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Your 2017 AGM and beyond

Against a background of political and economic uncertainties, this year has seen continued focus on corporate governance, executive pay and transparency for shareholders. Following the high profile failures of BHS and Sports Direct, the Government has put corporate governance firmly back on the agenda with the recent publication of a Green Paper. While there are a number of regulatory changes on the horizon in relation to narrative reporting (including regarding gender pay gap and payment practices), there is relatively little regulatory change for this reporting season.

2016 has been a year of firsts with the first viability statements and Modern Slavery Act statements being published and the first ever electronic AGM being held in the UK – not to mention Brexit. In addition, executive pay is likely to be a feature of the 2017 AGM season and remuneration committees will be busy as many will have to prepare a new remuneration policy to put to shareholders. As this is an area increasingly subject to scrutiny, we expect some lively AGMs.

In this update, we examine the developments and changes affecting this season's AGMs and annual reports and we look ahead to other changes on the horizon.

What's new for 2017?

There are a number of issues that companies may need to consider and address when preparing their AGM notice and annual report this season.

Changes to AGM notices

Disapplication of pre-emption rights: Where a company is seeking shareholder approval for the disapplication of pre-emption rights equal to 10% of the issued share capital, changes may be

Key Changes

- Many companies must put new remuneration policies to their shareholders for approval. Institutional investors have highlighted a number of issues they expect to see addressed, including a cap on all elements of remuneration
- Resolutions for the disapplication of pre-emption rights should now follow the Pre-Emption Group's template resolutions
- Companies should consider including appropriate disclosures on the impact of the UK's vote to leave the EU and of Brexit itself in their annual reports
- Companies should consider whether to include information on their new slavery and human trafficking statements (required by June 2017 for those with a December 2016 year end) and their related policies and procedures in their annual report

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required to the form of shareholder resolution proposed. In May 2016, the Pre-Emption Group published template resolutions for companies to use when requesting a disapplication of pre-emption rights. The Group expects companies to propose two separate resolutions to shareholders:

(i) to authorise the disapplication of pre-emption rights for up to 5% of the issued ordinary share capital to be used on an unrestricted basis; and

(ii) to authorise the disapplication of pre-emption rights for an additional 5% of issued ordinary share capital to be used only for the purposes of financing an acquisition or other capital investment (as defined by the Pre-Emption Group's Statement of Principles).

The resolution relating to the additional 5% should only be proposed when appropriate. Companies may want to add additional narrative to the notes to these resolutions to explain them to shareholders. In addition, where a company has undertaken a placing using the disapplication of pre-emption rights it is expected to publish in its next annual report the level of discount provided, the net proceeds raised, how those net proceeds were used and the percentage increase in issued share capital due to non-pre-emptive issuances for cash over the three-year period preceding the issue.

The Investment Association has published updated Share Capital Management Guidelines (July 2016) in which it gives its support to the Pre-Emption Group's two resolution approach and expects companies to follow it. Since August 2016, the Institutional Voting Information Service has stated that it will "amber top" any company seeking a 10% disapplication of pre-emption rights without following the template resolutions and, from January 2017, it will "red top" any such company. The Pensions Investments and Research Consultants Ltd (**PIRC**), on the other hand, will not support the additional 5% authority at all "unless the board has made a clear, cogent and compelling case why the 10% level is appropriate for the company".

Trends from the 2016 reporting season: viability statements

This was the first year in which companies were expected to include a viability statement in their annual reports (provision C2.2 of the UK Corporate Governance Code (**Corporate Governance Code**). This statement is intended to focus on the company's prospects in the longer term. In November 2016, the Investment Association published new guidelines on the viability statement setting out the expectation of institutional investors – this guidance is directed to premium listed companies but should be considered best practice for other companies.

Directors are left to decide the period against which they assess the company's prospects but must state the period and explain why it is appropriate. 81% of FTSE 350 companies chose a period of three years and 14% (often utility and property companies) chose a period of five years[1]. The Investment Association would like to see more differentiation between companies and a longer timeframe (than three or five years) given the long term nature of equity capital and directors' duties. It would also like to see a clear statement on why a particular period was chosen and it values directors making apparent how they have considered wider factors (including the specifics of the company's business and sector and its investment cycle in determining this period, as well as its business cycle).

