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UK Quoted Company Newsletter June 2018

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New statutory reporting obligations for quoted and other companies

The long-awaited draft [Companies \(Miscellaneous Reporting\) Regulations 2018](#) (the Regulations), along with related [Frequently Asked Questions](#) (FAQs), were published in June 2018 by the Department for Business, Energy and Industrial Strategy. The new statutory reporting obligations in the Regulations involve increased statutory disclosures in annual reports, and in some cases on websites, by quoted and other types of public and private companies in the areas of: directors' duties to promote the success of the company; engagement with employees and other stakeholders; remuneration matters; and corporate governance arrangements.

The Regulations follow on from the [Government Green Paper on Corporate Governance Reform](#) issued in November 2016 and its [response](#) issued in August 2017. For more on the Government response, see our [September 2017 newsletter](#).

Subject to Parliamentary approval, the new disclosure requirements discussed here come into effect for companies with financial years beginning on or after 1 January 2019 and so companies will need to report from 2020 onwards.

Although companies may be confident in their existing corporate governance procedures, thought should be given now to any new arrangements that may need to be put in place for 2019 to enable reporting in 2020, bearing in mind in particular that these disclosures are mandatory rather than "comply or explain". The fact that shareholders will in future have detailed information on which to challenge companies means that record-keeping will become more important than ever.

The key new disclosures in the Regulations are summarised in the table overleaf. See our [June 2018 client briefing](#) for more detail.



COMPANIES IN SCOPE	DISCLOSURE	WHERE
Directors' duties – section 172 reporting		
UK registered companies (other than small and medium-sized companies as defined in the Companies Act 2006 (the Act))	A statement describing how the directors have had regard to the matters in section 172(1) of the Act when performing their duty to act in the way most likely to promote the success of the company for the benefit of members	Strategic report (and for unquoted companies, on a website)
Reporting on engagement with employees		
UK registered companies (other than small companies) with more than 250 employees	A statement, covering prescribed matters, describing how the company has engaged with its UK employees and taken account of their interests	Directors' report (or strategic report, if appropriate)
Reporting on engagement with suppliers, customers and others		
UK registered companies (other than small companies) unless at least two of the below are met: <ul style="list-style-type: none"> turnover is not more than £36 million; balance sheet total is not more than £18 million; no more than 250 employees 	A statement summarising how the company has had regard to the need to foster its business relationships with suppliers, customers and others and the effect of that regard on principal decision-making	Directors' report (or strategic report, if appropriate)
Reporting on corporate governance arrangements		
UK registered companies not required to report under the Disclosure Guidance and Transparency Rules which satisfy either of (i) more than 2000 global employees; and (ii) turnover of more than £200 million and a balance sheet total of more than £2 billion globally	A statement of corporate governance arrangements including which corporate governance code, if any, the company applied and an explanation of any departures	Directors' report and on a website
Remuneration reporting		
Quoted companies (as defined in section 385 of the Act i.e. not including AIM companies)	Any discretion exercised in the award of directors' remuneration	"Annual statement" in the directors' remuneration report (DRR)
Quoted companies (as above)	The amount (or an estimate) of an incentive award attributable to share price appreciation and whether any discretion has been exercised as a result of share price appreciation or depreciation	"Annual report on remuneration" in the DRR
Quoted companies (as above) with more than 250 UK employees	A table showing the ratio of CEO pay to the median remuneration of UK employees as well as the 25th and 75th percentiles of their UK employees	"Annual report on remuneration" in the DRR
Quoted companies (as above)	For executive directors as regards performance targets or measures for more than one financial year, the maximum remuneration receivable assuming share price appreciation of 50 per cent	"Directors' remuneration policy" section in the DRR

Disclosure of inside information

The UK Financial Conduct Authority (FCA) has issued a draft technical note ([FCA/TN/506.2](#)) on periodic financial information and inside information for consultation. The consultation closes on 23 July 2018. The amendments to the existing technical note are extensive.

The note centres on identifying inside information in the context of the preparation of financial results and, if inside information is identified, disclosure of that information. The Market Abuse Regulation permits issuers to delay disclosure of inside information where (1) immediate disclosure is likely to prejudice the legitimate interest of the issuer (2) delay in disclosure is not likely to mislead the public and (3) the issuer is able to ensure the confidentiality of the information.

