

SCHEDULE 5

Regulation 69

AUDITORS

Eligibility

1. No person is eligible for appointment as auditor of an open-ended investment company unless he is also eligible under Article 28 of the Companies (Northern Ireland) Order 1990(1) for appointment as a company auditor.

2.—(1) A person is ineligible for appointment as auditor of an open-ended investment company if he is –

- (a) an officer or employee of the company; or
- (b) a partner or employee of such a person, or a partnership of which such a person is a partner.

(2) For the purposes of sub-paragraph (1), an auditor of a company is not to be regarded as an officer or employee of the company.

(3) The power of the Department to make regulations under Article 30 of the Companies (Northern Ireland) Order 1990 (ineligibility on ground of lack of independence) in relation to the appointment of company auditors is to be exercisable in relation to the appointment of auditors of open-ended investment companies –

- (a) for like purposes; and
- (b) subject to the same conditions.

3.—(1) No person is to act as auditor of a company if he is ineligible for appointment to the office.

(2) If during his term of office an auditor of a company becomes ineligible for appointment to the office, he must thereupon vacate office and give notice in writing to the company concerned that he has vacated it by reason of ineligibility.

(3) A person who acts as auditor of a company in contravention of sub-paragraph (1) or fails to give notice of vacating his office as required by sub-paragraph (2) is guilty of an offence and liable –

- (a) on conviction on indictment, to a fine;
- (b) on summary conviction, to a fine not exceeding the statutory maximum.

(4) In the case of continued contravention he is liable on a second or subsequent summary conviction (instead of the fine mentioned in sub-paragraph (3)(b)) to a fine not exceeding £100 in respect of each day on which the contravention is continued.

(5) In proceedings against a person for an offence under this paragraph it is a defence for him to show that he did not know and had no reason to believe that he was, or had become, ineligible for appointment.

Appointment

4.—(1) Every company must appoint an auditor or auditors in accordance with this paragraph.

(2) A company must, at each general meeting at which the company's annual report is laid, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next general meeting at which an annual report is laid.

(1) S.I.1990/593 (N.I. 5)

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(3) The first auditors of a company may be appointed by the directors of the company at any time before the first general meeting of the company at which an annual report is laid; and auditors so appointed are to hold office until the conclusion of that meeting.

(4) Where no appointment is made under sub-paragraph (3), the first auditors of any company may be appointed by the company in general meeting.

(5) No rules made under section 340 of the Act (appointment of auditors) apply in relation to open-ended investment companies.

5. If, in any case, no auditors are appointed as required in paragraph 4, the Authority may appoint a person to fill the vacancy.

6.—(1) The directors of a company, or the company in general meeting, may fill a casual vacancy in the office of auditor.

(2) While such a vacancy continues, any surviving or continuing auditor or auditors may continue to act.

7.—(1) Sub-paragraphs (2) to (5) apply to the appointment, as auditor of a company, of a partnership constituted under the law of England and Wales or Northern Ireland, or under the law of any country or territory in which a partnership is not a legal person; and sub-paragraphs (3) to (5) apply to the appointment as such an auditor of a partnership constituted under the law of Scotland, or under the law of any country or territory in which a partnership is a legal person.

(2) The appointment is, unless the contrary intention appears, an appointment of the partnership as such and not of the partners.

(3) Where the partnership ceases, the appointment is to be treated as extending to –

- (a) any partnership which succeeds to the practice of that partnership and is eligible for the appointment; and
- (b) any person who succeeds to that practice having previously carried it on in partnership and is eligible for the appointment.

(4) For this purpose a partnership is to be regarded as succeeding to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership; and a partnership or other person is to be regarded as succeeding to the practice of a partnership only if it or he succeeds to the whole or substantially the whole of the business of the former partnership.

(5) Where the partnership ceases and no person succeeds to the appointment under sub-paragraph (3), the appointment may with the consent of the company be treated as extending to a partnership or other person eligible for the appointment who succeeds to the business of the former partnership or to such part of it as is agreed by the company to be treated as comprising the appointment.

Rights

8.—(1) The auditors of a company have a right of access at all times to the company's books, accounts and vouchers and are entitled to require from the company's officers such information and explanations as they think necessary for the performance of their duties as auditors.

(2) An officer of a company commits an offence if he knowingly or recklessly makes to the company's auditors a statement (whether written or oral) which –

- (a) conveys or purports to convey any information or explanations which the auditors require, or are entitled to require, as auditors of the company; and
- (b) is misleading, false or deceptive in a material particular.