Grant Thornton found that 52% of companies that produced a viability statement kept the statement to the bare minimum, providing little detail or insight into how they assessed the company's viability[2]. The Investment Association picked up this theme and encourages directors to consider a range of prospects and risks when assessing viability, including the current state of affairs and sustainability of dividends. It suggests that companies distinguish between risks impacting performance and risks threatening operations, separate their assessment of prospects from their assessment of viability, give a clear statement on why the risks are important and how they are managed and controlled, and prioritise risks. It considers that directors should be clear as to how they have assessed these prospects and risks. It would also welcome more transparency on the stress-testing that directors use to assess a company's viability and it considers that companies should include company specific qualifications and assumptions.

Share buy backs: With the implementation of the EU Market Abuse Regulation on 3 July 2016, any reference to the EU Buyback and Stabilisation Regulation 2003 in the AGM resolution or related notes (if any) for approval for share buy backs should be removed.

Share buy backs have received increased criticism over the last couple of years. In March 2016, PIRC published its annual UK shareowner voting guidelines and a policy paper introducing its new policy on share buy backs. PIRC has concluded that, in a change to policy, it will recommend voting against a general authority to buy back shares unless the board has made a "clear, cogent and compelling case demonstrating both how the authority would benefit long-term shareholders, and also that the directors are not conflicted in recommending the authority". While PIRC stated that a buy back will, at times, be a valid means of returning capital to shareholders, it raised concerns that:

- directors often buy back shares in the belief that the company's shares are undervalued by the market (when the passage of time often shows that they were not);
- as buy backs are often conducted in tranches, it is virtually impossible to understand properly the true

1 Figures taken from PLC's 'Annual Reporting and AGMs 2016: What's Market Practice?'. 299 FTSE 350 companies' annual reports were reviewed by PLC.

2 Grant Thorton's Corporate Governance Review 2016.

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performance of a company, without considerable "unpicking" of each tranche; and

- share buy backs often enhance earnings per share results triggering executive bonus payments (hence directors are often conflicted in this respect).

While other investor bodies have not changed their positions on share buy backs for this AGM season and buy backs are not prevented by PIRC's new guidelines, companies should be prepared to demonstrate how a buy back resolution is in the shareholders' best interests and would increase earnings per share. We have already seen instances of PIRC recommending that its members vote against the buy back resolution and we would advise companies to add relevant explanatory wording to the notes to any buy back resolution.

Narrative reporting

Impact of Brexit: Since the UK's vote to leave the EU in June, companies have been considering the effect of Brexit, and its associated risks and uncertainties, on their business model and the markets in which they operate. Many annual reports published since the vote to leave the EU have included references to the vote and Brexit, although the nature of disclosures vary widely from company to company. Many companies refer to the uncertainty surrounding Brexit in their strategic reports with many stating that it is too soon to provide more specific disclosures while highlighting their capacity for resilience. Others have made specific comments on the impact of the vote to leave the EU on sterling and/or included disclosures relating to specific areas of their business that are affected (including, for example, consumer/customer confidence, property prices, cost bases, supply chains and sales). Some companies have highlighted Brexit as a principal risk for their business or as a factor that increases other principal risks.

The FRC flagged the need for Brexit disclosures both in its reminders for half-yearly and annual financial reports following the EU referendum and again in its Chief Executive's letter with year-end advice to preparers of annual reports. The FRC expects companies to provide increasingly company-specific disclosures with quantification of the effects as the economic and political effects become more certain in the medium and longer term.

Modern Slavery Statements[3]***:*** For a company with a 31 December 2016 financial year end, 2016 is the first financial year for which it will be required to publish a modern slavery statement, disclosing either the steps that it has taken during that financial year to ensure slavery and human trafficking do not take place in any of its supply chains or in any part of its own business, or that it has taken no such steps. The statement must be published in a prominent place on the company's website. Although the Act contains no time limit for the publication of such statements, Home Office guidance provides that the statement should be made as soon as reasonably practicable following the end of the financial year and, in any event, encourages reporting within six months of the end of the relevant financial year (ie June 2017 for companies with a financial year end of 31 December 2016).

Many companies have chosen to bring forward their compliance with this obligation and have already published modern slavery statements on their websites. Although not required by the Act, many organisations have also included this statement in their strategic reports and made reference to the processes and policies that they have

implemented with respect to slavery and human trafficking over the last year.

Executive remuneration

There has been much disquiet over the past year in relation to director pay increases and the perceived gap between executive director and employee pay; this is reflected in the proposals in the Government's recently published Green Paper on corporate governance. In addition, ensuring pay is linked to performance and scrutinising the exercise of discretion remain areas of focus for institutional investors.