This area is a complex one, particularly since the Hannam case in 2014 which stated that a company has a legitimate interest in the orderly disclosure of its financial results and that unless there was an exceptional event requiring immediate disclosure, the company could rely on DTR2.5.1R (as then was) to justify delaying disclosure until the due reporting date even though it might have all the relevant information to hand and the accounts were all but final.

The draft technical note reminds issuers that the requirement to disclose inside information applies even when issuers are in the process of preparing their periodic financial reports and that issuers should not consider that information will either always be inside information or will never be inside information. The FCA then suggests that the cases where immediate disclosure of inside information is likely to prejudice the legitimate interest of the issuer include circumstances where *"the issuer is in the process of preparing a periodic financial report and immediate public disclosure of information to be included in the report would impact on the orderly production and release of the report and could result in the incorrect assessment of the information by the public."* This legitimate interest would be in addition to the list set out in the ESMA Guidelines on delay in disclosure of inside information (ESMA 2016/1478).

New premium listing category for sovereign controlled companies

After extensive consultation, the FCA has published [new rules](#) effective from 1 July 2018 creating a fourth category of premium listing which will be available to companies that have a sovereign controlling shareholder. A new listing rule 21 has been created and, although the new rules are unlikely to affect existing listed issuers, there are extensive consequential amendments to the listing rules.

The 2018 Quoted Companies Alliance Corporate Governance Code

A revised 2018 Quoted Companies Alliance Corporate Governance Code (QCA Code) was [published](#) in April 2018, replacing the 2013 version. In the accompanying press release, the QCA talks about a Code that is *"tailored for small and mid-size quoted companies in the UK"* and it also states that *"The revision of the QCA Code is especially timely and relevant in that the London Stock Exchange has announced a change in the rules so that AIM companies will be required to apply a recognised governance code and explain how they do so from September 2018"*. For more on the new AIM Rules, see our [March 2018 newsletter](#).

The QCA Code centres around 10 broad principles, set out in the table overleaf. For each principle, there is a brief explanation of how a company should apply it followed by what disclosure should be made to demonstrate its application (prescribed disclosures). As before, companies which adopt the QCA Code are asked to provide either an explanation of how they are meeting its principles using the prescribed disclosures, or where they choose to depart from any principle (and its application), a "well-reasoned explanation". The QCA Code provides for two types of prescribed disclosure – website and/or annual report and accounts.

THE PRINCIPLES OF THE QCA CODE

Companies need to deliver growth in long-term shareholder value. This requires an efficient, effective, dynamic management framework and should be accompanied by good communication which helps to promote confidence and trust.

Deliver growth

- | | |
|----|---|
| 1. | Establish a strategy and business model which promote long-term value for shareholders. |
| 2. | Seek to understand and meet shareholder needs and expectations. |
| 3. | Take into account wider stakeholder and social responsibilities and their implications for long-term success. |
| 4. | Embed effective risk management, considering both opportunities and threats, throughout the organisation. |

Maintain a dynamic management framework

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| 5. | Maintain the board as a well-functioning, balanced team led by the chair. |
| 6. | Ensure that between them the directors have the necessary up-to-date experience, skills and capabilities. |
| 7. | Evaluate board performance based on clear and relevant objectives, seeking continuous improvement. |
| 8. | Promote a corporate culture that is based on ethical values and behaviours. |
| 9. | Maintain governance structures and processes that are fit for purpose and support good decision-making by the board. |

Build trust

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| 10. | Communicate how the company is governed and is performing by maintaining a dialogue with shareholders and other relevant stakeholders. |
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As regards content, many of the broad areas now covered by the principles of the QCA Code are similar to the 2013 version (e.g. establishing a strategy and business model; meeting shareholder needs; taking account of stakeholder and social responsibilities; effective risk management; and having a well-functioning and balanced board). However, the prescribed disclosures that companies are asked to make have developed and in many

areas are now more detailed and prescriptive. Consequently, such companies will need to look afresh at the QCA Code and, if they wish to be able to disclose how they apply its principles by way of the prescribed disclosures, may need to put new policies and processes in place. Of course, it is still open to companies to choose not to apply a principle, so long as they give a "well-reasoned explanation".