- (3) A person guilty of an offence under sub-paragraph (2) is liable –
- (a) on conviction on indictment, to imprisonment not exceeding a term of two years or to a fine or to both;
 - (b) on summary conviction, to imprisonment not exceeding a term of three months or to a fine not exceeding the statutory maximum or to both.

- 9.—(1) The auditors of a company are entitled –
- (a) to receive all such notices of, and other communications relating to, any general meeting of the company as a shareholder of the company is entitled to receive;
 - (b) to attend any general meeting of the company; and
 - (c) to be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors.

(2) The right to attend and be heard at a meeting is exercisable in the case of a body corporate or partnership by an individual authorised by it in writing to act as its representative at the meeting.

Remuneration

10.—(1) The remuneration of auditors of a company who are appointed by the company in general meeting must be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

(2) The remuneration of auditors who are appointed by the directors or the Authority must, as the case may be, be fixed by the directors or the Authority (and be payable by the company even where it is fixed by the Authority).

11.—(1) Subject to sub-paragraph (2), the power of the Department to make regulations under Article 398B of the 1986 Order⁽²⁾ (remuneration of auditors or their associates for non-audit work) in relation to company auditors is to be exercisable in relation to auditors of open-ended investment companies –

- (a) for like purposes; and
- (b) subject to the same conditions.

(2) For the purposes of the exercise of the power to make regulations under Article 398B of the 1986 Order, as extended by sub-paragraph (1), the reference in Article 398B(3) to a note to a company's accounts is to be taken to be a reference to the annual report of an open-ended investment company.

Removal

12.—(1) A company may by resolution remove an auditor from office notwithstanding anything in any agreement between it and him.

(2) Where a resolution removing an auditor is passed at a general meeting of a company, the company must, not later than 14 days after the holding of the meeting, notify the Authority of the passing of the resolution.

(3) Nothing in this paragraph is to be taken as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as auditor or of any appointment terminating that as auditor.

(2) Article 398B was inserted into the 1986 Order by Article 56 of the Companies (No. 2) (Northern Ireland) Order 1990 (S.I. 1990/1504 (N.I. 10))

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Rights on removal or non-reappointment

13.—(1) A resolution at a general meeting of a company –

- (a) removing an auditor before the expiration of his period of office; or
- (b) appointing as auditor a person other than the retiring auditor;

is not effective unless notice of the intention to move it has been given to the open-ended investment company at least 28 days before the meeting at which it is moved.

(2) On receipt of notice of such an intended resolution, the company must forthwith send a copy to the person proposed to be removed or, as the case may be, to the person proposed to be appointed and to the retiring auditor.

(3) The auditor proposed to be removed or, as the case may be, the retiring auditor may make with respect to the intended resolution representations in writing to the company (not exceeding a reasonable length) and request their notification to the shareholders of the company.

(4) The company must (unless the representations are received by the company too late for it to do so) –

- (a) in any notice of the resolution given to the shareholders of the company, state the fact of the representations having been made;
- (b) send a copy of the representations to each of the shareholders whose name appears on the register of shareholders (other than the designated person) and to whom notice of the meeting is or has been sent;
- (c) take such steps as FSA rules may require for the purpose of bringing the fact that the representations have been made to the attention of the holders of any bearer shares; and
- (d) at the request of any holder of bearer shares, provide a copy of the representations.

(5) If a copy of any such representations is not sent out as required because they were received too late or because of the company's default or if, for either of those reasons, any steps required by sub-paragraph (4)(c) or (d) are not taken, the auditor may (without prejudice to his right to be heard orally) require that the representations be read out at the meeting.

(6) Copies of the representations need not be sent out, the steps required by sub-paragraph (4)(c) or (d) need not be taken and the representations need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the court is satisfied that the rights conferred by this paragraph are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.

14.—(1) An auditor who has been removed from office has, notwithstanding his removal, the rights conferred by paragraph 9 in relation to any general meeting of the company at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his removal.

(2) The reference in paragraph 9 to business concerning the auditors as auditors is to be construed in relation to an auditor who has been removed from office as a reference to business concerning him as former auditor.

Resignation

15.—(1) An auditor of a company may resign his office by depositing a notice in writing to that effect at the company's head office.

(2) Such a notice is not effective unless it is accompanied by the statement required by paragraph 18.

(3) An effective notice of resignation operates to bring the auditor's term of office to an end as of the date on which the notice is deposited or on such later date as may be specified in it.

(4) The company must, not later than 14 days after the deposit of a notice of resignation, send a copy of the notice to the Authority.

