# Corporate Governance

# Key developments

This briefing is the third in our series of briefings on corporate governance and is designed to provide a synopsis of topical corporate governance matters impacting companies in the United Kingdom. This briefing tracks the development of certain matters identified in our **first** and **second** briefings and outlines new matters of interest.

This briefing focuses on key matters arising since the start of the year and is divided into the following topics:

- COVID-19 reliefs
- Regulatory landscape
- Diversity
- ESG reporting
- ESG monitoring
- Technical developments
- Governance in the news

If you would like further details on any topic, please contact a member of our Public Company Advisory ("**PCA**") team, whose details can be found on page 27 of this briefing.

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COVID-19 RELIEFS

# The effect of the COVID-19 pandemic on companies' disclosure obligations

Below is a summary of the current availability of measures and reliefs put in place to support companies during the COVID-19 pandemic.

*Ongoing*

National lockdown measures in response to the COVID-19 pandemic caused vast disruption to the "ordinary course of business" for companies and their employees in the initial two years of the crisis. In order to mitigate such disruption on usual business reporting practices, several temporary measures were put in place in 2020.

Now that the UK has transitioned to "living with Covid", regulators are requiring companies to return to pre-pandemic practices. As of the date of this publication, the following temporary measures, first introduced in 2020, either remain in place or have been terminated, as set out below.

| Requirement | Covid-19 Relief Measure | Status of measure |
|---|---|---|
| Disclosure of Net Short Positions (NSPs) | The threshold for disclosure of NSPs in shares admitted to trading on a regulated market was lowered from 0.2% to 0.1%. | In place indefinitely from 31 January 2022<br><br>See ESMA's statement **here** |
| Publication of financial reports in accordance with DTR 4.1 and DTR 4.2 | Deadlines for publication of annual financial reports by listed companies subject to DTR 4.1 and DTR 4.2 were extended from:<br>▫ 4 months to 6 months for annual reports; and<br>▫ 3 months to 4 months for half-yearly financial reports.<br><br>Companies unable to comply are expected to request a suspension of their listed securities. The FCA will no longer exercise forbearance in respect of non-compliant companies. | Extensions no longer available in respect of reporting periods ending on or after 28 June 2022<br><br>See the FCA's Primary Market Bulletin 39 **here** |
| Shareholder approval for Class 1 and Related Party transactions in accordance with LR 10.5.1R(2) and LR 11.1.7R | The Listing Rule requirement for a general meeting of a listed company to be held in order to approve a Class 1 or related party transaction was dispensed with, provided that written undertakings to vote in favour were obtained from a majority of shareholders who are eligible to vote. | Dispensation from holding a general meeting no longer available from 28 June 2022<br><br>See the FCA's Primary Market Bulletin 39 **here** |
| Disclosure of working capital statements in prospectuses and circulars | Listed companies were permitted, under certain circumstances, to disclose key modelling assumptions regarding COVID-19-related business disruption without requiring the inclusion of a qualified working capital statement in a prospectus or circular. | No longer available from 28 June 2022<br><br>See the FCA's Primary Market Bulletin 39 **here** |

| Requirement | Covid-19 Relief Measure | Status of measure |
|---|---|---|
| Publication of Modern Slavery Statement in accordance with s.54 of the Modern Slavery Act 2015 | Companies were permitted to delay publication of their Modern Slavery Statement by up to 6 months without penalty. Companies were still expected, however, to explain any delay in publication of its statement, to disclose any steps they took during the pandemic, and to treat publication of their next statement as an opportunity to disclose how they monitored risks and adapted accordingly during the pandemic. | No longer available from March 2021<br><br>See current government guidance **here** (note that guidance around delay has been removed) |
| Filing of annual accounts in accordance with the Companies Act 2006 | For companies that did not shorten their accounting period, their accounts filing deadline was automatically extended under specific legislation by 3 months.<br><br>From 6 April 2021, automatic deadline extensions no longer apply and companies must file their accounts by the usual deadlines. Eligible companies may still apply to Companies House for a 3-month extension, which may be granted where issues outside the company's control have prevented timely filing. This is unlikely to be granted if the company has already extended its filing deadline up to the maximum filing period of 12 months. | No longer available from 6 April 2021 unless applied for<br><br>See ICAEW guidance **here**<br><br>See Companies House guidance **here** |

REGULATORY LANDSCAPE

# FCA provides an update on its efforts to tackle market abuse

The FCA issued a press release outlining its continued efforts to tackle market abuse, insider dealing and market manipulation – a cornerstone of the FCA's 2022-2025 Strategy.

*June 2022*

## Who does this affect?

This update concerns issuers of and persons dealing in listed securities admitted to trading on UK and certain EU regulated markets and multilateral trading facilities.

## What is the development?

The FCA has noted recent press reports questioning its approach towards preventing market abuse and has published an update on the tools and methods it deploys to monitor and tackle insider dealing and market manipulation.

## How does this change the current position?

In April 2022, the FCA published its 3-year strategy for tackling market abuse in the UK alongside its Business Plan 2022/23.

The 3-year strategy aims to:

- reduce and prevent serious harm caused by firm failure;
- set higher standards for firms; and
- promote competition and positive change by adapting current regulatory frameworks.

In its update of 17 June 2022, the FCA sets out the practical ways in which it monitors and tackles market abuse on a daily basis and elaborates on how it is equipped to deliver its outcome-focused 2022-2025 Strategy. The FCA outlined the following key features of its approach to market surveillance:

- **Data-led approach:** It undertakes real-time monitoring of millions of suspicious transaction and order reports each day and applies dedicated software and algorithms designed to detect potential issues. This data is supplemented by suspicious transaction and order reports sent to the FCA by market participants, all of which are assessed by a member of its specialist team.
- **Publication of findings:** It regularly publishes its oversight findings in its Market Watch publication; the contents of which provide helpful guidance to market participants on scrutiny of the market and, in turn, improves the quality of suspicious transaction and order reports received by the FCA.
- **Enforcement action:**
  - The FCA notes the high burden of proof applicable in criminal prosecutions, and provides assurance that it takes criminal action where appropriate and where sufficiently strong and adequate evidence is available to it. It notes that 5 prosecutions have been instigated so far this year.
  - The FCA cautions that it will takes civil action where appropriate, particularly where criminal action is not necessarily preferable (or even possible). It reports that more than 10 subjects are currently awaiting decisions on cases brought against them.
  - The FCA uses its market intelligence to disrupt suspected market abuse. Noting that market abusers often operate across borders, the FCA cooperates with its international partners and brings its own data and intelligence to bear in such cases. It notes that its cooperation has contributed to successful action in Dubai, France and the US, for example.
- **Resources:** The FCA has approximately 90 enforcement staff members supported by specialist intelligence, legal and cyber resources, as well as its market oversight teams.

## What is the key takeaway?

The FCA's update provides greater insight into the role and importance of vigilance and reporting obligations of market participants in the FCA's oversight and new outcome-focused strategy on prevention of market abuse. The FCA has stated its expectation that, provided market participants deliver effective monitoring and reporting, it will not necessarily need to introduce many regime changes.

## What should affected companies do?

Market participants should continue to play their part in monitoring, preventing and reporting suspected or actual market abuse. To achieve this, companies might consider:

- ensuring that all individuals within the business who are in a position to detect (and potentially commit) market abuse are regularly re-trained on the rules, regulations and internal company policies which must be observed in order to avoid committing market abuse offences, and what should be done when market abuse is suspected – for example, scenario-based training can be effective
- consistently reviewing and improving their market abuse detection and prevention systems and controls – where there have been "near misses", analysing the root cause and immediately implementing solutions
- continuing to fulfil their reporting obligations, following the spirit and not just the letter of the market abuse regime rules

### Next steps

Companies should continue to ensure their inside information policies and processes are robust and fit for purpose.

### Further information:

- Click **here** for the FCA update of 17 June 2022.
- Click **here** for the FCA Strategy: 2022 to 2025.
- Click **here** for the FCA Business Plan 2022/23.

# QCA findings on the role of non-executive directors

The Quoted Companies Alliance ("**QCA**") has published findings from a recent YouGov survey of small and mid-sized quoted companies (the "**Survey**") on the role and value of non-executive directors.

*June 2022*

### Who does this affect?

The Survey collated feedback from a cross section of 107 small and mid-sized UK quoted companies on how their boards operate and the role and value of non-executive directors ("**NEDs**").

