

## CREST Proxy Voting Service

### 1. Background

CREST launched the Domestic Proxy Voting Service in January 2003. This allows companies to offer shareholders who are CREST members the facility of sending back an electronic proxy via the CREST system.

CRESTCo has published some specimen wording and a guidance note for issuers on its website ([www.crestco.co.uk](http://www.crestco.co.uk)). The purpose of this guidance note, which has been prepared in association with a joint Working Party of the Law Society's Company Law Committee and the City of London Solicitors' Company together with the ICSA's Registrars Group, is to provide more background detail for issuers.

Issuers should refer to the CRESTCo specimen wording and guidance note for issuers and should seek their own legal advice if they decide to offer CREST members the ability to use the CREST Proxy Voting Service.

### 2. What is the nature of the service?

The CREST Proxy Voting Service is an additional medium by which shareholders who are members of CREST can submit their proxy appointments and instructions, provided that the issuer has chosen to make this medium available. It does not replace or supersede any existing medium, whether electronic or paper, that is already offered by the issuer. The CREST service has been developed at the request of the major fund manager associations, including the National Association of Pension Funds, the Association of British Insurers and the Investment Managers Association. In the interests of encouraging institutional shareholder voting we therefore recommend as a point of Best Practice that issuers offer this additional medium.

An issuer can allow shareholders who are CREST members to use the CREST Proxy Voting Service without making arrangements for an electronic proxy facility (for example an online service) to be available to all shareholders. However, issuers should be aware that such a step could be open to criticism, and we would recommend as a matter of Best Practice that such arrangements are put in place at the same time as the CREST alternative is offered.

### 3. Articles of Association

#### 3.1 Articles must be consistent with the use of the CREST Proxy Voting Service

Issuers may allow shareholders to use the CREST Proxy Voting Service only if their Articles of Association permit this, either expressly or by implication.

Where an issuer has amended its Articles only by reflecting the Table A amendments made by the Companies Act 1985 (Electronic

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Communications) Order 2000, it is thought that no further changes are necessary to permit use of the facilities provided by the CREST Proxy Voting Service. Equally, where an issuer has made no amendments at all to its Articles to deal with proxies being received by way of electronic communication then section 372 (2A and 2B) of the Companies Act deems the new Table A provisions to be incorporated into the Articles and therefore it is thought that no changes would be necessary to permit the use of the facilities provided by the CREST Proxy Voting Service.

Issuers who have made other specific provision in their Articles of Association to permit electronic communication of proxy appointments should examine their Articles closely to see if they are consistent with the use of the CREST Proxy Voting Service.

Issuers are recommended to seek specific advice from their legal advisers as to whether it is necessary for their Articles of Association to be amended before the CREST Proxy Voting Service can be used.

### 3.2 Proxies sent by sponsors and voting service providers

One particular issue to consider when determining whether or not the Articles permit the use of the CREST Proxy Voting Service is the fact that the CREST system allows CREST sponsors and voting service providers (“VSPs”) to send proxies via the CREST system on behalf of the relevant registered holder. This gives rise to the question of whether or not some evidence of the authority of the person sending the proxy via the CREST system on behalf of the holder, needs to be provided to the company under the provisions of the Articles.

Given that the person communicating the CREST proxy instruction may be an agent of the CREST member (i.e. a sponsor or VSP) rather than the CREST member itself, the issuer must ensure that it can rely on the validity of the appointment. Issuers would normally need to rely on appropriate documentary evidence to establish the authority of an agent of the securities holder who appoints a proxy. However, the Uncertificated Securities Regulations 2001 (“USRs”) which provides the UK statutory framework for CREST, allow the recipients of “properly authenticated dematerialised instructions” (“PADIs”) sent through CREST to rely on (and prevents the person on whose behalf they are sent from denying) their authenticity, subject to limited exceptions (Regulation 35, of the USRs). CREST proxy instructions should comply with the statutory requirements for PADIs provided that they relate only to securities held in uncertificated form in CREST and additional documentary evidence of authority should therefore (subject to what is said below about any specific provision in the issuer’s Articles of Association) not be required for instructions sent in CREST by CREST sponsors or VSPs in relation to such securities.