16.—(1) This paragraph applies where a notice of resignation of an auditor is accompanied by a statement of circumstances which he considers ought to be brought to the attention of the shareholders or creditors of the company.

(2) An auditor may deposit with the notice a signed requisition that a general meeting of the company be convened forthwith for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting.

(3) The company must, not later than 21 days after the date of the deposit of a requisition under this paragraph, proceed to convene a meeting for a day not later than 28 days after the date on which the notice convening the meeting is given.

(4) The auditor may request the company to circulate a statement in writing (not exceeding a reasonable length) of the circumstances connected with his resignation to each of the shareholders of the company whose name appears on the register of shareholders (other than the designated person) –

(a) before the meeting convened on his requisition; or

(b) before any general meeting at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his resignation;

and to take such steps as FSA rules may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares.

(5) The company must (unless the statement is received by it too late for it to do so) –

(a) in any notice or advertisement of the meeting given or made to shareholders of the company, state the fact of the statement having been made;

(b) send a copy of the statement to every shareholder of the company to whom notice of the meeting is or has been sent; and

(c) at the request of any holder of bearer shares, provide a copy of the statement.

(6) If a copy of the statement is not sent out or provided as required because it was received too late or because of the company's default the auditor may (without prejudice to his right to be heard orally) require that the statement be read out at the meeting.

(7) Copies of a statement need not be sent out or provided and the statement need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the court is satisfied that the rights conferred by this paragraph are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.

17.—(1) An auditor who has resigned has, notwithstanding his removal, the rights conferred by paragraph 9 in relation to any such general meeting of the company as is mentioned in paragraph 16(4)(a) or (b).

(2) The reference in paragraph 9 to business concerning the auditors as auditors is to be construed in relation to an auditor who has resigned as a reference to business concerning him as former auditor.

Statement by auditor ceasing to hold office

18.—(1) Where an auditor ceases for any reason to hold office, he must deposit at the head office of the company a statement of any circumstances connected with his ceasing to hold office which

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he considers should be brought to the attention of the shareholders or creditors of the company or, if he considers that there are no such circumstances, a statement that there are none.

(2) The statement must be deposited –

- (a) in the case of resignation, along with the notice of resignation;
- (b) in the case of failure to seek re-appointment, not less than 14 days before the end of the time allowed for next appointing auditors; and
- (c) in any other case, not later than the end of the period of 14 days beginning with the date on which he ceases to hold office.

(3) If the statement is of circumstances which the auditor considers should be brought to the attention of shareholders or creditors of the company, the company must, not later than 14 days after the deposit of the statement, either –

- (a) send a copy of the statement to each of the shareholders whose name appears on the register of shareholders (other than the designated person) and take such steps as FSA rules may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares; or
- (b) apply to the court;

and, where an application is made under sub-paragraph (b), the company must notify the auditor.

(4) Unless the auditor receives notice of an application to the court before the end of the period of 21 days beginning with the day on which he deposited the statement, he must, not later than seven days after the end of that period, send a copy of the statement to the Authority.

(5) If the court is satisfied that the auditor is using the statement to secure needless publicity for defamatory matter –

- (a) it must direct that copies of the statement need not be sent out and that the steps required by FSA rules need not be taken; and
- (b) it may further order the company's costs on the application to be paid in whole or in part by the auditor notwithstanding that he is not a party to the application;

and the company must, not later than 14 days after the court's decision, take such steps in relation to a statement setting out the effect of the order as are required by sub-paragraph (3)(a) in relation to the statement deposited under sub-paragraph (1).

(6) If the court is not so satisfied, the company must, not later than 14 days after the court's decision, send to each of the shareholders a copy of the auditor's statement and notify the auditor of the court's decision.

(7) The auditor must, not later than seven days after receiving such a notice, send a copy of the statement to the Authority.

(8) Where notice of appeal is filed not later than 14 days after the court's decision, any reference to that decision in sub-paragraphs (5) and (6) is to be construed as a reference to the final determination or withdrawal of that appeal, as the case may be.

19.—(1) If a person ceasing to hold office as auditor fails to comply with paragraph 18 he is guilty of an offence and liable –

- (a) on conviction on indictment, to a fine;
- (b) on summary conviction, to a fine not exceeding the statutory maximum.

(2) In proceedings for an offence under sub-paragraph (1), it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

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20. Section 249(1) of the Act (disqualification of auditor for breach of trust scheme rules) applies to a failure by an auditor to comply with a duty imposed on him by FSA rules as it applies to a breach of trust scheme rules with the modification that the reference to an authorised open-ended investment company includes an open-ended investment company within the meaning of these Regulations.