### What is the development?

The Survey provides useful insights into what boards should be keeping in mind when considering their effectiveness and performance, in order to ensure that they continue to remain as well-equipped as possible to meet the ongoing needs of the company on whose board they serve. Reference to the findings of this Survey may prove useful when carrying out annual board performance reviews.

### How does this change the current position?

The Survey made the following findings in relation to NEDs in 2022 compared with previous years:

- The average NED salary of £40,500 marks a significant decrease from the 2019 average of £48,840, after having previously consistently increased between 2013 to 2019. The QCA notes that this may reflect a general sentiment among companies that NEDs have tended to work fewer hours than expected. Notwithstanding this, companies generally feel their NEDs are providing value for money.
- Companies felt that NEDs brought the most value to companies they serve by "providing checks and balances" and "bringing broader business experience", and noted that they could contribute more by increasing their involvement in long-term vision planning, having valuable contacts within other companies and having broader business experience.
- A significant proportion of companies (60%) felt that their boards lack cyber/IT expertise and the QCA draws a potential link with the average age of NEDs in this market and this perceived lack of expertise.
- Only a small proportion of companies felt that their board had sufficient ESG knowledge. The QCA notes that companies should actively seek to improve this, given increasing investor and regulator expectations in this area.
- A vast majority (97%) of companies felt that NEDs were very or fairly knowledgeable about the company business and 89% agreed that NEDs were nevertheless sufficiently independent, notwithstanding their good knowledge of the business.
- Only 6% of companies involve their investors in all aspects of board member recruitment. The QCA notes that as stakeholder engagement increased, investors may want to have greater involvement in hiring processes, for example potentially to address matters of diversity and ESG expertise.

### What is the key takeaway?

Companies are not required to take any action with respect to the Survey, but may find it useful to understand how the role played by NEDs in their own organisation compares with developing trends amongst their peers and competitors.

### What should affected companies do?

The QCA recommends that Chairs and NEDs should consider the key messages from the findings of this Survey, and ask the following questions of themselves:

#### Chairs

1. Do board performance assessments include metrics to measure improvement in key areas?
2. How do you ensure the right skills are on the board to address the most significant challenges?
3. Do your current recruitment methods support a diverse board composition?

#### NEDs

1. Do you know in what areas your board is currently lacking skills, and what can you do to cover these weak points?
2. Do other board members and investors see you as an independent actor on the board?
3. Are you able to commit enough time to the role and is the efficiency of your time commitment improving?

**Next steps**

Consider the potential weaknesses of your board in areas highlighted by the Survey findings and, in particular, consider recruiting individuals with additional expertise in areas of cyber/IT and ESG and/or seek external advice and guidance in these areas.

**Further information:**

- Click **here** for a copy of QCA Survey.

# UK Government response to consultation on overhauling the corporate governance and audit landscape

The long-awaited UK Government response to a 2021 consultation on strengthening the UK's audit, corporate reporting and governance systems, was published on 31 May 2022.

*May 2022*

### Who does this affect?

The focus of many of the reforms will primarily affect public interest entities ("**PIEs**"), their directors and their auditors. A new breed of "750 PIEs" (see below) will fall within scope, in addition to AIM companies that meet the 750:750 criteria.

### What is the development?

The government seeks to implement wide-ranging reforms designed to strengthen the UK's audit, corporate governance and reporting regime. The reforms, when implemented, will widen the definition of "PIE", such that more companies will fall within the scope of the overhauled regime. Entities falling within the newly-widened definition will be subject to heighted governance and reporting obligations, as set out below.

### How does this change the current position?

The government will implement primary and secondary legislation, and make changes to the UK Corporate Governance Code (the process for which the FRC has already embarked upon) in order to bring effect to the proposed overhaul. Proposed changes include the following:

- **Definition of "PIE"**: The government proposes to widen the definition of "PIE" based on size, such that it will capture large companies or LLPs with at least 750 employees and an annual turnover of at least £750 million ("**750 PIEs**") (these 750 PIEs as newly defined will not be subject to the same requirements applicable to existing PIEs, and there will be a grace period for companies which eventually cross the size threshold and become classed as a "750 PIE").
- **UK Corporate Governance Code** (the "**Code**"): The FRC will consult on updating the Code to provide for a directors' statement on, and other disclosures concerning, the effectiveness of, and assurances on reporting of, a company's internal controls.
- **ARGA**: The FRC will become the Audit, Reporting and Governance Authority (ARGA), which will be responsible for monitoring and enforcing, via new statutory powers, corporate reporting obligations of in-scope entities.
- **Director accountability**: Directors should note that ARGA will have the power to investigate and sanction PIE directors for any alleged breaches of statutory duty under the Companies Act 2006 and/or of their corporate reporting and audit responsibilities; the latter of which will also be expanded to include a requirement for directors to report on what steps they have taken to detect and prevent fraud.
- **Audit Market**: ARGA will also have powers to set and enforce auditor appointment requirements – this is intended also to apply to FTSE 350 companies, who will be required, following phased changes, to appoint a 'challenger' audit firm or allocate a meaningful portion of their audit exercise to a smaller challenger firm.
- **Capital Maintenance**: 750 PIEs will be required to disclose their distributable reserves, confirm the legality of proposed dividends, provide detail on the directors' strategy for shareholder returns on a long-term basis and report on measures taken by the board to detect and prevent fraudulent activity.
- **Resilience Statement**: 750 PIEs will be required to publish a new "Resilience Statement" which explains how the board assesses the company's prospects and adapts the company's business model over the short, medium and long-term.
- **Audit and Assurance Policy**: 750 PIEs will also be required to adopt and detail an "Audit and Assurance Policy" which sets out how directors seek and obtain assurance in respect of reporting disclosures made to shareholders.

### What is the key takeaway?

These proposals have been made in response to the financial harms created by the sudden collapse of "big business", with recent cited examples often including BHS (2016), Carillion (2018), Patisserie Valerie (2018) and Thomas Cook (2019), each of which became financially distressed not long after receiving clean bills of health from their auditors. With these reforms, the government intends to reinforce the UK's reputation as a world-leading destination for investment, and to set a golden standard globally for corporate governance, risk management and internal control, corporate reporting and audit.

## What should affected companies do?

In-scope (or soon to be in-scope) entities should not wait for reforms to come into effect before making any internal policy and process changes. In particular, companies which will be classed as PIEs by size should review their reporting and governance practices now and identify potential gaps which should be addressed in order to smooth the transition from the current to the newly heightened requirements under the audit reforms.

### Next steps

Post-implementation of the reforms, entities which are not yet PIEs by size or nature should continually keep under review the possibility that (and likely timeframe within which) they may fall within the definition of PIE and become subject to additional governance and reporting requirements, and anticipate what additional processes or reporting lines they may need to implement internally in order to comply. The grace period that the government intends to allow should be seen as a backstop deadline and not a commencement date for a newly-in-scope entity to begin meeting its additional governance obligations.

**Further information:**

- Click **here** for a copy of the Government's 2022 response to the 2021 consultation 'Restoring Trust in Audit and Corporate Governance'.
- Click **here** for a copy of FRC's Position Paper.

# FRC Plan and Budget for 2022 to 2025

The FRC published its 3-Year Plan 2022 to 2025 (the "**Plan**") which, amongst other items, sets out its progress towards establishing the new Audit, Reporting and Governance Authority ("**ARGA**"). The Plan also comprises a detailed breakdown of the FRC's intended expenditure for 2022-23, alongside a summary of expected costs and headcounts for the following two years.

*April 2022*

### Who does this affect?

This update may be of interest to UK audit firms, as well as those companies expected to fall within the overhauled corporate governance and audit regime, i.e., listed companies and large private companies in the UK.

### What is the development?

The FRC's Plan has been published following release of the UK government's 2021 consultation "Restoring Trust in Audit and Corporate Governance", which outlines how the FRC will transition into ARGA. The Plan sets out how the FRC will be restructured (including in terms of increase in headcount and expenditure) in order to meet its envisaged new role and powers under the government's plans.