However, if in relation to proxies, the Articles require specific evidence of authority from any agent to be provided to the company, then it is likely to be the case that the Articles will need to be amended in order to permit proxies to be submitted via CREST. The CREST system itself does not

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distinguish between the type of person who has submitted the proxy – i.e. whether it was the registered holder, a sponsor or a VSP – and there is no provision for VSPs or CRESTCo to provide proof of authority to the company.

This is not thought to be a problem if the wording in the Articles of Association is the same as that in Table A, as amended by the Companies Act 1985 (Electronic Communications) Order 2000. The Table A wording refers to the “appointment of a proxy and any authority under which it is executed or a copy of such authority certified notarially or in some other way approved by the directors” being deposited/received at the relevant address. This means the directors can decide to accept the receipt of a proxy form from a sponsor or voting service provider on behalf of the registered holder via the CREST system as sufficient proof of authority for the registered holder and do not need to demand specific evidence in writing from the sponsor/VSP as to their authority. A problem, may, however, arise where an issuer has Articles of Association which require the evidence to be “delivered personally or by post” or similar, as it is thought that, in practice, sponsors and VSPs will be unwilling to provide evidence of their authority in this way. In this case, it is thought that the issuer will need to amend the Articles before being able to offer shareholders the CREST alternative.

Issuers should check this point with their legal advisers.

### 3.3 Board Resolution

If an issuer allows shareholders to use the CREST Proxy Voting Service, it is recommended that a specific board resolution is passed approving the use of the CREST Proxy Voting Service.

In the case of an issuer with Articles which include a provision equivalent to Regulation 62 of Table A, it is recommended that this board resolution also confirms that the board will treat proxies received from sponsors and VSPs via CREST as providing sufficient proof of authority. This point is addressed specifically in Article 62A of CRESTCo’s specimen wording for Articles which, if adopted, would remove the need for such a confirmation.

## 4. Wording for notice of meeting/proxy form

CRESTCo has produced specimen wording for inclusion on the proxy card or in the notice of meeting. The wording attached to this note is a slightly modified version of that wording. The following points should be noted in relation to this wording:

### 4.1 Address

Companies with Articles which include a provision equivalent to Regulation 62 of Table A are required under their Articles of Association to give an address to which an appointment of a proxy should be sent in order to be valid. This will include any number or address used for the purposes of electronic communication. This is therefore an essential item to include.

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#### 4.2 Timestamps

The wording should include a definition of the point at which an issuer will be taken to have “received” the proxy appointment. This is to avoid any arguments about whether a proxy has been validly received within the relevant time limit. It is suggested that this should be the moment that a message is available for retrieval by the issuer’s agent in CREST. This is considered to be an electronic equivalent of a proxy card arriving through the letterbox of the issuer or its agent. This is also therefore an essential item to include. This should not be changed without discussion with the issuer’s registrar and CRESTCo.

#### 4.3 CREST Opening Times

Currently, the deadline for transmitting a proxy message in CREST is 8pm. Such messages cannot be sent on weekends or on other days when the CREST system is closed (such as some, but not all, public holidays). We recommend as a point of Best Practice that issuers bear this in mind, and, particularly if the deadline for receipt of proxies falls outside this period, consider drawing this to the attention of holders. However, this is not essential.

#### 4.4 Amendment of proxies

The specimen wording attached to this note refers to amendments to a proxy instruction. We recommend that this wording is included for practical reasons, see paragraph 5 below for further detail.

#### 4.5 Invalidity of a CREST Proxy Instruction

The last sentence of the specimen wording allows the issuer to treat as invalid a CREST Proxy Instruction in the circumstances set out in Regulation 35(5)(a) of the USRs. This sentence should always be included. Regulation 35(5)(a) sets out the circumstances when the issuer’s agent cannot rely (as permitted by Regulation 35(4)) on the authenticity of a CREST Proxy Instruction that it receives.

### 5. Amendment and Revocation of proxies

#### 5.1 Articles of Association provisions about receipt, amendment and revocation of proxies

The Companies Act 1985, s372(5), allows the issuer to set a last date and time by which proxy appointments must be received in order to be valid, provided it is not more than 48 hours before the meeting. The 48 hour period will invariably be specified in the Articles (see, for example, Article 62 of Table A). The Articles will also normally provide for notice of revocation of a proxy to be received at the address at which the appointment was received at any time up until the commencement of the meeting (see, for example, Article 63 of Table A). There is, typically, no specific provision in the Articles relating to the receipt of an amendment to the instructions (i.e. as to which way the proxy is to vote) to a previously appointed proxy.

