Financial Regulatory Alert

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UK Financial Conduct Authority Publishes Consultation Paper on New Diversity Requirements for Listed Companies

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The UK Financial Conduct Authority (FCA) has issued a consultation paper here (the “Consultation Paper”) proposing new disclosure rules relating to diversity and inclusion on the boards and executive committees of listed companies. The new rules are also expected to include a new template for these disclosures, to ensure consistency of data across listed companies. The consultation period lasts until 20 October 2021.

The publication of the Consultation Paper follows the issuance of a Discussion Paper earlier in July, here, seeking views on diversity and inclusion in the financial services industry more generally.

This is the second environmental, social and governance (ESG) consultation paper the FCA has issued regarding listed companies in recent weeks. As we discussed in our article here, a consultation paper has already been issued proposing new climate related disclosures for standard listed companies.

Background

Following the publication of the UK Chancellor of the Exchequer’s “Roadmap” for financial services in November 2020,[1] and the decision of the UK government not to follow the European Union’s (EU) Sustainable Finance Disclosure Regulation rules after the end of the Brexit Transition Period, the general view of the UK government’s approach to ESG issues is that it is prioritising climate change above other ESG matters. This is certainly true, but on a number of occasions recently, the FCA has indicated that, at least for its part, this does not mean that other ESG requirements will not also be coming.[2] For example, in its consultation paper on new climate change disclosures rules for investment firms and asset managers (see our article here), the FCA has proposed to call its new sourcebook the ESG Sourcebook, even though the proposed rules at the moment only relate to climate change, explicitly stating that it expects new rules on ESG more broadly in the future.

The new diversity and inclusion disclosure rules in the Consultation Paper, and those discussed in the Discussion Paper, should be seen in the context of expressing the FCA’s ESG goals. The FCA has stated that it considers that, if it sets the proposed diversity and inclusion targets and improving transparency, “the UK would continue to be a thought-leader with high standards of corporate governance and market integrity” and its proposals would “suppor[t] shareholder and investor scrutiny of companies’ performance against ESG factors”.[3]

The New Proposed Rules

The new rules are proposed to apply to (i) companies incorporated in the United Kingdom which have any class of securities admitted to the Official List[4] and (ii) companies with a listing of equity shares admitted to the Official List.[5] Such in-scope companies will have to include in their annual report a statement setting out:[6]

- Whether at least 40 per cent of the individuals on the board of directors are women.[7]
- Whether at least one of (i) the chair, (ii) the chief executive, (iii) the senior independent director or (iv) the chief financial officer is a woman.
- Whether at least one individual on the board is from a non-white ethnic minority background.[8]

Where the company has not met all of these targets, the company will have to include a statement of the targets it has not met and its reasons for not meeting the targets.[9] The company will have to account for any changes in meeting these targets which have occurred between the reference date and the date on which the annual financial report is approved.[10]

The company will also have to include numerical data on the gender and ethnic diversity of the individuals on its board and “executive management”, set out in standard tables (replicated here), and indicating any data which is not available.[11] “Executive management” here is proposed to mean the executive committee or most senior executive or managerial body below the board (or where there is no formal committee or body, the most senior level of managers reporting to the chief executive) including the company secretary but excluding administrative and support staff.

Companies are also guided that they may include in the annual financial report a brief summary of any key policies, procedures and processes, and any wider context, which it considers contributes to improving the diversity of its board and executive management, along with any mitigating factors or circumstances which make achieving diversity more challenging (for example, the size, or the company of main operations).[12]

Amendments to Corporate Governance Statements

Listed companies whose securities are admitted to trading and which are required to appoint a statutory auditor[13] are currently required to have Corporate Governance Statements, which include descriptions of the diversity policy applied to the administrative, management and supervisory bodies, with regard to age, gender, educational and professional backgrounds; a description of the objectives of the diversity policy; a description of the diversity policy’s implementation; and the results in the reporting period.[14] Under the new proposed rules, this Corporate Governance Statement will have to be expanded to ensure that the diversity policy applies to the remuneration, audit and nomination committees, and that it has regards to other characteristics, such as ethnicity, sexual orientation, disability and socio-economic backgrounds.[15]

The contribution of Phil Davies is gratefully acknowledged.

[1] https://www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services.

[2] For example, in its consultation paper on new climate change disclosure rules for investment firms and asset manager (see our article here), the FCA has said that it plans to add a new Sourcebook to the FCA Handbook, and to call this the "ESG Sourcebook" as even though it is currently expected only to have climate change-related rules, "[i]t is anticipated that the sourcebook may be expanded in the future" to cover other ESG issues.

[3] Consultation Paper, paragraph 2.18.

[4] Listing Rules (LR) 9.8.6 R.

[5] LR 14.3.27 R.

[6] Where the reference date chosen is different from the reference date of the previous accounting period, the firm will have to explain why it has chosen a different reference date: LR 9.8.6 R (9)(c) and LR 14.3.27 R (1)(c).

[7] The proposed rules note that all disclosures/statistics should be based on the number of women, men, or non-binary people based on self-identification: LR 9.8.6F G, LR 14.3.28 G.

[8] LR 9.8.6 R (9)(a), LR 14.3.28 R (1)(a).

[9] LR 9.8.6 R (9)(b), LR 14.3.28 R (1)(b).

[10] LR 9.8.6 R (9)(d), LR 14.3.28 R (1)(d).

[11] LR 9.8.6 R (10), LR 14.3.28 R (2).

[12] LR 9.8.6G G.

[13] Except for (i) an issuer which is a subsidiary, when the parent is also subject to these conditions, (ii) certain issuer the sole business of which is to act as the issuer of asset backed securities, (iii) certain credit institutions, and (iv) AIFs or UK UCITS: DTR 1B.1.2 R and 1B.1.3 R.

[14] DTR 7.2.8A R (1).

[15] Proposed DTR 7.2.8A.

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