### How does this change the current position?

- **Governance:** The FRC currently comprises four divisions: Regulatory Standards, Supervisions, Enforcement and Corporate Services. Over the 3-year period of this Plan, these four divisions will adapt in size and focus to meet new regulatory responsibilities. The FRC will continue to streamline its governance structure into a more executive-led model, with appointment of a permanent Chair and non-executive directors during 2022.
- **Data collection:** During the 3 years of the Plan, the FRC will gather more data on the impact of its regulatory activities with a view to better understanding which measures lead to improved outcomes and can be accurately and consistently measured and reported on, in order to illustrate to stakeholders how effectively the FRC is carrying out its regulatory role. The FRC notes in its Plan that it will continue its work on audit culture and audit quality indicators, being a means of assessing how audit quality is improving over time. The FRC notes that even once it has transitioned into ARGA, it will take time for it to build a picture of the emerging regulatory landscape and to set a baseline for what "good looks like".
- **Headcount and expenditure:** Headcount and costs are expected to increase by around 16% in order to discharge the newly expanded role of ARGA, with some of the larger increases being made to new statutory accountancy oversight positions.

### What is the key takeaway?

Under its new power and status, ARGA will be tasked with monitoring and enforcing compliance with the new audit regime requirements. This will require an increase in current headcount and funding of the FRC's current activities, which will largely be implemented in the first two years of the Plan. Following the initial expansion and restructuring of the FRC into ARGA, the FRC (as ARGA) will be monitoring practices and collecting data on the effectiveness of measures with a view to continuing to develop and improve audit practices and reporting.

### What should affected companies do?

Companies should consider whether any changes need to be made to their current practices and processes in order to enable them to meet newly heightened levels of responsibility, accountability and reporting under the incoming regime changes.

**Next steps**

- Provide training to directors ahead of implementation of the new regime.
- Review and introduce appropriate amendments or updates to the terms of reference of your audit committee to facilitate compliance with the proposed changes.
- Review and introduce appropriate changes to existing reporting lines and practices within the company with a view to establishing the information channels which will be needed to ensure compliance with heightened reporting and disclosure obligations.

**Further information:**

- Click **here** for a copy of the 3-Year Plan 2022 to 2025.
- Click **here** for a copy of the Government's 2021 consultation 'Restoring Trust in Audit and Corporate Governance'.

# Case Study: HP v Autonomy

*June 2022*

## Background

Hewlett Packard ("**HP**") made a recommended cash offer to acquire Autonomy Corporation Limited ("**Autonomy**") for US$11.1 billion in August 2011 through a special purpose vehicle ("**BidCo**") incorporated by HP. At the time, Autonomy was the UK's largest software business and a highly profitable FTSE 100 company, headed by its CEO, Dr. Mike Lynch.

In November 2012, HP announced that it had written down Autonomy's value by US$8.8 billion; US$5 billion of which was alleged to have been attributable to fraudulent misrepresentation of Autonomy's financial performance during the period leading up to the announcement of HP's takeover offer. The key element of the alleged fraud consisted of Autonomy's publication of information to the market which was known by CEO, Dr Lynch and CFO, Sushovan Hussain to be false. As a result, HP and BidCo sought to recover damages of US$4.5 billion against Autonomy's CEO and CFO, on the grounds that Autonomy was an enterprise of considerably less value than it appeared to be as compared with its published information.

## Legal strategy and basis for the claim

Under Schedule 10A of the Financial Services and Markets Act 2000 ("**FSMA**"), an issuer, such as Autonomy, is liable to compensate persons who make investment decisions in reliance on the issuer's untrue or misleading published (or omitted) information, and suffer loss as a result.

However, in this case, HP and BidCo would not have benefitted from a direct claim against Autonomy as issuer, as Autonomy was a wholly-owned subsidiary of BidCo at this point in time. They therefore wished to sue the former CEO and CFO of Autonomy directly instead. To achieve this, HP and BidCo deployed a two-part "dog-leg" claim structure, whereby:

- HP entities including BidCo notified Autonomy of a claim under Schedule 10A, FSMA for $4.5 billion. Autonomy admitted liability for that claim.
- Autonomy (as a "Claimant" along with other HP entities) then sued the former CEO and CFO (the "Defendants") to recover this loss (on the basis that they had breached their directors' duties).

## Ruling

The Court concluded that Autonomy "was a smaller company with a materially less attractive revenue mix, with lower growth and less success in the market and (overall) lower profit margins that it was represented and appeared from its published information to be"; and that, had Autonomy's published information been accurate, HP and BidCo would still have purchased Autonomy, but at a significantly reduced bid price. The decision only ruled on liability, with a ruling on quantum to follow.

## Significance and next steps

This is understood to be the first case to come to trial involving a claim under Schedule 10A, FSMA, or its predecessor section 90A. Those provisions have applied since November 2006, and so the success of this claim is a noteworthy development for listed companies.

The significance of this decision is that similar such claims can be brought against target directors, not just the target. Here, the bidder (and target) of the takeover successfully used the two-part "dog-leg" claim structure to pursue target directors. This got around the limitation of the directors' liability under Schedule 10, FSMA. This structure will be of particular interest in takeover situations.

Going forward, target companies and directors should be mindful of the fact that:

- The use of a newly-incorporated SPV (prevalent in takeovers) will not be enough to invalidate this type of claim under Schedule 10A, FSMA.
- There is no defence to a FSMA or fraud claim that the claimants had the means of discovering the truth. No defence of contributory negligence or caveat emptor was available in this case.

Importantly, the actions and public statements of directors made even after a transaction has completed can still impact future claims. In particular, in this case, the description of the acquisition as "almost magical" by a HP employee who later became CEO was relied upon by the Court as evidence that HP would have acquired Autonomy, regardless of fraud. Buyers should be cautious about what statements their directors communicate to the public shortly after a high-profile transaction, and should ideally wait until the financial details are independently verified before making descriptive claims.

This decision serves as a warning particularly for start-ups against using targeted management and accounting strategies to optimise their pitch to investors, especially in the tech industry. In a culture that is increasingly attuned to visionary CEOs, market-changing innovation and ambitious mission statements, it is a reminder that the law creates a stricter framework for investor communications. Companies must ensure that published financial information justifies all statements made to investors, whatever their stage of development.

**Further information:**

- Click **here** for the judgment.
- Click **here** for a White & Case alert summarising the decision.

DIVERSITY

# Female representation in FTSE 350 companies

The FTSE Women Leaders Review ("**WLR**"), FCA and the Institutional Voting Information Service ("**IVIS**") have each set new targets for female representation within in-scope organisations.

*Ongoing*

## Who does this affect?

The WLR targets apply to FTSE 350 companies and the largest 50 private companies in the UK by sales.

The IVIS targets apply to FTSE 350 companies and "Small Cap" companies.

The FCA targets apply to UK standard and premium-listed issuers.

## What is the development?

**WLR targets**

Although not mandatory, the WLR recommends that in-scope companies should:

- ensure a minimum of 40% female representation on their boards by the end of 2025; and
- have at least one woman in the role of Chair or Senior Independent Director ("**SID**") on their boards, and/or one woman in the CEO or Finance Director role, by the end of 2025.

**IVIS targets**

- FTSE 350 companies should ensure a minimum of 33% female representation on their boards and a minimum of 28% female representation on their executive committees; and
- Small Cap companies should ensure a minimum of 25% female representation on both their boards and their executive committees.

**FCA targets**

Issuers should attain or explain why they do not have:

- a minimum of 40% female representation on their boards; and
- at least one of the senior board positions (Chair, CEO, SID or Chief Financial Officer) held by a woman.

## How does this change the current position?

- The WLR has increased to 40% the previous target set by the Hampton Alexander Review (2016) ("**HAR**") of 33% female representation on boards, and has extended the deadline for compliance from the end of 2020 to the end of 2025. The WLR has also gone further than the HAR in proposing targets for women to take up specific, executive roles on the board.
- The FCA has narrowed the scope of application of the new Listing Rules from the previous CP 21/24 proposals (2021). These will no longer apply to issuers with standard-listed debt, debt-like securities or other non-equity securities.

## What is the key takeaway?

Although the WLR recommendations are not mandatory, they are designed to encourage enduring and sustainable change. The WLR stresses that increasing female representation should not be regarded as merely a "tick-box" compliance exercise.

Failure to comply with IVIS targets may result in the company being "red-topped". UK company stakeholders pay close attention to and often follow IVIS's guidance, and so companies that wish to meet stakeholder expectations, and follow good governance practices, are encouraged to meet the targets set by IVIS.

Although the FCA's new Listing Rules are set on a "comply or explain" basis, issuers may be subject to penalties (e.g. financial or public censure) under the Listing Rules and Disclosure Guidance and Transparency Rules if they fail to adequately explain reasons for non-compliance.

## What should affected companies do?

In-scope companies should actively work towards meeting these new targets and engage with investors in doing so. Where targets are set on a voluntary or "comply or explain" basis, in-scope companies should, at the very least, ensure they have good reasons for, and are transparent about, their failure to meet the targets.