#### 5.2 CREST system

Under the CREST Proxy Voting Service, it is not possible, in CREST system terms, to prevent holders from submitting changes to their instructions, or

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revoking their appointment of a proxy within the 48 hour period prior to a meeting. There are, however, logistical problems with this in practice and paragraphs 5.3 and 5.4 below describe the practical and legal issues relating to amendments and revocations.

### 5.3 Amendments to Instructions

As a shareholder appoints a proxy to act for him, it is thought that the company cannot prevent a shareholder changing his instructions to his proxy at any time prior to a poll being called simply by including wording to this effect in the notice of meeting. (It might also be undesirable to do so, for example, in case there were to be a significant change in that period which affects the way in which the shareholder wants to vote.) All that the Articles of Association normally require is that the appointment of proxy is submitted before the 48 hour deadline. If the Chairman has been appointed as proxy he should not ignore any change of instructions received before the vote is actually cast.

Thus the person appointed as a proxy has an obligation to act in accordance with the appointor's instructions and so should, as far as practicable, take account of last minute changes in those instructions. There are, however, logistical problems should such amendments come through CREST, not least the problem of ensuring that the change is actually communicated to the appointee. To be safe, therefore, during the 48 hours prior to the meeting, any amendment of instructions to a proxy appointed through CREST should be communicated directly to the appointee through other means.

Although, as mentioned above, an issuer cannot prevent a change of instructions being given at any time prior to a poll being held, an issuer can make it a term of any particular proxy facility that it provides that an amendment to a proxy instruction cannot be made via that facility, for example during the 48 hours before the meeting. It is therefore possible (subject to checking whether the wording of the Articles of Association permit this) to include in the notice of meeting/proxy form wording to prevent amendments being made via CREST after the deadline for receipt of the appointment. It is important that the wording does not prevent amendments (including by those who have submitted CREST proxies) by other means and it is recommended that the notice include wording to remind shareholders of this fact.

In order to prevent logistical difficulties at the meeting, we recommend that issuers specify in the notice of meeting a last date and time by which amendments to proxies must be received through CREST. The specimen wording at the end of this note includes such a statement. The additional wording is that the message "regardless of whether it constitutes the appointment of a proxy or an amendment to the instruction given to a previously appointed proxy" must, in order to be valid be received before the relevant time for receipt of proxies.

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#### 5.4 Revocations

The question of revocations is more difficult because Table A (see Regulation 63) and most Articles of Association specifically provide that a vote given is valid unless notice of determination of the authority of the person voting is received at any time before the beginning of the meeting and that the notice of determination can be received at the place where the proxy, including an appointment contained in an electronic communication, was duly received. In cases where the Articles adopt this approach, it is therefore not possible to prevent such a revocation being made via the CREST system.

### 6. Features of the CREST service

Full details of the CREST Proxy Voting Service are given on the CREST website. The CREST manual and CREST Market Norms are also available on the CREST website. The following notes are intended only as a summary:

#### 6.1 The announcement of the meeting

The announcement of the meeting through CREST follows the same basic procedures as corporate actions being announced through CREST in that the information supplied is that which is required for investors to process the event and not the full set of documentation that is normally sent in paper form. As such, the announcement in CREST is not a substitute for the formal notice of meeting, nor does it enable the issuer to meet any other legal or regulatory obligations regarding the notice or announcement with which the issuer would normally have to comply.

The announcement of the meeting in CREST is entered into the system by either a CREST registrar or a CREST receiving agent which has been appointed by the issuer as its “announcement agent”. CRESTCo will assume that the announcement agent for each security will be the CREST registrar for that security and that that registrar will have been validly appointed to act in this capacity by the issuer. If an issuer wishes to appoint another registrar or receiving agent to act as its announcement agent, it must first notify CRESTCo in writing.

It is recommended as Best Practice that an issuer will ensure that its agent has full details of the meeting in good time to be able to input the details into the CREST system by the date on which documentation is despatched to shareholders. The issuer’s agent should have those details on or before the business day before the day on which the details are to be input into the CREST system.

The numbering conventions used by companies for their meeting resolutions have yet to be standardised, and can currently include numeric, alpha and roman numerals. CREST can facilitate the use of all these conventions, however a combination of the above would lead to sequential problems in many members’ internal systems. It is therefore recommended as Best Practice that issuers ensure that a simple numbering convention is chosen and used consistently throughout a meeting notice.