Many listed companies will be putting their remuneration policy to a shareholder vote in 2017, as the policies approved in 2014 expire. As a reminder, this is a binding shareholder vote and a vote against the policy would mean that a company would have to continue to use its existing shareholder-approved remuneration policy.

In advance of the 2017 reporting season, the Investment Association published revised guidelines and an open letter to board chairmen in October 2016 highlighting its concerns, and a number of institutional investor bodies and

3 Section 54 of the Modern Slavery Act 2015, which came into force in October 2015, requires a commercial organisation (a body corporate or partnership (wherever incorporated or formed) which carries on part of a business in the UK) supplying goods or services with a total turnover of £36 million or more to make a slavery and human trafficking statement for each financial year ending on or after 31 March 2016.

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Trends from the 2016 reporting season: shareholder dissent on the rise

The 2016 AGM season was more contentious than the previous season. Two FTSE 100 companies had resolutions relating to the approval of the directors' remuneration report rejected by their shareholders (although both votes were advisory only):

- BP: 59% against
- Smith & Nephew: 53% against

In compliance with provision E2.2 of the Corporate Governance Code, both companies made statements, when announcing the results of voting, explaining the action they intended to take to understand the reason behind the vote result. Both companies' statements included commitments to continue consultation and engagement with shareholders in relation to remuneration.

Four FTSE 250 companies had resolutions defeated:

- Weir Group: 72% of votes cast against the directors' remuneration policy and 72% of votes cast against amendments to the LTIP rules to take account of the proposed remuneration policy
- SVG Capital: 32% of votes cast against the general power to disapply pre-emption rights on the issue of new shares for cash of up to 5% of the company's issued share capital
- Renewables Infrastructure Group: 42% of votes cast against the adoption of new articles of association
- Paysafe Group: 52% of votes cast against the directors' remuneration report (advisory only)

These are the most acute examples of the trend towards more votes against resolutions. The most commonly contested resolutions relate to directors' remuneration, the re-election of directors, short notice to convene a general meeting, authority to allot and the disapplication of pre-emption rights. Excluding resolutions relating to directors' remuneration, 133 companies have seen a total of 216 resolutions receive more than 10% shareholder opposition[4].

To minimise the chances of resolutions not being voted through at AGMs, companies should understand the views and concerns of their major shareholders and maintain good relationships and regular dialogue with them. Good PR and communication strategies and careful monitoring of the press, research reports and the shareholder register are also advisable.

investors, including ISS, Legal & General Investment Management and Hermes, have published guidelines or reports setting out their expectations for 2017.

2017 remuneration policies: Institutional investors have highlighted a number of issues they expect to see addressed in remuneration policies put to shareholders in 2017.

- *A maximum cap on all elements of remuneration, including salary:* Most companies did not include a maximum cap in the first remuneration policies put to shareholders but investors expect a cap to be included in 2017. As an alternative to a stated maximum (which may not be practical), companies could consider including a maximum percentage increase per annum or a maximum increase measured against an index.
- *Salary increases:* Increasing director pay and pay inequality are key issues for 2017 and the Investment Association has said, in its open letter to company chairmen, that there must be a "clear and explicit rationale" for director pay increases and that companies must be sensitive to the "prevailing mood" and the "effect of executive pay levels on all stakeholders". Companies will need to reflect this in any new policy, and take care to explain the reason for any increases awarded in 2016.
- *Disclosure of bonus targets:* This was a focus in the 2016 AGM season and companies have responded, with 53% of the FTSE 100 providing full disclosure in their 2016 reports. Companies can choose not to disclose targets where they are commercially sensitive, but institutional investors have made clear that full retrospective disclosure is expected.
- *Discretion:* The operation of discretion remains a thorny issue. Many companies included a general ability to exercise discretion where necessary in their original remuneration policies. Care needs to be taken in any new policies as the Investment Association has made clear that it is not in favour of companies including discretion to make payments that would be outside of their remuneration policy. There is one area, however, where investors are in favour of companies exercising or introducing discretion. This is where discretion is used as an "underpin" to ensure that payments made under bonus plans and LTIPs are appropriate, by which investors mean reflect the share price and value received by shareholders. There is concern that the application of formulaic performance conditions has resulted in substantial payouts even though underlying share price and company performance has been poor.