**Next steps**

- Calculate the percentage of female representation on your boards and executive committees, and the number of women holding executive director roles, including Chair, Senior Independent Director, Chief Executive Officer and Chief Financial Officer.
- Review recruitment and promotion processes and diversity initiatives within your organisation and identify areas for improvement.
- If possible, advocate for and take action to increase female representation on your board and executive committees, particularly in respect of key influential board positions such as Chair and CEO.

**Further information:**

- Click **here** for a copy of the FTSE Women Leaders Review.
- Click **here** for a copy of IVIS's approach for 2022.
- Click **here** for a copy of the FCA's policy statement on diversity and inclusion on company boards and executive management.

# Ethnic diversity on FTSE 350 company boards

The Parker Review Committee published a report on its findings with respect to diversity on the boards of FTSE 100 and FTSE 250 companies (the "**Report**").

*March 2022*

### Who does this affect?

The Parker Review Committee focuses on and monitors the diversity of the board of FTSE 100 and FTSE 250 companies.

### What is the development?

The Parker Review has published an update on progress made with respect to improving ethnic diversity on UK company boards, five years on from its first report in 2017.

The 2017 Parker Review (the "**PR 2017**") had recommended that the board of each FTSE 100 company should have at least one non-white director by 2021 and that the board of each FTSE 250 company should have at least one non-white director by 2024 (the "**Original Target**").

The Report notes that approximately 94% FTSE 100 companies will have achieved their Original Target by May 2022, and that there is good progress amongst FTSE 250 companies, with 55% having already reached their Original Target.

### How does this change the current position?

The Report acknowledges that good progress has been made overall, and sets out updated objectives for companies, to:

- **FTSE 100**: maintain at least their current level of board-level ethnic diversity;
- **FTSE 250**: ensure at least one director from an ethnic minority background by December 2024;
- **FTSE 350**: develop a pipeline of candidates from an ethnic minority background and plan for succession through mentoring and sponsoring; and
- **FTSE 350**: enhance transparency and disclosure with a view to tracking progress against the Parker Review objectives.

### What is the key takeaway?

The Parker Review Committee reiterates the 'business case' for increasing diversity on boards, and the richness that it offers to a company's leadership. The PR 2017 recommendations were built on two key tenets set out by the Committee:

- Diversity enhances long-term profitability and sustainability of businesses by bringing into the boardroom new and different talent.
- It is important to illustrate the belief of the UK's leading companies that there are equal opportunities to succeed at the highest level within such companies – and that this would also enhance the cohesiveness of society.

The Committee notes the progress that has been made since PR 2017, and points to worldwide attention on matters of racial equality, which has consequently 'raised the bar for the corporate world'.

Failure to achieve the recommended targets could lead to negative reputational consequences for in-scope companies, in an era of growing stakeholder expectations and scrutiny across a number of matters, including diversity, and particularly where peer or competitor companies have successfully achieved the Original Target.

Although the Parker Review targets are voluntary, the Steering Committee of the Parker Review has noted that insufficient progress may lead to the implementation of a revised approach, with some recommendations becoming mandatory.

## What should affected companies do?

FTSE 100 and FTSE 250 companies that are yet to meet the targets set by PR 2017 should ensure they are on track to achieve such targets as soon as possible in the case of FTSE 100 companies, and by the end of 2024 in the case of FTSE 250 companies. Companies that have already met these targets should now focus on increasing the number of ethnic minority candidates in more influential board positions (e.g. Chairs and CEOs).

Both FTSE 100 and FTSE 250 companies should continue to seek opportunities to ensure any appropriate increase in the presence of ethnic minority individuals on their boards, including in particular, now, with respect to representation within key influential board positions (e.g. Chair, CEO). Companies may find it helpful to review their talent management processes and other inclusion and diversity initiatives and assess how well these are working within their organisations. The Report suggests that one area to focus on may be to invest resources into internal succession planning processes, rather than aiming to recruit such ethnic minority candidates "ready-made" from outside the organisation.

### Next steps

- Develop mechanisms and processes to identify, develop and promote diversity internally, e.g. nomination committees, HR teams and recruitment partners should actively seek out and consider suitable candidates from ethnic minority backgrounds when vacancies arise.
- Identify and mentor / sponsor individuals from ethnic minority backgrounds over time to help engender a pipeline of succession-ready candidates when managerial or executive positions arise, e.g. continually review your inclusion and diversity initiatives, as well as your internal succession planning processes, to ensure that ethnic minority candidates can "grow" within your organisation.
- Closely monitor and report accurately and fully on the ethnic diversity of your board, covering your board appointment processes, the work of your nomination committee and the strategies and measures being taken with a view to ensuring diversity on the board and more widely within the company.
- Be ready to disclose in your annual report why your company may not have met its diversity targets within the applicable Parker Review-based timeline.

### Further information:

- Click **here** for a copy of the Parker Review (2022).
- Click **here** for a copy of the Parker Review (2017).

ESG REPORTING

# The Modern Slavery Act 2015

## The FRC published a report highlighting the significant shortcomings in the quality of modern slavery reporting as required under section 54 of the Modern Slavery Act 2015 (the "**MSA**").

*April 2022*

### Who does this affect?

Section 54 of the MSA requires commercial corporate entities and partnerships, wherever incorporated or formed and which carry on a business, or part of a business, supplying goods or services within the UK and which have a total annual turnover of £36 million or more, to publish an annual modern slavery and human trafficking statement (the "**Statement**"). In April 2022, the FRC published a report (the "**FRC Report**") setting out its findings on the quality of Statement reporting. The FRC Report is addressed to investors, lenders, shareholders, NGOs, clients and other stakeholders, as well as in-scope companies themselves.

### What is the development?

The FRC Report sets out its findings on the modern slavery reporting practices of a sample of 100 companies comprising FTSE 100, FTSE 250, and Small Caps, and summarises how well those companies have described how opportunities and risks to the success of the business have been considered and addressed, with a particular focus on Statements themselves, but also on disclosures within annual reports and s.172 statements.

### How does this change the current position?

The FRC Report concludes that reporting on modern slavery in both Statements and annual reports lacks the information needed for shareholders and wider stakeholders to make sufficiently informed decisions on the subject matter. To summarise a handful of the FRC's findings on shortcomings:

- Around 1 in 10 in-scope companies did not produce a statement at all and therefore failed to comply with their s.54 obligation.
- Where companies did produce a statement, only a third of these were considered clear and easy to read.
- Only a quarter of companies disclosed results against KPIs and only 12% confirmed that their decision making was based on such KPIs.
- The vast majority of statements were wholly backward-looking, with less than a third of companies disclosing action plans based on identified risks.
- Only 14% of companies provided a direct link in their annual reports to their statement.

Market regulators and watchdogs are becoming increasingly concerned that not enough is being done by companies to address modern slavery and human trafficking risk. The Queen's Speech in May 2022 noted the government's plan to introduce a Modern Slavery Bill (the "**Bill**"). Whilst the text for the Bill is yet to be published, the government has signalled its intention to incorporate many of the recommendations set out in its 2020 Response to a consultation on transparency in supply chains and the purpose of the Bill will be to increase the accountability of companies in the fight against modern slavery and human trafficking. The Home Secretary has confirmed that the Bill will:

- extend reporting to public bodies;
- mandate the specific topics that Statements must cover, based on the currently voluntary guidelines;
- set a single deadline for reporting; and
- require organisations to publish their Statements on the Government Registry.

### What is the key takeaway?

The FRC Report emphasises the role that companies must play in helping to address and eradicate modern slavery and trafficking practices. Given increasing investor awareness of these critical social responsibility and human rights matters, organisations failing to meet regulator and market expectations may face reputational damage and be held to account by shareholders and investors and, in due course, under tightened legislation.

### What should affected companies do?

- Review the company's approach to identifying and addressing slavery and human trafficking risks within business operations and supply chains, before the Bill becomes law.
- Ensure Statements are properly linked and accessible: in annual reports, on the company's website, to the government registry and to the underlying document itself.
- Ensure Statements are a prioritised within the purview of senior board members and signed-off by them.
- Improve disclosure in **Statements** by:
  - avoiding broad-brush, descriptive statements and increasing critique of performance and identification of areas of concern;
  - continuing to provide clear discussion of modern slavery concerns within your business but provide more detail on how anti-modern slavery policies operate in practice and how their effectiveness is measured;
  - identifying emerging risks and detailing the company's plans for addressing such risks – the FRC emphasises that companies need to demonstrate a proactive (and not merely reactive) approach;

- including detail on how supply chains are vetted before entering into agreements – the FRC advises that companies should demonstrate how they have engaged prospective suppliers on modern slavery issues and, where applicable, sought to leverage their position to improve labour practices before contract approval;
- including detail on outcomes and explain how specified actions aimed at tackling identified risks are tracked for effectiveness; and
- improving clarity, focus and narrative – longer Statements did not necessarily provide more informative disclosure.

