

## SCHEDULE 6

Regulation 63

### AUDITORS

#### Eligibility

1. No person is eligible for appointment as auditor of an investment company with variable capital unless he is also eligible under section 25 of the Companies Act 1989<sup>(1)</sup> (eligibility for appointment as company auditor) for appointment as a company auditor.

2.—(1) A person is ineligible for appointment as auditor of an investment company with variable capital 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) above, an auditor of a company shall not be regarded as an officer or employee of the company.

(3) The power of the Secretary of State to make regulations under section 27 of the Companies Act 1989 (ineligibility on ground of lack of independence) in relation to the appointment of company auditors shall be exercisable in relation to the appointment of auditors of investment companies with variable capital—

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

(4) Any reference in this paragraph to an officer of an investment company with variable capital shall include a reference to a shadow director of such a company.

3.—(1) No person shall 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 shall thereupon vacate office and shall forthwith 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) above or fails to give notice of vacating his office as required by sub-paragraph (2) above 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) above) 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 shall appoint an auditor or auditors in accordance with this paragraph.

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(1) 1989 c. 40.

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(2) A company shall, 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.

(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 shall hold office until the conclusion of that meeting.

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

(5) No rules made under section 107 of the 1986 Act (appointment etc of auditors) shall apply in relation to investment companies with variable capital.

5. If, in any case, no auditors are appointed as required in paragraph 4 above, SIB 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) below 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 other country or territory in which a partnership is not a legal person; and sub-paragraphs (3) to (5) below apply to the appointment as such an auditor of a partnership constituted under the law of Scotland, or under the law of any other 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 shall 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 shall 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 shall 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) above, 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 shall be treated as comprising the appointment.

## **Rights**

8.—(1) The auditors of a company shall 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) above 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.
- (4) This paragraph applies to a shadow director of an investment company with variable capital as it applies to an officer of such a company.

**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 shall 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 SIB shall, as the case may be, be fixed by the directors or SIB (and shall be payable by the company even where it is fixed by SIB).

**11.—**(1) Subject to sub-paragraph (2) below, the power of the Secretary of State to make regulations under section 390B of the 1985 Act<sup>(2)</sup> (remuneration of auditors and their associates for non-audit work) in relation to company auditors shall be exercisable in relation to auditors of investment companies with variable capital—

- (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 section 390B of the 1985 Act, as extended by sub-paragraph (1) above, the reference in section 390B(3) to a note to a company's accounts shall be taken to be a reference to the annual report of an investment company with variable capital.

## **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 shall not later than 14 days after the holding of the meeting notify SIB of the passing of the resolution.

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(2) Section 390B was inserted into the 1985 Act by section 121 of the Companies Act 1989 (c. 40).

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(3) Nothing in this paragraph shall 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 with that as auditor.

### **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 investment company with variable capital at least 28 days before the meeting at which it is moved.

(2) On receipt of notice of such an intended resolution, the company shall 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 shall (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 person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations) and to whom notice of the meeting is or has been sent;
- (c) take such steps as SIB regulations 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) above 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) above 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 above 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) Any reference in paragraph 9 above to business concerning the auditors as auditors shall 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 below.

(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 shall not later than 14 days after the deposit of a notice of resignation send a copy of the notice to SIB.

**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 shall, 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 more than 28 days after the date on which the notice convening the meeting is given.

(4) The auditor may request the company to circulate to the shareholders of the company whose name appears on the register of shareholders (other than the person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations)—

(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;

a statement in writing (not exceeding a reasonable length) of the circumstances connected with his resignation.

(5) The company shall (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 above in relation to any such general meeting of the company as is mentioned in paragraph 16(4)(a) or (b) above.

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(2) The reference in paragraph 9 above to business concerning the auditors as auditors shall 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 shall deposit at the head office of the company a statement of any circumstances connected with his ceasing to hold office which 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 shall 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 the shareholders or creditors of the company, the company shall 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 person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations) and take such steps as SIB regulations 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 paragraph (b) above, the company shall 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 shall not later than seven days after the end of that period send a copy of the statement to each of the registrar of companies and SIB.

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

- (a) it shall direct that copies of the statement need not be sent out and that the steps required by SIB regulations 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 shall 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) above in relation to the statement deposited under sub-paragraph (1) above.

(6) If the court is not so satisfied, the company shall 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 shall not later than seven days after receiving such a notice send a copy of the statement to each of the registrar of companies and SIB.

(8) Where a 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) above shall 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 above, 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) above, 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.