4 Figures taken from PLC's 'Annual Reporting and AGMs 2016: What's Market Practice?'. The voting results of 283 FTSE 350 companies were reviewed.

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- *Pensions:* As part of the focus on pay inequality, there is increased scrutiny of directors' pensions and disparities between pension provision for directors and for employees. The Investment Association has suggested that companies should justify contribution rates for executive directors where those are different from contribution rates for employees generally.

Executive Remuneration Working Group's report: The Executive Remuneration Working Group (**ERWG**), which was established by the Investment Association as an independent panel to undertake an in-depth review of executive pay, published its report in July 2016.

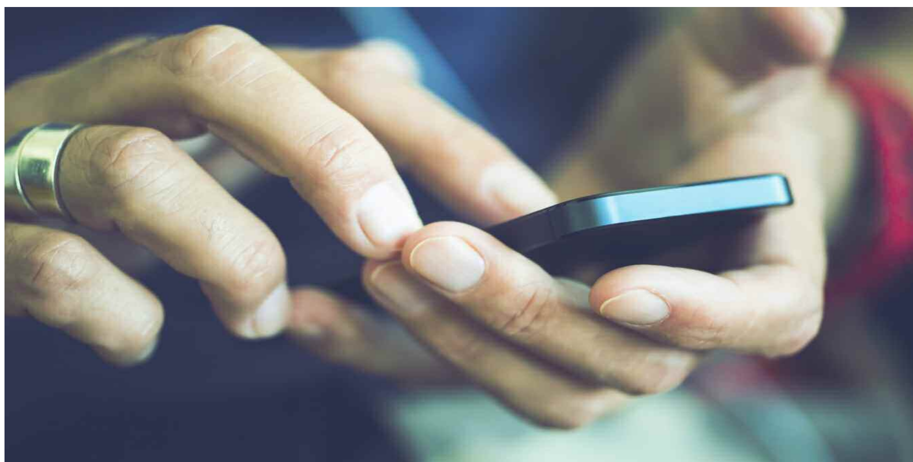
The report highlighted two central causes of the ratcheting of pay – the "one-size-fits-all" LTIP model and executives discounting the value of remuneration due to ever more conditions being attached (malus, clawback and holding periods being key). To deal with this, the ERWG recommended more flexibility for remuneration committees to choose pay structures. It considered four long term incentive structures: (i) LTIPs, (ii) deferred bonus, (iii) grant of shares awarded on performance, and (iv) restricted share awards. Of the four, the ERWG did not recommend the grant of shares awarded on performance but endorsed the other three structures.

The ERWG also made recommendations for repairing trust between companies and investors, by improving engagement with shareholders and increasing transparency. The ERWG recommended that companies focus on material issues when consulting with investors and make sure consultation is genuine consultation. It also recommended greater disclosure of the process for setting bonus targets and the use of discretion. The ERWG also focused on ensuring remuneration committees are more accountable and recommended that the chair of the remuneration committee should be a member of the committee for at least a year before appointment as chair. Many of the ERWG's recommendations are reflected in the options for reform of executive remuneration in BEIS's consultation on corporate governance reform (see below).

Government consultation on corporate governance reform: The Department for Business, Energy & Industrial Strategy (**BEIS**) has published a Green Paper on corporate governance reform, which includes proposals on executive pay, providing greater accountability to employees, customers and suppliers, and corporate governance in large private businesses. The closing date for responses to the Green Paper is 17 February 2017.

The Green Paper contains consultation on wide-ranging changes to executive remuneration, with the focus on the following areas:

- *Shareholder votes on executive pay:* The Green Paper proposes that shareholders be given greater say over executive pay. Proposals include subjecting all or some elements of executive pay (such as annual bonus, LTIPs or proposed increases in salary) to a binding vote; introducing stronger consequences for companies losing the annual advisory vote on the remuneration report; requiring companies to set an upper threshold for total annual pay, and requiring a binding vote in any year where that threshold is exceeded; and requiring a binding vote on the remuneration policy more frequently than every three years.
- *Shareholder engagement:* The Green Paper suggests requiring disclosure of fund managers' voting records at AGMs and the extent to which they have used proxy voting, requiring companies to establish a senior "shareholder" committee to consider executive remuneration, and encouraging individual retail shareholders to exercise their voting rights.
- *The role of remuneration committees:* Two options are proposed regarding the role of remuneration committees. The first is to require the remuneration committee to consult shareholders and the wider workforce in advance of preparing the remuneration policy, possibly through changes to the Corporate Governance Code or by designating a specific non-executive director to be responsible for workforce and wider stakeholder interests. The second, reflecting the recommendation made by the ERWG (see above), is that remuneration committee chairs should have served at least 12 months on the remuneration committee before being appointed chair.