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### 6.2 Appointment and instruction of a proxy

A registered holder of securities in CREST or, where appropriate, their VSP will be able to appoint and instruct a proxy by electronic means using the CREST system. It is, of course, the responsibility of the issuer's agent and the issuer to decide whether a particular proxy appointment made using the CREST voting service is valid, as is the case for proxies appointed by other means. CREST members have been advised by CREST that issuers will not cumulate proxy instructions received through the CREST system – each instruction will supersede the previous one for that account. Where proxy instructions are received through more than one medium (e.g. CREST and the internet and paper), then which takes precedence will be determined in accordance with the Articles of Association.

### 6.3 Results

CRESTCo has also produced functionality to allow issuers to announce the result of a meeting via the CREST system. This will allow issuers to note that a resolution has been passed or has failed either on a show of hands or on a poll and, if they so choose, to include the number of votes proxies were instructed to cast for and against each resolution (or, on a poll, the votes actually so cast).<sup>1</sup> Whether this functionality is used is a matter for each individual company but it is expected that a central mechanism such as this may reduce the number of queries regarding results the company normally receives. Again, making any such announcement through CREST does not ensure compliance with any statutory or other regulatory requirements.

### Specimen wording for issuers

#### **Shares held in uncertificated form, i.e. in CREST – instructions for electronic proxy appointment through CREST (to be incorporated in notice of meeting or form of proxy)**

*The following specimen wording has been drafted with a view to use by companies incorporated in England and Wales.*

*The specimen wording provided with this note is for guidance only. It replicates the CRESTCo model wording with the exception of the wording relating to an amendment to an instruction given to a previously appointed proxy (see paragraph 5 above). It is the responsibility of issuers and their own legal advisers to ensure that the documentation which they issue is adequate and satisfactory for their purposes. Neither ICSA, CRESTCo Limited nor any of their advisers nor the joint Working Party of the Law Society's Company Law Committee and the Company Law Sub-Committee of the City of London Solicitors' Company take any responsibility for or in respect of the specimen wording; and nothing in this specimen wording represents advice by ICSA or CRESTCo Limited or any of their advisers or that joint Working Party to any person.*

<sup>1</sup> See separate Guidance Note 030513: Disclosing Proxy Votes.

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CREST members who wish to appoint a proxy or proxies through the CREST electronic proxy appointment service may do so for the [annual general] meeting to be held on DATE and any adjournment(s) thereof by using the procedures described in the CREST Manual. CREST Personal Members or other CREST sponsored members, and those CREST members who have appointed a voting service provider(s), should refer to their CREST sponsor or voting service provider(s), who will be able to take the appropriate action on their behalf.

In order for a proxy appointment or instruction made using the CREST service to be valid, the appropriate CREST message (a "CREST Proxy Instruction") must be properly authenticated in accordance with CRESTCo's specifications and must contain the information required for such instructions, as described in the CREST Manual. The message, regardless of whether it constitutes the appointment of a proxy or an amendment to the instruction given to a previously appointed proxy must, in order to be valid, be transmitted so as to be received by the issuer's agent (ID XXXXX) by the latest time(s) for receipt of proxy appointments specified in the notice of meeting. For this purpose, the time of receipt will be taken to be the time (as determined by the timestamp applied to the message by the CREST Applications Host) from which the issuer's agent is able to retrieve the message by enquiry to CREST in the manner prescribed by CREST. After this time any change of instructions to proxies appointed through CREST should be communicated to the appointee through other means.

CREST members and, where applicable, their CREST sponsors or voting service providers should note that CRESTCo does not make available special procedures in CREST for any particular messages. Normal system timings and limitations will therefore apply in relation to the input of CREST Proxy Instructions. It is the responsibility of the CREST member concerned to take (or, if the CREST member is a CREST personal member or sponsored member or has appointed a voting service provider(s), to procure that his CREST sponsor or voting service provider(s) take(s) such action as shall be necessary to ensure that a message is transmitted by means of the CREST system by any particular time. In this connection, CREST members and, where applicable, their CREST sponsors or voting service providers are referred, in particular, to those sections of the CREST Manual concerning practical limitations of the CREST system and timings.

The company may treat as invalid a CREST Proxy Instruction in the circumstances set out in Regulation 35(5)(a) of the Uncertificated Securities Regulations 2001.

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