- Improve disclosure in **annual reports and s.172 statements** by:
  - clearly and directly cross-referring to your Statement;
  - increasing the amount of information included on modern slavery risks to your business – do not assume that producing a separate Statement is sufficient, as the FRC expects companies to reflect and tie in its disclosures and efforts on tackling slavery and human trafficking into the rest of its usual business reporting, in particular in your s.172 statements;
  - including modern slavery KPIs; and
  - including detail on internal controls linked to oversight of human rights and slavery issues, responsible personnel, and how often relevant policies and governance arrangements are reviewed.

**Next steps**

- Fix any linking issues now: The FRC noted a high incidence of issues such as broken links, linking to outdated statements; or links on the government registry directing the viewer back to the company's homepage rather than to its current Statement. Provide clear and direct links on the company website (ideally on the homepage, rather than appearing, for example, far down in the company website's search results) and within its annual report. These are easy administrative fixes which should be prioritised.
- In your next Statement, ensure it is both backward and forward-looking and contains clearly structured detail on what risks have been identified, how they have been identified, what the company is doing about them and how the company intends to measure its own effectiveness in tackling those risks going forward – both descriptively and through use of KPIs.
- In your next annual report, ensure that the impact on your business of any identified slavery and human-trafficking risks are explicitly addressed and, where appropriate, include clear cross-referencing and draw links between your Statement and your s.172 statement. The FRC wants to see modern slavery monitoring and reporting as an integral and key aspect of business risk management.

**Further information:**

- Click **here** for a copy of the Modern Slavery Act 2015.
- Click **here** for a link to the Government's practical guide on "Transparency in Supply Chains".
- Click **here** for a copy of the FRC Report.

# Wates Corporate Governance Principles for Large Private Companies (“Wates Principles”)

The FRC has released its findings on how companies have responded to legislation requiring large private companies to produce corporate governance reports, and the quality of such reporting (the “**FRC Report**”).

*February 2022*

### Who does this affect?

The FRC’s review has focused on private companies and unlisted public companies in the UK which have over 2000 employees and/or a turnover of more than £200 million and total balance sheet assets of more than £2 billion.

### What is the development?

Since 2018, large private companies and others meeting the requisite threshold are required to report on their corporate governance in respect of financial years starting on or after 1 January 2019. The Wates Principles were published alongside the new legislation providing for the new reporting obligations of in-scope private companies, to provide a set of principles and governance framework that such companies could align themselves with, and report and disclose against. The FRC has now published an in-depth assessment of how companies have responded to the legislation and, of those companies who have followed the Wates Principles, the quality of their reporting.

### How does this change the current position?

Historically, corporate governance regulation and reporting has focused on public listed companies. The FRC Report notes the significant level of adoption by in-scope companies of the Wates Principles as their governance code of choice and observed that “the positive response by so many companies to the Wates Principles reflects the benefits of allowing industry to develop its own guidelines through the Wates Coalition”.

The FRC Report noted the following conclusions from its review of current reporting practices:

- There has been significant take-up by in-scope companies of the wates principles as their governance code of choice.
- It is relatively early to draw too many conclusions, with some companies having completed only their first cycle of reporting against the wates principles.
- The principles are challenging and yet flexible enough to be used by a very diverse range of companies that meet the criteria.
- Companies operating in professional, scientific and technical activities sectors provided the highest level of disclosures, whereas those in information and communication sectors, provided relatively fewer disclosures.

**Areas for improvement in reporting**

| | |
|---|---|
| **Principle 1**<br>**Purpose and Leadership** | □ **purpose**: explain the link between the company’s purpose and its behaviours, and provide detail on the processes in place for the board to understand shareholders’ views on the company’s purpose<br>□ **values and culture**: explain how the board monitors culture and how values guide the board’s decision-making<br>□ **strategy**: explain how strategy is implemented and aligns with other matters, such as the company’s purpose and culture |
| **Principle 2**<br>**Board Composition** | □ **chair and composition**: include discussion on the size and structure, balance, diversity and effectiveness of the board, and how the chair promotes open debate and constructive discussion<br>□ **balance and diversit**y: include, as applicable, reference to the Hampton Alexander Review / Women Leaders Review targets<br>□ **size and structure**: explain how the suitability of the board’s size and structure is assessed and how appointments are made |

## Areas for improvement in reporting

| | |
|---|---|
| **Principle 3**<br>**Director Responsibilities** | ▫ **effectiveness**: explain how board effectiveness is measured and any actions taken following evaluation, how directors' objectivity is ensured and measures in place for the board's professional development<br>▫ **accountability**: describe the processes for periodic review of governance processes, the policies in place to clarify the relationship between the company and its owners, and the lines of accountability for the board as a whole and detail any actions taken following review processes<br>▫ **committees:** detail the suitability of members by reference to their experience, and explain how the independence of members is ensured and how this has improved decision-making<br>▫ **integrity of information**: provide more detail on the type of information systems in place |
| **Principle 4**<br>**Opportunities and Risk** | ▫ **opportunities**: disclose more detailed information including how opportunities are identified and how the board considers such opportunities<br>▫ **risks**: include consideration of scenario analysis and detail on external communication channels on risk information |
| **Principle 5**<br>**Remuneration** | ▫ **remuneration**: disclose remuneration policies and include detail on how these take sector practices into account and the company's response to topical issues such as the gender pay gap<br>▫ **subsidiaries**: cross-refer back to parent company remuneration policy where this is relied on |
| **Principle 6**<br>**Stakeholder relationships and engagement** | ▫ **engagement**: detail the dialogue between the board and stakeholders regarding future developments and realignment of strategy, and refer to international standards and frameworks on environmental, social and community impact issues<br>▫ **workforce**: detail the channels through which feedback is sought and received from the workforce, the nature of the dialogue between the board and the workforce, and the procedures for addressing concerns raised |

### What is the key takeaway?

Overall, the FRC has noted positive progress relatively early on in the initial rounds of corporate governance reporting by in-scope companies, and has expressly recognised where strengths lay. However, it has also expressly identified those areas which are lacking in sufficient disclosure and in-scope companies should make proactive efforts to address those gaps.

### What should affected companies do?

Companies should continue to build on the areas of strength in their reporting, and address the above-listed weaknesses identified by the FRC in their next annual report. Companies should not, however, wait until reporting season to consider the FRC's critiques, as it may be that internal procedures and reporting lines need to be updated and amended in time to facilitate additional internal information reporting and collation ahead of drafting the next annual report.

**Next steps**

- For those companies who align with and report against the Wates Principles, continue to assess and evaluate how reporting can be improved in light of the FRC's initial feedback, and implement this in your next annual report.
- For those companies who report against another governance code, consider the overarching critiques noted in the FRC Report and consider to what extent these might equally apply to your company and can be improved upon in its reporting. Governance is as much about the "spirit" as the "letter", and companies should not necessarily be constrained by one set of code principles if it feels it can benefit from drawing across several codes.

**Further information:**

- Click **here** for a copy of the FRC research report.

# Mandating climate-related financial disclosures

On 21 February 2022, the Department for Business, Energy and Industrial Strategy ("**BEIS**") published non-binding guidance for in-scope companies and LLPs on how to comply with new mandatory climate-related reporting requirements which came into effect on 17 January 2022.

*February 2022*

### Who does this affect?

The BEIS guidance confirms that the new mandatory disclosure requirements apply to:

- UK companies that have more than 500 employees and either have securities admitted to trading on a UK regulated market or are banking companies or insurance companies (Relevant Public Interest Entities);
- UK companies with securities admitted to AIM with more than 500 employees;
- UK registered companies not included in the categories above, which have more than 500 employees and a turnover of more than £500 million (high turnover companies);
- large LLPs, which are not traded or banking LLPs, and have more than 500 employees and a turnover of more than £500 million; and
- traded or banking LLPs which have more than 500 employees.