- *Ensuring greater transparency:* Here, the Green Paper considers whether: (i) the ratio of CEO pay to median employee pay should be disclosed in the annual remuneration report, along with an explanation of why the ratio is appropriate; and (ii) the existing requirement to report bonus plan performance targets should be strengthened.
- *LTIPs:* In relation to executive pay, the Green Paper asks for views on how LTIPs could be better aligned with the long term interests of companies and shareholders, and whether vesting periods should be longer than the current norm of three years, with the suggestion that vesting periods should be a minimum of five years.

Looking ahead

Electronic AGMs: format of the future?

The first ever electronic AGM in the UK was held by Jimmy Choo in June 2016, enabling shareholders to participate in the AGM wherever they were in the world without any travel or additional costs. The meeting was delivered by Equiniti Registrars and held via a secure app. It attracted a lot of media interest and we are beginning to see other companies in the UK show an interest in electronic AGMs or a hybrid of electronic and physical AGMs. Electronic AGMs are already popular in the United States and we expect them to become increasingly popular in the UK over time. There is an ever growing appetite for digital solutions internationally and this is coupled with the general desire for greater shareholder access and engagement.

Companies will need to assess and implement the processes and technology necessary to enable an AGM to be held electronically – company registrars should be able to assist with this. From a legal perspective, companies may also need to amend their articles of association to allow for electronic AGMs and this will require a special resolution from shareholders. Jimmy Choo amended their articles at the 2015 AGM in order to then hold their 2016 AGM electronically.

Audit

Mandatory rotation of auditors and retendering of audit engagement: FTSE 350 companies are already required under UK law[5] to put their statutory audit services engagement out to tender at least every ten years and to change their statutory auditor at least every 20 years. Where a company has not completed a competitive tender process in the last five financial years, the audit committee report must set out when the company proposes to complete its next competitive tender process and the reasons why that timing is in the best interests of the company's members. EU legislation, introduced in the UK in June 2016[6], is now extending these requirements to public interest entities (**PIEs**) – broadly, companies listed on a regulated market in the EU (not AIM), banks, building societies and insurers – with effect for financial years beginning on or after 17 June 2016. Any such companies not previously subject to these requirements will need to assess when they will need to put their audit out to tender. The audit committee report must provide advance notice of any audit retendering plans (amended provision C3.8 Corporate Governance Code), for financial year beginning on or after 17 June 2016. This requirement is also reflected in amendments to the FRC's Guidance on Audit Committees (April 2016).

Change to audit committee competence requirements: Changes to the Corporate Governance Code which apply to financial years starting on or after 17 June 2016 require the audit committee as a whole to have competence relevant to the sector in which the company operates (amended provision C3.1 Corporate Governance Code). This requirement is also reflected in amendments to the FRC's Guidance on Audit Committees which states that the board should ensure a range of skills, experience, knowledge and professional qualifications in addressing the composition requirements for the audit committee. Companies should ensure that their audit committee's composition is compliant for the 2017 financial year and review and update their audit committee terms of reference to reflect the revised Corporate Governance Code and the FRC's Guidance on Audit Committees.

5 The Statutory Audit Services for Large Companies Market Investigation (Mandatory Use of Competitive Tender Processes and Audit Committee Responsibilities) Order 2014.
6 Directive 2014/56/EU and Regulation (EU) No 537/2014, implemented into UK law by the Statutory Auditors and Third Country Auditors Regulations 2016 (SI 2016/649).

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New non-financial reporting requirements

Draft regulations[7] that will require the inclusion of a non-financial information statement in the strategic report have been laid before Parliament and are expected to apply to financial years commencing on or after 1 January 2017.

UK quoted companies[8] are already required to include in their strategic report, to the extent necessary for an understanding of the business, information about the main trends and factors likely to affect the development of the business and information about environmental matters, employees and social, community and human rights issues[9].