Independent review of the Financial Reporting Council

In April 2018, the Department of Business, Energy and Industrial Strategy (BEIS) launched [a review](#) to assess the Financial Reporting Council's (FRC) structure, governance, impact and powers, to help ensure it is fit for the future. In June 2018, BEIS published a [call for evidence](#) as part of the review. The deadline for the call for evidence is 6 August 2018.

BEIS seeks evidence in the following areas:

- **Purpose and function.** This section looks at whether the existing structure and functions of the FRC are appropriate, which includes responsibilities for: the UK Corporate Governance and Stewardship Codes; reviews of financial statements for Companies Act 2006 (the Act) compliance; acting as the competent authority for audit; and oversight of regulation of the accountancy profession including misconduct investigations. There are also broad questions about: the FRC's objectives; its name; and whether any of its functions ought to be moved to another regulator.
- **Impact and effectiveness.** This section considers the strengths and weaknesses of the FRC in all its roles including audit regulation and quality, accounting and financial reporting, corporate governance and stewardship and actuarial oversight, as well as the speed and effectiveness of its investigations, enforcement and compliance. In particular, the review seeks views on ways the FRC could improve the quality of financial reporting to ensure investor confidence and on whether a stronger regulatory role is needed to ensure that the information needs of investors and others are met.

- **Role in reducing the risk of major corporate failure.** This section looks at whether there is more the FRC could or should do to address the risk of major corporate failures, whether it responds quickly and effectively to warning signs, as well as whether viability statement reporting could be made more effective.
- **Powers and sanctions.** This section looks at whether there are gaps in the FRC's powers and cites calls to extend the FRC's powers of oversight and enforcement of non-accountant directors, as well as concerns that arrangements to enforce statutory directors' duties, as set out in the Act, are insufficient to deter breach. It also discusses whether the FRC makes the best use of sanctions at its disposal and whether the sanctions regime has the right deterrent effect.

In addition, the review raises broad questions on the FRC's statutory footing, the relationship between the FRC and the Government, as well as the FRC's internal governance and staffing.

Spike in director-related concerns at AGMs

In June 2018, the Investment Association issued [analysis](#) of its Public Register of FTSE All-Share companies which have received more than 20 per cent votes against any resolution or withdrawn a resolution at AGMs to date this season. Among its observations, it notes an emerging trend of an increase in directors receiving high votes against their re-election. In this regard, it notes that 94 companies have been added to the Public Register in 2018 of which 34 were added due to director-related resolutions (compared with 21 at the same point in 2017, an increase of 62 per cent). It also notes that the number of individual director-related resolutions with more than 20 per cent votes against rose from 27 in 2017 to 54 in 2018, an increase of 100 per cent.

Women on boards

In June 2018, BEIS and the Government Equalities Office published a [press release](#) noting figures released by the Hampton-Alexander Review on gender balance. The figures reveal that:

- FTSE 100 company boards have on average 29 per cent women on their boards, and are on track to reach the target of 33 per cent by 2020.
- In the FTSE 350, approximately a quarter of board positions are held by women (with 10 all-male boards remaining), and the FTSE

350 may fall short of the target unless companies step up the pace.

The press release also notes that the [on-line portal for FTSE 350 companies to submit their gender data](#) has opened. Sir Philip Hampton, chair of the review, has said that they will be analysing, and hoping to see an increase in, the numbers of women taking on executive leadership roles or reporting to Executive Committees.

Other recent developments as regards board diversity noted in the press release include the publication, in May 2018, of a [press release](#) by BEIS revealing "The worst explanations for not appointing women to FTSE company boards".

Corporate governance update

Over the course of 2017 and 2018, we have reported a number of corporate governance developments, some of which are still work in progress. Here, we provide a brief update.

DEVELOPMENT	STATUS
New FRC UK Corporate Governance Code	The new Code is currently expected to be launched on 16 July 2018 and to be effective for companies with reporting periods beginning on or after 1 January 2019.
New secondary legislation on statutory reporting	A draft of the regulations have been put before Parliament (see earlier article), and, subject to Parliamentary approval, will apply for relevant companies with financial reporting periods beginning on or after 1 January 2019.
FRC final form strategic report guidance	This is currently expected to be published by the end of July 2018.
BEIS consultation on insolvency and corporate governance	This consultation closed on 11 June 2018. The Government response is awaited.

