only engendering wider support for the resolution but will put pressure on the company to address the issues outlined in the resolution through providing greater levels of public support. Media support may be garnered through press releases and announcements of support by investors, through the publication of the AGM documentation and through the AGM itself.
- The company – The company secretary also plays an important role and filers should contact them as early as possible to understand and confirm the filing deadline as well as seek approval for paperwork.
- Retail shareholders – Promoting the issues and proposed requisitioned resolution with organisations that represent retail shareholders such as UK Shareholders' Association (UKSA) and Share Soc can help to get support on the issue with a wider range of shareholders and stakeholders.

STEP 2 – ESTABLISHING A ‘ROUTE’ TO FILING

Once filers have ascertained that there is sufficient support for escalation with a company, they should proceed to confirm which ‘avenue’ to take and create a timeline which will be worked to.

THE LEGAL THRESHOLDS FOR REQUISITIONING

The power of shareholders to requisition a resolution is set out in Section 338 of the Companies Act 2006 which provides that:

- “(3) A company is required to give notice of a resolution once it has received requests that it do so from –
- a) members representing at least 5% of the total voting rights of all the members who have a right to vote on the resolution at the annual general meeting to which the requests relate (excluding any voting rights attached to any shares in the company held as treasury shares), or
 - b) at least 100 members who have a right to vote on the resolution at the annual general meeting to which the requests relate and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.”

Alternatively, Section 303 provides that:

- (2) The directors are required to call a general meeting once the company has received requests to do so from –
- a) members representing at least 5% of such of the paid-up capital of the company as carries the right of voting at general meetings of the company (excluding any paid-up capital held as treasury shares).

And that a request:

- (4) b) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting.

Shareholders may, therefore, either requisition a resolution to be moved at the Company’s AGM or require the directors to call a dedicated general meeting at which the resolution may be moved.

REQUISITIONING A RESOLUTION AT AGM OR REQUIRING THE DIRECTORS TO CALL A GENERAL MEETING

There are several differences between calling a GM and requisitioning a resolution for circulation at an AGM that filers will need to consider which option to take.

In situations where the purpose of exercising requisitioning rights is to address an urgent or time-sensitive concerns, it may be more appropriate to require the directors to call a general meeting as the Company’s AGM may be several months away. Calling a General Meeting to address a specific issue may also be beneficial in that other shareholders’ attention is not diluted by several other orders of business that are addressed at an AGM. Calling a separate meeting will also be more likely to attract the attention of shareholders and other stakeholders as opposed to a resolution at the AGM.

However, calling a GM will also be significantly more disruptive and therefore more expensive for the company (particularly if the costs are passed on to filers), filers will need to consider whether calling a separate GM is necessary given the costs for the company or the filers and whether this is in the best interest of its clients. It will also adversely impact on the time that other shareholders have to consider the resolution(s) put forward by filers, and will reduce the time that those shareholders have to engage with the Board and the requisitions making them more likely to support the Board’s recommendation.

The Option to Requisition a General Meeting

After receiving a valid request from shareholders, the Directors are required to circulate the notice of meeting within 21 days of the request being made, with the meeting itself required to be held within 28 days after the circulation of the notice of meeting.

Shareholders also have the right to require the company to circulate a supporting statement in connection with the matters referred to in the resolutions to be moved at the general meeting. This statement can be submitted at any point up to a week before the general meeting. However, so that shareholders have sufficient time to make an informed voting decision, and so that the proxy voting agencies have enough time to consider the statement before releasing their reports, the supporting statement should be submitted at least 3-4 weeks prior to the general meeting, and ideally would be submitted with the request to call a meeting and so be included in the Notice of Meeting.

Requisitioning a Resolution at the AGM

Of the two options provided by S338 CA 2006, option a) the 5% of total voting rights thresholds is most likely to be appropriate for institutional shareholders. Satisfying the 5% threshold requires less coordination from different investors; than would be required to satisfy the 100-member threshold, particularly where a number of investors are “indirect investors” and holding their shares through nominees.