New provisions in the Companies Act 2006[10] will require all large listed companies, banks, building societies and insurers with more than 500 employees to include a non-financial information statement in their strategic report containing information similar to that already required from UK quoted companies (see previous paragraph). The information must include a description of a company's policies on the matters, the outcome of the policies, an explanation of where the company is not following the policies, and principal risks related to these matters and how the company manages them. Where a company does not have policies on any of these matters, the statement must provide a clear and reasoned explanation. For some companies this will be a new requirement. For most existing UK quoted companies, this new requirement will supplement their existing strategic reporting requirements and they will need to identify what additional information will need to be included in next year's strategic report. Helpfully, the new regulations clarify that compliance with this new requirement will be treated as complying with certain of the existing reporting obligations for strategic reports[11] and there is a carve-out allowing a company not to disclose commercially sensitive information.

Prompt payment reporting

The draft payment reporting regulations are now expected to come into force on 6 April 2017 for financial years starting on or after this date. These regulations will require large companies and LLPs to publish specified information about the payment of their suppliers, including the average time taken to pay supplier invoices. Reporting is expected to be required on a half-yearly basis to a government website. There is no requirement for this information to be included in annual reports although we expect some companies will do so. Further guidance on these reporting requirements is also expected early in 2017.

Gender pay gap reporting

The draft gender pay gap reporting regulations are now expected to come into force on 6 April 2017. These regulations will require private sector employers with 250 or more employees to publish the difference in mean and median gross hourly pay and bonus pay between male and female employees and the proportion of male and female employees who receive bonuses. An employer must also report the number of male and female employees in each quartile of its overall pay range. The information must be published in a report on the employer's website and uploaded to a government sponsored website. As with prompt payment reporting, there is no requirement for this information to be included in annual reports although we expect some companies will do so. Relevant employers must publish their first gender pay gap reports on or before 4 April 2018, based on information from the previous 12 months. Further guidance on these reporting requirements is expected to be published early in 2017.

Diversity on boards

Diversity on boards continues to be a hot topic and it is now extending beyond gender diversity to ethnic diversity. Five years on from the Davies review on "Women on boards", there are no longer any all male-boards in the FTSE 100. The Hampton-Alexander review published in November 2016 builds on the Davies review and sets out a series of recommendations for further improving gender diversity in the FTSE 350 with a new focus on improving the representation of women in executive positions. The recommendations include: new targets for FTSE 350 companies of a minimum of 33% women on boards by 2020 and of a minimum of 33% women on executive committees and the direct reports to the executive committee by 2020; and amendments "as soon as feasible" to the Corporate Governance Code to require FTSE 350 companies to disclose in their annual report the gender

> *"UK companies have made great progress on gender diversity but we still have much to do when it comes to ethnic and cultural diversity as a business imperative"*
>
> *Sir John Parker, The Parker Review Committee.*

7 Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016, amending Part 15 of the Companies Act 2006.

8 A company whose equity share capital is (i) included in the Official List; or (ii) officially listed in an EEA state; or (iii) admitted to dealing on the NYSE or Nasdaq.

9 Section 414C(7) Companies Act 2006.

10 Sections 414CA – CB Companies Act 2006, which will be inserted into the Companies Act 2006 by the new regulations.

11 Section 414C Companies Act 2006.

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balance on the executive committee and direct reports to the executive committee. The FRC has committed to not make any further changes to the Corporate Governance Code until 2019 so it is unlikely that we will see immediate change in this respect.

The Parker review, also published in November 2016, focuses on ethnic diversity on UK boards. The report highlights that ethnic diversity on UK boards is disproportionately low – only about 1.5% of all FTSE 100 board directors who are UK citizens are "people of colour", compared with people of colour comprising approximately 14% of the overall UK population. To address this imbalance, this review makes a number of preliminary recommendations, including that each FTSE 100 board should have at least one director of colour by 2021 and each FTSE 250 board should have at least one director of colour by 2024. The report was published in consultation format and asks for feedback by 28 February 2017, prior to the publication of the final recommendations.

A recent amendment to the Disclosure Guidance and Transparency Rules will require each listed company,[12] for financial years beginning on or after 1 January 2017, to include in its corporate governance statement a description of its diversity policy and the policy's objectives, how it is implemented and the policy's results in the reporting period (or an explanation of why the company does not have a diversity policy) (new DTR 7.2.8AR).

12 Most companies with transferable securities admitted to trading on a regulated market, except for companies that qualify as small or medium companies under the Companies Act 2006 (sections 382 to 383 or 456 to 466).

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