Intra-group guarantees and loans: guidance

On 6 June 2018, The Law Society and The City of London Law Society issued [guidance notes on \(i\) intra-group guarantees and \(ii\) intra-group loans](#). The notes cover the following areas:

- **Guarantees and distributions.** The question considered here is whether, when an English group company gives a guarantee to a creditor of its parent company or of a fellow subsidiary company, that guarantee constitutes a distribution of assets to its members? The conclusion reached is that a guarantee given in relation to a normal financing transaction (when, at the time the guarantee is given, the board of the guarantor company considers that the entity to whom the credit is provided is likely to be able to repay it when it falls due) does not constitute a distribution of assets.

- **Intra-group loans and distributions.** The question considered here is whether, when an English group company makes an on-demand loan to its parent company or to a fellow subsidiary company, that loan constitutes a distribution of assets to its members? The conclusion reached is that a normal on-demand loan (broadly, one where the subsidiary's board concludes, at the time the loan is made, that the borrower is likely to be able to repay the loan when this is demanded) does not constitute a distribution of assets.

These notes have been prompted by a paper produced by the Institute of Chartered Accountants in England and Wales entitled "Guidance on Realised and Distributable Profits under the Companies Act 2006 (Tech 02/17BL)".

Ashurst General Counsel Conference

WEDNESDAY 7 NOVEMBER 2018

Ashurst is delighted to announce the date of our next annual General Counsel Conference. The theme of this year's conference is "harnessing opportunity from change". The conference is aimed at senior counsel and company secretaries, and will comprise engaging, technical and commercial talks, and thought provoking and interactive discussions, on topical issues across a broad range of subjects.

If you would like to receive the invitation to this event please email AshurstGCConference@ashurst.com

Ashurst Publications in the Last Quarter

Ashurst has published a number of client updates and briefings in the second quarter of 2018 and a selection of them are collected below.

Here we draw out just a few of these. In July 2018, we published our UK Q2 Public M&A Update covering a number of newsworthy items, including a further court decision in the *Takeover Panel v King* case and changes to the UK merger control regime. See the first item under Corporate below. In June 2018, we also published our Pensions Update on the Government consultation on its proposals to sharpen the teeth of the Pensions Regulator and impose stricter duties on employers with defined benefit pension schemes, including plans to force companies to involve the Regulator at an earlier stage in corporate transactions, restructurings and refinancings. See the first article below under Employment and pensions.

Corporate

- [UK Q2 2018 Public M&A Update](#)
- [New statutory reporting obligations on quoted and other companies](#)

Employment and pensions

- [£1m fines and criminal sanctions – a new-look Pensions Regulator is on the way](#)
- [How can employers close their gender pay gap?](#)
- [Extended off-pay roll working rules are coming to the private sector](#)

Business conduct and risk

- [A "test case" for Select Committee powers](#)
- [Regulators turn hackers to combat financial crime](#)
- [US imposes new Russian sanctions: what is different this time?](#)

Tax

- [Construction contractor wins IF35 appeal](#)
- [Litigation privilege and internal investigations](#)
- [Proposed anti-avoidance legislation on profit fragmentation](#)

Competition

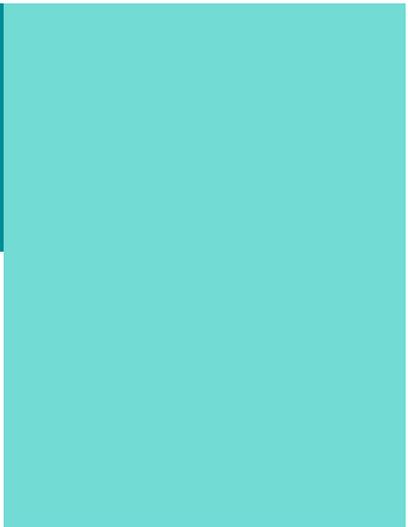
- [New UK national security merger thresholds comes into force](#)
- [EY did not "jump the gun" - landmark case on EUMR standstill obligation](#)
- [CMA publishes joint ventures competition law do's and don't's](#)
- [Some welcome clarity on shape of post-Brexit UK competition law](#)

Dispute resolution

- [Supreme Court confirms legal effectiveness of "no oral modification" clauses](#)
- [The rule against reflective loss and its exceptions](#)
- [Supreme Court closes door on "Wrotham Park" damages in breach of contract claims](#)

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