Practical Submission Deadlines

Shareholders will need to begin to consider what timelines they wish to work to and how any costs may be shared.

In legal terms the two applicable deadlines for the request to requisition a resolution and circulate an accompanying supporting statement is as follows:

- latest that a resolution must be submitted is 6 weeks prior to AGM (or before the Notice of Meeting, if later)
- latest that the supporting statement must be submitted is 1 week prior to AGM

Ideally, the resolution and supporting statement should both be submitted together, in enough time for them to be included in the primary Notice of Meeting circulated by the Company, and so enough time for shareholders to make a fully informed voting decision. The best way to ensure this is to submit the request to the Company before the end of the relevant Financial Year. This will also result in the costs associated with complying with the requests being paid by the Company⁶. Where this is not possible the requests should be submitted as soon as possible, but at the latest the supporting statement should be submitted at least 3-4 weeks prior to the AGM. If done at any later stage, it is unlikely that the major proxy voting agencies will have sufficient time to consider the resolution and statement in tandem when they release their reports and proxy voting advice (usually 2-3 weeks ahead of the AGM).

Costs Associated with Circulating the Resolution

As mentioned above, the responsibility for the costs associated with requisitioning a resolution and circulating a supporting statement will vary depending on when the requests are submitted.

Costs associated with circulating a resolution will be paid by the filers unless the request is received before the end of the financial year preceding the meeting, or if the Company resolves otherwise. Where a resolution is lodged after this date, filers are likely to be required to deposit sufficient funds with the company to cover the costs of complying with the requisition. Requisitionists should also consider including a supplementary resolution which seeks approval for the company to meet its own costs in complying with the resolution. Where the supplementary resolution is passed, the company may choose to reimburse the deposit after the AGM.

In all other cases, the costs must be paid by the filers who requested the circulation of the resolution. The extent of these costs will often be limited and relate predominantly to administration, and printing required.

⁶ Section 340 CA 2006

STEP 3 – CLARIFYING OBJECTIVES & WORDING

The filers will need to reach a mutual agreement on what objectives they hope to achieve and what (if any) concessions or compromises from the company will be satisfactory. In addition, the exact wording of both the resolution and supporting statement will need to be established.

AGREEING ON OBJECTIVES

The objective of any escalation will be to elicit some change in the behaviour of the company where previous engagement activities have not resulted in the desired change. The escalation should seek to protect or enhance long-term value on behalf of the investor's clients or achieve the client's wider sustainability objectives. Requisitioning a resolution can be an effective way of effecting this change and where the resolution is successfully passed, they require companies to take certain actions or respond to the concerns of a group of shareholders.

The act of requisitioning a resolution may be enough to encourage the desired change from the company. Signalling to the board that a group of institutional shareholders are concerned enough about an issue to file a requisitioned resolution may encourage them to take a different approach. In some cases, this may result in sufficient behavioural changes from the company, or even for the board to offer its support for the resolution.

Once a resolution has been filed and the company comes under increased scrutiny from the media, shareholders, and various stakeholders, the board may seek to compromise with the filers of the resolution, asking them to withdraw the resolution in return for the board committing to take certain actions, or to file its own resolution at the AGM, addressing the same issue. It is therefore important to agree on the objectives of the resolution and what outcomes would be agreeable or satisfactory ahead of submitting the request.

When the company responds to the requisitionists requests, which leads to the resolutions not needing to be put to all shareholders, this should also be seen as a successful use of the process.

FOCUS ON LONG-TERM VALUE THROUGH THE DRAFTING PROCESS

The successful passing of any resolution will need the support of institutional shareholders who have to make a voting decision consistent with their fiduciary duty to promote long-term value on behalf of their clients. The wording of a resolution and the supporting statements will, be critical to gaining the support of institutional investors with significant holdings. The statement should clearly outline why the resolution is aligned with creating or protecting shareholder value and is in the best interest of all shareholders. Filers may find that drafting the resolution and statement at the same time ensures that the objective of the resolution is clear, and will also ensure that the two are able to be circulated together.