### What is the development?

In-scope companies and LLPs must include in their annual report disclosures on material climate change-related risks and opportunities in line with the recommendations of the Taskforce on Climate-related Financial Disclosure ("**TCFD Recommendations**"). This should include explanations on how climate change is addressed in corporate governance; the impacts on strategy; how climate-related risks and opportunities are managed; and the performance measures and targets applied in managing these issues.

### How does this change the current position?

These new mandatory reporting requirements signal the beginning of a trend towards increased mandatory reporting on climate-related metrics. Whereas reporting in line with the TCFD Recommendations was previously voluntary – for the newly in-scope companies and LLPs, it is now mandatory.

Whereas reporting by entities on climate matters has so far been framed with an "inside-out" perspective (e.g. considering how the company contributes to climate change) the TCFD Recommendations promote thinking from an "outside-in" perspective, addressing how climate change might affect every part of the entity's operations, supply chain and key stakeholders.

The FCA's listing rules already require listed companies to disclose against the TCFD Recommendations on a "comply or explain" basis. The BEIS guidance clarifies that UK companies with more than 500 employees that are within the scope of FCA rules will be subject to both the newly implemented regulations and the relevant FCA rules. Since both sets of requirements are based on the TCFD Recommendations and recommended disclosures, there is a high degree of consistency between the two sets of requirements.

### What is the key takeaway?

The BEIS guidance confirms that in-scope companies and LLPs which do not comply with these new disclosure requirements may be subject to an order of the court to prepare revised accounts. This could lead to potential breaches of filing deadlines and related consequences.

### What should affected companies do?

The new mandatory disclosure requirements apply to accounting periods commencing on 6 April 2022. In-scope companies and LLPs may wish to read the guidance straight away in order to prepare for and make any adjustments to internal reporting processes in order to meet the new reporting obligations when due.

#### Next steps

- In-scope organisations should assess whether they are now in-scope or subject to additional reporting considerations as a result of the new regulations.
- Consider whether any internal policy making, information-gathering and/or reporting processes need to be overhauled or revised in order to structure the necessary reporting lines and facilitate additional disclosures.
- Newly in-scope entities can refer to reporting by listed entities who already report along TCFD Recommendations for a sense of how disclosures can be presented.
- If your company is on the border of being in-scope, or for reputational and good practice reasons alone, consider whether it may be possible and appropriate to report on climate change matters in line with, or in the spirit of, the TCFD Recommendations.

#### Further information:

- Click **here** for a copy of the BEIS guidance.

# FCA technical note on climate-related disclosures

## The FCA published the final version of its technical note (TN 802.1) on TCFD aligned climate-related disclosure requirements for listed companies.

*February 2022*

### Who does this affect?

The FCA technical note confirms that climate-related financial disclosures under the TCFD Recommendations and Recommended Disclosures ("**TCFD Recommendations**") should be made by:

- under Listing Rule 9.8.6R(8), premium-listed commercial companies in respect of reporting periods beginning on or after 1 January 2021; and
- under Listing Rule 14.3.27R, standard-listed companies of equity shares, and companies with standard listed shares other than equity shares, or standard listed issuers of global depositary receipts representing equity shares, (in each case, other than investment entities or shell companies (such as special purpose acquisition companies (SPACs)), in respect of reporting periods beginning on or after 1 January 2022.

### What is the development?

The FCA technical note provides answers to the most common queries received in respect of TCFD reporting and reiterates the disclosures that in-scope companies must include in their annual financial report. The note draws attention specifically to which particular Listing Rules and other provisions contain guidance on various aspects of disclosure.

### How does this change the current position?

The technical note does not introduce any new provisions or compliance obligations in and of itself. However, in helping to clarify the reporting requirements of listed companies for the purposes of their TCFD-related and other ESG disclosures, it reiterates the increasing importance and mandatory nature of these reporting obligations.

### What is the key takeaway?

The FCA technical note provides specific points of reference for companies required to disclose in line with the TCFD Recommendations as to how to comply with the Listing Rule requirements. The note reminds companies that, as well as the TCFD Recommendations, they may be subject to ESG-related disclosure obligations under other provisions of the Listing Rules or under particular provisions of the Disclosure Guidance and Transparency Rules, Market Abuse Regulation and Prospectus Regulation.

### What should affected companies do?

In-scope companies are required to include in their annual financial reports:

- a statement setting out whether it has included climate-related financial disclosures consistent with the TCFD Recommendations;
- a clear indication as to where in the annual financial report the TCFD related disclosures can be found;
- if it has not included the above climate-related financial disclosures, a statement setting out the reasons why, and a description of any steps it is taking or plans to take in order to make disclosures in future, including timeframes; and
- where a company has made its TCFD disclosure in a document other than its annual financial report, an explanation as to why.

Companies should refer to the following specific provisions and principles in order to frame compliant and effective disclosures:

- For guidance (including references to key TCFD documents) on determining whether climate-related financial disclosures are consistent with the TCFD Recommendations refer to and consider:
  - LR 9.8.6BG, LR 9.8.6CG and LR 9.8.6DG, and LR 14.3.28G, LR 14.3.29G and LR 14.3.30G; and
  - The Fundamental Principles of Effective Disclosure contained in Section F of the TCFD Annex.
- Where a listed company does not include climate-related financial disclosures consistent with all of the TCFD Recommendations in either its annual financial report or in another document, refer to and consider:
  - LR 9.8.6R(8)(b)(ii) and LR 14.3.27R(2)(b); and
  - the explanation as to why such disclosures have not been included should be full, clear and meaningful, and be written in plain language that is easy to understand with no ambiguity.

- Where a listed company provides details of any steps it is taking or plans to take in order to be able to make those disclosures in the future, and the timeframe within which it expects to be able to make those disclosure, refer to and consider:
  - LR 9.8.6R(8)(b)(ii)(C) and LR 14.3.27R(2)(b)(iii);
  - LR 9.8.6EG and LR 14.3.31G – the limited circumstances in which the FCA expects companies to explain rather than disclose; and
  - companies should provide a sufficient level of detail such that investors and stakeholders can fully understand the nature of the proposed action.
- Whilst LR 9.8.6R(8) and LR 14.3.27R set out important obligations for listed companies to make climate-related financial disclosures consistent with the TCFD Recommendations, the note reminds companies that they may be required to make other ESG and climate related disclosures under other provisions of the Listing Rules, or under particular provisions of the Disclosure Guidance and Transparency Rules, Market Abuse Regulation and Prospectus Regulation. The note flags that more information on these provisions is set out in Technical Note (TN 801.1).

### Next steps

When producing your next annual financial report, refer to the guidance provided in this 3-pager technical note (TN 802.1) and ensure that all aspects are covered so as to meet the FCA's expectations.

**Further information:**

- Click **here** for a copy of the FCA Technical Note (TN 802.1).
- Click **here** for a link to the Listing Rules.
- Click **here** for the FCA's Disclosure Guidance and Transparency Rules sourcebook.
- Click **here** for the Market Abuse Regulation.
- Click **here** for the Prospectus Regulation.
- Click **here** for the FCA Technical Note (TN 801.1).

ESG MONITORING

# New Glass Lewis ESG profile pages

On 7 February 2022, Glass Lewis announced that ESG scores and data will be included in a new ESG profile page to be included in its proxy paper research reports on individual companies.

*February 2022*

### Who does this affect?

The ESG profile pages will track publicly-listed companies.

### What is the development?

ESG scores will cover Board Accountability, ESG Transparency, ESG Targets and Alignments, and, for certain companies, their approach to climate risk mitigation.

### How does this change the current position?

With the availability of much more contemporaneous data just prior to AGMs, investors will be equipped with a better and more up to date understanding of the company's position and performance on key areas just prior to engaging with the board at the AGM.

### What is the key takeaway?

As part of its Proxy Paper research service, Glass Lewis will collect and publish ESG scores and data on publicly-listed companies just prior to their AGM date. This will provide investors with the most up-to-date information on that company before voting on any resolutions. This may be useful for publicly-listed companies who may expect their stakeholders to attend AGMs armed with the most up-to-date metrics and could thus have more specific, focused and/or difficult questions.

### What should affected companies do?

Boards may therefore expect to be questioned by stakeholders on the reasons for any disparity between certain scores, metrics or performance indicators, as published by Glass Lewis as compared with the equivalent information last published by the company itself. The board should ensure it is equipped with the latest information across all key areas for the company just prior to the AGM.