Whilst no word cap or limit is applicable to the length of the resolution, filers should consider the approachability of the resolution and statement and ensure that they are structured and phrased in such a way as to be accessible to the different parties across the company's shareholder base. This should be available in hard copy or electronic form and in being put to the General Meeting it should not be defamatory, frivolous or vexatious.

The supporting statement is limited to 1,000 words. The supporting statement should explain why the filers believe that requisitioning a resolution was a necessary step and evidence that the filers have previously engaged extensively with the company – but it has not resulted in sufficient change by the board.

In some instances, particularly where a company's register features a large number of retail or individual shareholders, filers may wish to share a draft of the proposed resolution and statement with organisations such as ShareSoc or UKSA. As representatives of individual shareholders they may be able to provide practical insights into how these shareholders will engage and secure support for the resolution. For example, they may provide advice on logging support for the resolution through to verifying their identity as individual shareholders.

THE ROLE OF SHAREHOLDERS AND THE WORDING OF THE RESOLUTION

Requisitioned resolutions in the UK, if passed, are legally binding and oblige the directors to follow the direction of the resolution. The exact wording of the resolution and the wider implications it may have on the company and its long-term value are therefore important, and institutional investors will be cognisant of both the impact on long-term value (i.e. their role as fiduciaries) and their role as shareholders. There is a balance to be struck between signalling investor views and directing management to a specific action. Institutional investors consider resolutions should be focused on the delivery of a specific outcome as opposed to directing the board to take a specific course of action given the role and responsibilities of the company’s board and management in the setting and implementing the corporate strategy.

Goal-based resolution

Resolutions which direct the company towards achieving a specific goal or taking a particular action require increased attention to this balance. Institutional investors may be more inclined to support a resolution requiring a set outcome that the board should meet rather than a resolution which directs the board to take a specific action or approach, or which appears to be dictating strategy. For example this may include directing a company to set emissions targets aligned with the goals of the Paris Agreement as

opposed to directing the company to reduce emissions via taking action such as using only electric vehicles or ceasing from various business activities. Resolutions have a greater chance of passing if they allow company management to propose its own strategy to achieve the specified goal. Resolutions that focus on a set outcome should instead, focus on providing a mechanism to hold the board to account over the way it manages the company and its strategy.

Disclosure-based resolution

Resolutions which have the effect of requiring the company to make additional disclosures are unlikely to elicit such concerns and are more easily supported.

Ordinary and Special Resolutions

Filers will also need to consider if the wording and objective of the resolution will mean that the resolution will need an ordinary (50%) or special (75%) majority to pass. Any resolution which, if passed, would result in the Company having to amend its articles of association will require a special majority. In addition, several companies’ articles of association will make reference to “Members’ reserve Power” as outlined in the model articles, this outlines that “members may, by special resolution, direct the directors to take, or refrain from taking, specified action”.

Requisitioned resolutions in the UK, if passed, are legally binding and oblige the directors to follow the direction of the resolution.



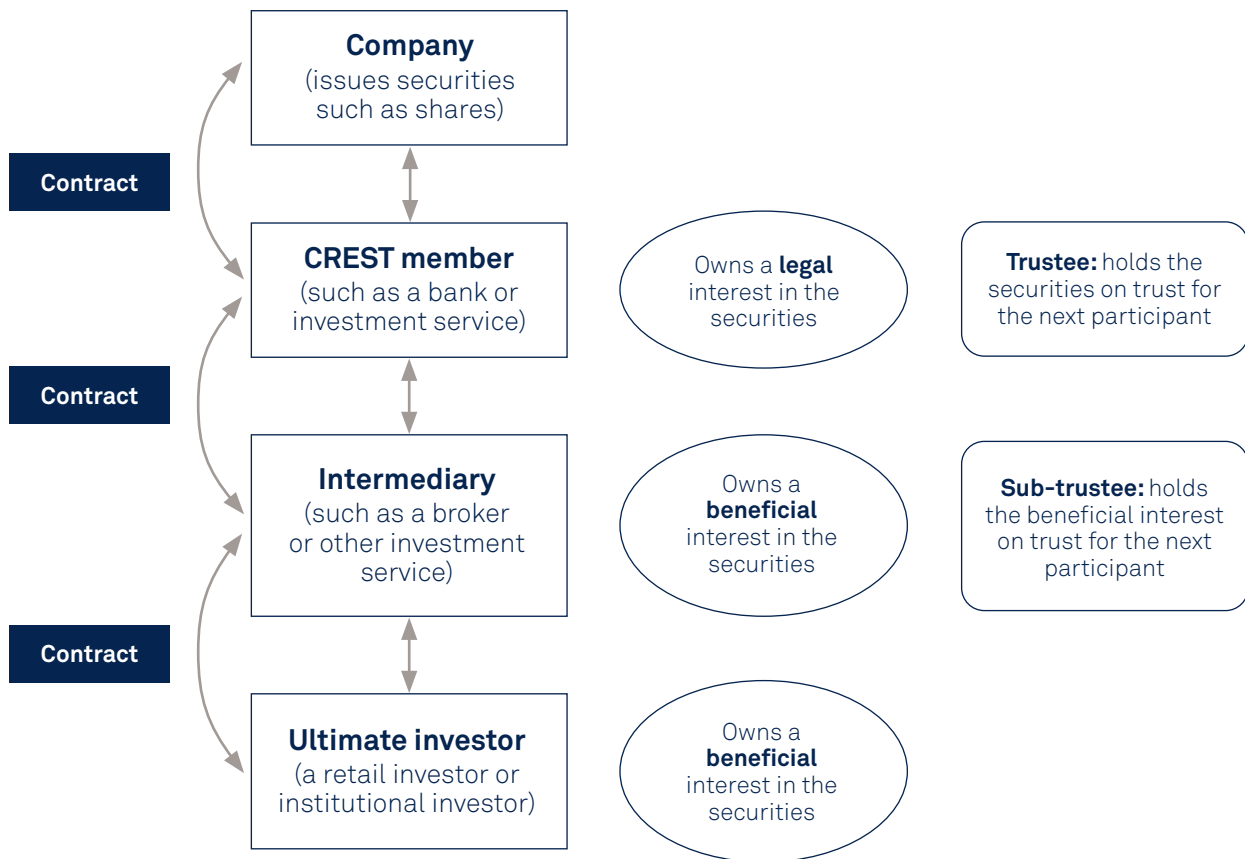
STEP 4 – ACCESSING SHAREHOLDINGS

To meet the thresholds outlined in Stage 2, shareholders will have to demonstrate to companies that they are able to exercise voting rights and have the right to requisition a resolution. To do this, filers have to navigate the intermediated security chain.

INTERMEDIATED SECURITY CHAIN

Under the UK's system of intermediated security ownership, asset managers are rarely the legal owner of securities, but rather they own a beneficial interest in the security. Most investors' securities are held through the intermediated security chain, with the ultimate party being the custodian

whose CREST account appears on the company's register of members. This CREST member is the legal owner of the securities and is the only party with a direct relationship with the company. The relationship between the CREST members, the various intermediaries, and the asset manager is classified 'as a series of trusts and sub-trusts', of which the ultimate investor is the beneficiary⁷. Investment managers may own a beneficial interest in the securities but will not have a direct relationship with the company, and are not considered to be members of the company for the purposes of the share register. The below diagram, from the Law Commission's scoping paper on Intermediated Securities, provides a simplified demonstration of the typical intermediated ownership chain.



⁷ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/11/Law-Commission-Intermediated-Securities-Scoping-Paper-1.pdf>

⁸ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/11/Law-Commission-Intermediated-Securities-Scoping-Paper-1.pdf>

Investors holding through intermediaries are not considered for the purposes of the Companies Act to be members of a company. This means that a number of shareholder rights (including requisition rights) are only exercisable by the CREST member. For investors to exercise these rights they must be enfranchised in some capacity by the CREST member.