### Next steps

- Directors who are due to speak at their company's AGM should familiarise themselves with and ensure that they understand the reporting behind the information provided on the Glass Lewis ESG profile pages ahead of their AGM.
- Directors should ensure they are equipped with the necessary facts and figures to answer any stakeholder questions relating to matters disclosed on the ESG profile pages.
- Review current ESG targets and consider whether the company's disclosed metrics and performance indicators are being reflected in its ESG profile page score on an ongoing basis.

### Further information:

- Click **here** for a copy of the Glass Lewis press release.

# EDC monitoring of ESG information

The British Private Equity and Venture Capital Association ("**BVCA**") announced that the European Data Cooperative ("**EDC**") will collect detailed ESG information as part of a new initiative to measure industry efforts in tackling issues including climate change, female under-representation and bribery and corruption.

*January 2022*

### Who does this affect?

This initiative will affect European private equity and venture capital firms and companies.

### What is the development?

From mid-2022, the EDC will collect data on the progression towards net-zero emissions and diversity targets of in-scope organisations. The aim is to measure the industry's performance on ESG issues that matter to society, and to track progress on an annual basis.

### How does this change the current position?

The EDC's data collection of ESG information by using one platform with a standardised methodology allows for consistent pan-European statistics that are more readily comparable across peers and will enable in-scope organisations to comply with the rising demands for action and openness on their ESG activities whilst empowering stakeholders with comparative data.

### What is the key takeaway?

Although the vast majority of BVCA members are already active in supporting their businesses to develop ways to combat climate change, improve diversity and strengthen company governance, the EDC's data collection efforts will allow for a single, standardised way of collecting and benchmarking this data, thus enabling stakeholders and regulators to track progress.

### What should affected companies do?

In-scope organisations should bear in mind that they may increasingly be compared to their industry peers as a result of newly available comparative data, and should keep under review any ESG targets/scores their peers are achieving, and be prepared to explain the reasons for any potential discrepancy or lag in its own achievements and targets.

**Next steps**

- Companies should refer to Invest Europe's new reporting standard to be available from summer 2022.
- Review current internal reporting frameworks and implement any appropriate changes ahead of EDC's ESG data collection.
- Continue to consider ways of improving and accelerating the company's ESG related targets.

**Further information:**

- Click **here** for a copy of the BVCA press release.

TECHNICAL DEVELOPMENTS

# Companies House update on the register of beneficial owners of overseas entities

An update from Companies House highlights that draft regulations, laid before Parliament on 22 June 2022, include provisions relating to the electronic delivery of documents, protection of information and registrable beneficial owners, and the digital nature of the register of beneficial owners of overseas entities (the "**Register**").

*June 2022*

### Who does this affect?

Overseas entities must apply to be added to the Register if they are a registered proprietor of a qualifying estate in land in England and Wales which was acquired on or after 1 January 1999, and provide details about those persons who exercise significant control over the entity. A 'qualifying estate' means a freehold title or lease granted for more than 7 years. The Economic Crime (Transparency and Enforcement) Act 2022 (the "**ECA 2022**") defines an 'overseas entity' as any legal entity which is governed by the law of a non-UK country or territory. This covers a corporate body, partnership or other entity that has a legal personality under the law by which it is governed. A non-UK trust will usually fall outside this regime as it has no legal personality.

### What is the development?

Overseas entities which do not register their relevant real estate interests on the Register, will face sanctions, such as daily fines and restrictions on their ability to carry out transactions affecting the land in question. It will not be possible for a third party to be registered as the legal proprietor of UK land transferred to it by an overseas entity, unless that overseas entity is on the Register and its ongoing filings are up to date.

### How does this change the current position?

Once the Register is operative, overseas entities with interests in a qualifying estate will be required to register details of those interests on the Register and keep this information updated on an annual basis. Companies House will contact all overseas entities captured by the ECA 2022 who own land in England, Wales and Scotland to ensure they are aware of their new responsibilities.

### What is the key takeaway?

Companies holding a qualifying estate in land in England and Wales post-implementation of the Register must ensure they include relevant details on that Register, in order to remain compliant and to avoid sanctions or restrictions relating to the relevant estate.

### What should affected companies do?

Overseas entities with interests in a qualifying estate (i.e. UK land) should ensure they keep themselves updated on the implementation of the ECA 2022, as they will have a grace period of only 6 months after the Register is set up to register all existing interests in UK land.

The application for registration must contain:

- a statement as to beneficial information of the entity (including any registrable beneficial owners and managing officers, as applicable);
- a statement that the overseas entity has complied with the duty to identify any registrable owners;
- any information necessary to verify information relating to registrable beneficial owners and managing officers; and
- the name and contact details of an individual who may be contacted about the application.

#### Next steps

- Once the regime is in force, an overseas entity wishing to acquire the freehold, or take a long lease, of property in the UK should ensure that they are listed on the Register in good time.
- Overseas entities who own, or wish to own, land in the UK should start thinking about how the new rules will apply to their particular ownership structures and gather the necessary information required to be disclosed on the Register.

#### Further information:

- Click **here** for the Register of Overseas Entities (Delivery, Protection and Trust Services) Regulations 2022.
- Click **here** for the Companies House Guidance.

# UK Stewardship Code signatory deadline

## The next deadline to apply to become a signatory to the UK Stewardship Code 2020 (the "**Code**") is 31 October 2022.

*May 2022*

### Who does this affect?

The Code applies to:

- asset owners, (e.g. pension funds, insurers, sovereign wealth funds);
- asset managers, (i.e. those who manage assets on behalf of UK clients or invest in UK assets); and
- service providers, (e.g. investment consultants, proxy advisors and data and research providers).

### What is required?

An in-scope organisation wishing to become a signatory must submit a Stewardship Report to the FRC demonstrating how it has applied the Code's Principles in the previous 12 months (the "**Report**"). This Report:

- may cover any 12-month period beginning after 1 January 2020;
- must be reviewed and approved by the applicant's governing body; and
- must be signed by the applicant's chair, chief executive or chief investment officer.

The FRC will assess the Report and if approved, the organisation will be listed as a signatory to the Code. Once listed, the organisation must submit a Report annually to remain a signatory to the Code.

### How does this change the current position?

The previous window for submitting the Report is now closed (April 2022). The next window will open in September 2022 and applications must be made by 31 October 2022.

### What is the key takeaway?

The Code is a voluntary set of principles that sets high expectations for how investors, and those that support them, invest and manage money on behalf of UK savers and pensioners, and how this leads to sustainable benefits for the economy, environment and society. Organisations who choose to adopt the principles set out in the Code may apply to the FRC for recognition as a "signatory" to these principles. As the Code is voluntary, there is no fixed penalty for organisations that fail to meet its requirements, however, such organisations might face enquiries from their stakeholders, commercial consequences and/or reputational damage for failing to meet these minimum requirements, especially where peer or competitor organisations have successfully "signed" the Code.

### What should affected companies do?

In-scope organisations that wish to become signatories to the Code should prepare and submit a Report to the FRC using an online form or by post. Each of the Code's Principles enshrines reporting expectations, and it is for the organisation to determine which reporting expectations are relevant and appropriate to its business or role in the investment community. For example, some expectations will be more relevant for asset managers or those investing directly, while others will be more relevant to asset owners or those using intermediaries. The Code recognises that signatories differ by size, type, business model and investment approach and that they do not exercise stewardship in an identical way, and will take these factors into account during the approval process.

**Next steps**

To become a signatory to the Code, organisations must submit to the FRC a Report by 31 October 2022 demonstrating how they have applied the Code's Principles in the previous 12 months. The Report may cover any 12-month period beginning after 1 January 2020. The FRC will assess the Report and if it meets the FRC's reporting expectations, the organisation will be listed as a signatory to the Code. Once listed, organisations must annually report to remain signatories.

**Further information:**

- Click **here** for the FRC webpage on the UK Stewardship Code.
- Click **here** for the UK Stewardship Code 2020.

# European Single Electronic Format (“ESEF”) reporting update

**On 1 January 2022, ESEF took effect as the new standard format for annual financial reporting for companies admitted to trading on EU and UK regulated markets.**

*January 2022*

### Who does this affect?

This update concerns publicly listed issuers on EU and UK regulated markets.

### What is the development?

On 25 January 2021, the FCA confirmed that under the ESEF initiative, issuers with transferable securities admitted to trading on UK regulated markets in particular:

- must publish their annual financial reports in an XHTML web browser format, replacing the previous PDF format, for financial years starting on or after 1 January 2021, for publication from **1 January 2022**; and
- where such issuers prepare consolidated annual financial reports in accordance with IFRS, must:
  - tag basic financial information for financial years starting on or after 1 January 2021 for publication from **1 January 2022**; and
  - tag notes to the financial statements for financial years starting on or after 1 January 2022, for publication from **1 January 2023**.

### How does this change the current position?

The ESEF establishes a structured format for annual reports, and includes the ability to “tag” individual disclosures in annual reports in line with a published taxonomy. Compared to unstructured PDF formats which were previously employed by UK companies, such structured files allow the content in the annual financial report to be more easily read through specialist software, thereby improving the accessibility and comparability of information for stakeholders and regulators.

### What is the key takeaway?

For the first time, the consolidated financial statements of EU and UK listed companies will be freely available in the public domain in a machine-readable format. That means investors and other stakeholders will be able to search IFRS consolidated financial statements electronically.

### What should affected companies do?

Companies should ensure they have the necessary procedures and programmes or software available to them to ensure compliance with the new format requirements.

**Next steps**

- Review annual report preparation processes and consider whether any new systems/processes (in and/or out of house) need to be implemented to support publication of the company’s financial report in ESEF.

**Further information:**

- Click **here** for a copy of ESMA’s ESEF paper.

# Governance in the news

**"Investor concern over potential "weakening" of pay rules for non-executives" (22 June 2022)**

Investors have expressed concern over government moves to change current rules on executive remuneration so as to allow non-executives to take a bigger proportion of their remuneration in the form of shares. Current rules discourage use of performance-related pay for non-executive directors (e.g. long-term incentive plans) in order to help avoid "circumstances which are likely to impair a non-executive director's independence". The proposals remain under review.

**"FRC Chair proposes Oxley-Sarbanes style reforms to UK audit rules" (16 June 2022)**

The Chair of the FRC, Sir Jan du Plessis, has said that the dropping of oversight rules for company boards to tackle audit failure was a "missed opportunity". In his first public speech since his election, he has now pledged to hold company directors to account with his own version of the extra reporting obligations on company boards and managements imposed by the US Sarbanes-Oxley Act, which had been brought in in the wake of the collapse of Enron. Du Plessis has noted that whilst the audit profession was in part to blame for a succession of scandals, such as Carillion and Patisserie Valerie, company directors also need to take responsibility for their company's accounts. This represents something of a U-turn on the government's decision last year to ditch plans to use legislation to require directors to sign off on companies' internal controls over financial reporting, modelled on the Sarbanes-Oxley Act, as it sought a more "business friendly" regime. Du Plessis has stated that his intended reforms "won't be Sarbanes-Oxley, but it is the same idea".

**"Netflix sued over alleged insider trading (or Morses)" (6 June 2022)**

One of Netflix's investors has filed a suit in Delaware alleging sales of US$450 million worth of Netflix shares by executives before the public disclosure by Netflix of its subscription attrition rates which caused it to lose.

**"Majority support for environmental proposals wanes in 2022 AGM season" (1 June 2022)**

AGM voting trends on environmental matters suggest that investors have eased off applying serious pressure on the largest 3000 US companies so far:

- Last year around 33% of 124 environmental proposals were passed with majority support.
- This year, 20% of 172 environmental proposals have passed with majority support.

However, Climate Action 100+ (an investor group) has been tracking shareholder proposals submitted this year and noted that 22 out of 39 such proposals have been withdrawn following agreement reached with the proposing shareholders. This might suggest that environmental proposals are being dealt with increasingly through separate discourse and/or action between companies and shareholders. The picture of how seriously environmental matters will be taken across this year's AGMs remains to be seen.

**"DWS raid by German regulator" (31 May 2022)**

DWS Group, the asset manager arm of Deutsche Bank, was raided by 50 police in an un-notified raid on 31 May following greenwashing allegations by whistle-blower and former DWS executive, Desiree Fixler. Fixler alleged DWS Group had made misleading statements in its 2020 annual report, including that more than half the group's US$900 billion assets were invested using ESG criteria. DWS Group's CEO, Asoka Wöhrmann, has resigned following the raid. The investigation is now proceeding to evaluate the seized evidence. Whilst this story flags the increasing clamp-down on greenwashing, it also showcases whistleblowing policies in action and it is perhaps worth reminding clients of the need to be clear and up to date on how their whistleblowing policies and processes operate – Fixler claimed that she was fired by DWS Group for raising concerns around the unit's ESG claims.

**"HSBC banker suspended in light of 'anti' climate-change remarks" (22 May 2022)**

Stuart Kirk, now the ex-global head of responsible investing at HBSC Asset Management, speaking at the FT's Moral Money Summit last Thursday likened climate change to the 'Y2K millennium bug' and remarked how "there was always some nut job telling me about the end of the world". He has since been suspended by HSBC with a number of chief executives from HSBC distancing themselves from Kirk's views. HSBC continues to be subject to stakeholder campaigns to move away from financing of companies with substantial greenhouse gas emissions.

**“Nike overhauls diversity leadership” (18 May 2022)**

Nike’s head of diversity will step down at the end of July and be replaced by Jarvis Sam, who will be appointed to the newly created role of Chief Diversity, Equity and Inclusion (‘DE&I’) Officer. This forms part of an active effort by Nike “to get its house in order” with respect to diversity and to ensure that the diversity of its leadership reflects its public image and marketing strategies. UK companies often follow suit from US companies, so it will be interesting to see whether similar, dedicated roles begin to emerge across UK company boards as part of continued diversity efforts.

**“Oil and gas companies shift to short-term outlook on climate change resolutions” (17 May 2022)**

A spate of Big Oil companies have indicated their intentions to diverge from stakeholder calls to accelerate decarbonisation. BP, ConocoPhillips and other oil and gas companies have recently voted down activist proposals to move to lower-carbon fuels. This follows in the wake of BlackRock’s recent statement of intent to vote against the majority of upcoming climate-related resolutions this AGM season, citing reasons including short-term investor returns. Exxon, Chevron and Shell are due to hold their AGMs over the coming week and the trend so far would suggest that advocates of investment in lower-carbon fuels can expect to see further set-backs in the campaign for a transition by Big Oil to sustainable energy commitments.

**“Sexist remarks by shareholders at Aviva AGM” (9 May 2022)**

Certain stakeholders may need to reassess the appropriateness and modernity of their own perspective on board diversity. “Inappropriate” and “sexist” remarks were directed at female board members at Aviva’s 2022 AGM, including to question whether Aviva’s chief executive, Amanda Blanc, was the right “man for the job” and whether she should be “wearing the trousers”. The chair reproached those shareholders at the end of the discussions. This story highlights the multiple levels at which views on diversity may be falling behind broader general trends and standards within a company’s make-up (and need to be actively addressed).

**“Continued executive pay dissent (Ocado and Standard Chartered)” (4 May 2022)**

Ocado and Standard Chartered (“SC”) have received significant dissenting votes against executive pay and remuneration policy at their respective AGMs (although the resolutions were ultimately passed and chairs of each remuneration committee were re-elected). The dissenting votes (30% Ocado, 31% SC) followed advice from proxy advisers, ISS and Glass Lewis, to vote down “excessive pay-outs” in Ocado’s case and in light of a failure to cut management bonuses following a PRA fine in SC’s case. The Investment Association (IA) will expect Ocado and SC to now consult with stakeholders and in due course publish the reasons for dissent. This latest spate of AGM results shows that executive remuneration continues to be an area of scrutiny by proxy advisers and stakeholders.

**“Brewdog staff to receive £100 million of shares” (4 May 2022)**

Brewdog chief James Watt has stated his intention to transfer £100 million worth of shares to certain employees in an effort to repair relations with management following last year’s allegations of a ‘toxic workplace culture’. Brewdog also brought in Allan Leighton, the former Asda boss, as chairman and set up various new initiatives to improve the environment. Brewdog is planning to list on the LSE, so this ongoing story illustrates the importance of workplace culture, particularly as assessing and monitoring culture is a key provision of the UK Corporate Governance Code.

The White & Case UK Public Company Advisory ("**PCA**") team advises UK public companies on their day-to-day legal affairs. In particular, the team engages with listed companies outside of their transaction cycle and provides advice across a range of matters, with particular expertise in corporate governance and corporate advisory. The team is experienced in company secretarial matters and regularly provides support to non-legal functions (as well as legal and company secretarial teams) within PLCs. Our clients range in size and maturity from newly listed companies to mature companies and from small cap companies to global FTSE 350 companies.

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