Section 145 provides for a company's constitution to allow members to nominate another person as entitled to exercise various shareholder rights, including those conferred on members such as the rights to require directors to call general meetings, require circulation of a statement, and require circulation of resolution for an AGM of a public company (Sections 303, 314, and 338 respectively). However, for this section of the act to be used to allow non-members to exercise requisitioning rights it has to be provided for in the Company's own articles, and as outlined in the Law Commission's scoping paper into intermediated securities, this is rarely included in company articles.

In lieu of this, filers may use section 153 of Companies Act which allows beneficial indirect owners to exercise certain member rights, including those to require circulation of a statement, and require circulation of resolution for an AGM of a public company (Sections 313, and 338 respectively), provided that they can prove their beneficial ownership over the shares:

- *Undersigned by all shareholders making the request.*
- *Where the shareholders are not members the following information should be provided:*
 - *Name and Address of the custodian and confirmation that they hold shares on behalf of the filer;*
 - *The number of shares being held by the custodian on behalf of the filer, and the total amount paid up on those shares (this number should be correct as of the date that the request is made to the company);*
 - *The shares are not held on behalf of any other investors or, if they are, that the other investors are not among the other filers, (e.g. in the chain of beneficial ownership e.g. a client of the filer); and*

– *the shares confer voting rights.*

– *that the filer has the right to instruct the custodian how to exercise those rights;*

- *The filers provide evidence that the company requires.*

When requesting that custodians provide confirmation that they hold shares on behalf of the filers, we advise that the letter sent to the custodian includes the filers shareholder registration number (SRN).

Accessing all the information from intermediaries required to comply with the above conditions will likely be one of the most challenging and practically demanding tasks. Even where one of the filers has organised all the above, other filers may be struggling and so it is vital that this process is undertaken as soon as is reasonably practical: whilst the process has been known to take as little as 48 hours where an investors individual holding is above 5%, it may also take up to 6 weeks in cases with several investors and complicated ownership chains⁹ In this instance, for individual shareholders to appear on a company's share register, they may be required to purchase certificated shares through an execution-only broker.

Once the request has been submitted there is no requirement on the filers to maintain a shareholding in the company and they are free to trade the relevant securities as they wish. However, firms may wish to consider how divesting is consistent with the objective of using the shareholding to affect change and enhance the long-term value of the company.

⁹ Firms listed in the UK but incorporated in other jurisdictions may have different and additional requirements such as hard copies of resolutions, verification of signatures. and any lack of these may give rise to the possibility for the board to exclude the resolution.

CONSULTING WITH CUSTODIANS

The most important intermediary through this stage is the custodian bank who will likely be the CREST member identified on the company's register of members.

Some custodians may not have much (or any) experience in facilitating requisitioned resolutions, and in some instances it may also be important to work with share registrars to obtain the relevant information. Filers should note, however, that in some instances where the share registrar is involved there is a risk of compromising the confidentiality of the resolution and its wording, as the registrar will have directly been appointed by the company.

Filers should alert their custodian as soon as possible that they are intending on requisitioning a resolution and will require the custodian to provide it with a signed letter evidencing:

- the number of shares in the relevant company that it holds on behalf of the filer;
- that the investor has the right to instruct the member on how to exercise its rights; and
- the correct way that the custodian is identified on the company's register.

The company may challenge some of the above and so it is important for filers to be in contact with custodians so that it can rectify any issues with the necessary documentation promptly.

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Accessing all the information from intermediaries required to comply with the above conditions will likely be one of the most challenging and practically demanding tasks.

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Other Considerations

The difficulty in ascertaining a number of these information points can be compounded by various practices:

- Share lending – Where filers have consented to a securities lending transaction it may complicate issues regarding the number of shares which are beneficially held by the filer, who has the power to exercise rights (investor vs borrower), and at what date the filers should verify ownership for, given that the ownership level may differ after stock lending.
- Omnibus accounts – The use of omnibus accounts by custodians to pool securities means that investors do not have a proprietary right over specific securities held by its custodian. This may make it difficult for custodians to correctly state the number of shares held on behalf of the filer.
- Client mandates – Client documentation may have provisions relating to active stewardship and the use of securities for the purposes of requisitioning a shareholder resolution.



STEP 5 – SUBMISSION OF THE REQUEST

After the wording of the resolution and statement have been agreed and filers have all the necessary paperwork in place filers will be in a position to submit the request to circulate a resolution to the company.

SUBMITTING THE REQUEST

The letter that the filers submit to the company must clearly identify the resolution which the company will be required to circulate and be undersigned and authenticated by all the filers making the request. The letter must be submitted before the latest of:

- 6 weeks ahead of the relevant AGM; or
- Circulation of the Notice of Meeting pertaining to the relevant AGM.¹⁰

The company will only have to circulate the requisitioned resolution if it has received from the filers a sum that meets the costs of circulating the resolution before the applicable deadline (latest of the two above). The company may, however, resolve not to pass on the costs to the filer. A company's Articles of Association may make provisions for the passing on of costs associated with requisitioning rights and so filers should consult the company's Articles. All filers undersigning the letter should be able to provide documentation to accompany the letter consistent with stage 4.

The request to circulate a supporting statement must clearly identify the statement and be undersigned and authenticated by all filers making the request. The request must be submitted more than one week prior to the relevant AGM/GM.

The company will only have to circulate the statement if it has received from the filers a sum that meets the costs of circulating the statement a week ahead of the relevant AGM/GM. Again the company may resolve otherwise and not pass on the costs.

However, if the request to circulate the resolution and the supporting statement are made prior to the end of the financial year to which the AGM pertains, then the company will have to bear all costs connected to circulation of the resolution and statement.

Filers may submit the request either in hard copy form or electronic form¹¹ but it is wise to send to the company using both methods.

Whilst the legal deadline applicable to the resolution and statement differ, we suggest that the two should be submitted together, ideally, ahead of the relevant financial year end date to ensure that the materials are distributed in the Notice of Meeting and that all stakeholders have sufficient time to consider the relevant matters, therefore increasing the likelihood that the resolution receives significant levels of support.

AFTER SUBMISSION

After the letter to circulate the resolution and statement is submitted, filers should be proactive in engaging with shareholders, proxy advisers, the media and other stakeholders to gather support for the resolution. It is important to communicate the rationale behind the resolution and why the resolution is in the best interest of shareholders, and whether it will protect or enhance the company's long-term value. When interacting with other shareholders, especially those based in non-UK jurisdictions filers need to be aware of the relevant regulations in those jurisdictions e.g. the SEC's Proxy Solicitation Rules.

As mentioned under section 3, once a resolution has been filed the board may seek a compromise with the filers of the resolution, asking them to withdraw the resolution in return for the board committing to take certain actions, or to file its own resolution at the AGM, addressing the same issue. If a negotiated outcome has been achieved after the publication of the notice of meeting, filers are still able to withdraw the request to requisition.

¹⁰ S338 CA 2006 <https://www.legislation.gov.uk/ukpga/2006/46/section/338>

¹¹ S303(6) CA 2006 <https://www.legislation.gov.uk/ukpga/2006/46/section/303>

Advocacy through the media will increase awareness of the resolution and provides an opportunity to communicate to shareholders that might not otherwise be reachable (i.e. institutions with smaller holdings and retail shareholders). Additional press attention that can be generated will also bring further scrutiny onto the company and the issue that filers have identified. Whilst this additional pressure will be beneficial and may in itself contribute to the company deciding to alter its behaviours, it may also bring additional scrutiny to the practices and behaviours of the filer's group or parent company. Filers should alert internal media and corporate affairs teams that they may come under additional scrutiny and be prepared to answer questions in relation to both the company's approach to similar issues as that being filed, including both the actions of the corporate entity, and the manager's previous voting record.

In response to the filing of a resolution, many companies may try to reject the resolution. For example, the company may challenge the resolution on the grounds that the filers have failed to correctly satisfy the thresholds or challenge the resolution itself through claiming that it would, if passed, be ineffective (e.g. as it directly contravenes the company's articles, or that it is considered frivolous, defamatory, or vexatious), or that the resolution is directing the board rather than focusing on the delivery of a specific action. There has been little case law in the UK on such cases. However, provided that the resolution is drafted with the clear aim of promoting the long-term value of the company, and filers familiarise themselves with the company's articles, the company should not be able to legitimately challenge the resolution on the above grounds.

Boards who do not support the requisitioned resolution are likely to include, in the Notice of Meeting or the Annual Report, a commentary in response to the content of the requisitioned resolution and the supporting statements and why the Board suggests that shareholders vote 'against' the resolution. Filers may wish to prepare a response to this Company statement to circulate with the media and other stakeholders.

Proxy advisers will also be an important stakeholder in engendering wider shareholder support for the resolution. This is especially true of those agencies with the largest market share, ISS and Glass Lewis, but also the wider range of proxy advisors including the IA's institutional Voting Information Service (IVIS), Minerva, and PIRC. Resolutions that gain the support of proxy advisors are far more likely to be passed and be supported by other institutional shareholders, and the reports produced by these agents are widely read by institutional shareholders. The proxy advisers often provide recommendations to many institutions against bespoke policies designed to reflect the interests and voting policies of investors. Proxy advisers are more likely to support resolutions that make an explicit link to the long-term value of the company without encroaching on the role of the Board to set the company's business strategy.

Whilst these parties might not indicate support for the resolution or suggest shareholders vote 'for', engaging with them early will allow filers the opportunity to ensure that the proxy advisor's report is reflective of the motivations for filing the resolution and will also provide an additional opportunity for the filers to respond to the company's commentary on the resolution. Ultimately, proxy advisers will base their reports and recommendations on information that is in the public domain, and so it is important that the filers make any additional statements or rationale publicly available, pointing out the concerns that investors have with the company's response.

Finally, vote confirmation will take an increased importance for the filers when casting their own votes on the requisitioned resolution, to ensure that the votes have been validly cast and counted.

STEP 6 – POST-AGM ACTIONS

Following the AGM, and the vote on the resolution the response of filers will, evidently, differ depending on the results of the poll:

RESOLUTION ACHIEVES THE REQUISITE MAJORITY

Where the resolution passes with the required majority the company will be obliged to act in a way that is consistent with the direction of the resolution and filers should be active in monitoring the company's response and holding them to account on their deliverance.



Tabling a shareholder proposal and achieving the requisite support from the board on the resolution is not the only measure of success.

GREATER THAN 20% OF VOTES AGAINST THE BOARD RECOMMENDATION

There will be instances where the resolution does not pass with the required majority. However, the UK Corporate Governance Code provides that when 20% or more of the votes are cast against the Board's recommendation the company should explain how it will engage with shareholders to understand the reasons behind the result and publish a statement no later than six months after the shareholder meeting. In addition, ahead of the next AGM the board should disclose what feedback the board has received and the impact the views have had on the decisions the board has taken and any actions or resolutions now proposed. In this instance, the company should be pro-active in engaging with the filers and the wider shareholder base so there is opportunity to further influence the company, and hold the company to account over their compliance with the UK Corporate Governance Code.

Shareholders may find the IA's Public Register a useful resource in monitoring significant votes against and the statements companies make in response to the resolutions cast at the AGM .

Whilst tabling a shareholder proposal and achieving the requisite support from the board on the resolution is a good outcome, it should not be used as the only measure of success. For example, building support for the resolution and getting it onto the ballot also shows considerable progress. In recognition of this, some companies may still be willing to continue engagement with the filers of the resolution and work collaboratively to avoid a similar resolution being requisitioned at the next AGM, and to achieve a mutually desirable outcome.

¹² <https://www.theia.org/public-register>

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