

C L I F F O R D

C H A N C E



FROM SHAREHOLDERS TO STAKEHOLDERS
SECTION 172 STATEMENT: TELLING YOUR STORY







JANUARY 2020

SECTION 172 COMPANIES ACT 2006

DUTY TO PROMOTE THE SUCCESS OF THE COMPANY

Section 172(1)

A director of a company must act in the way he/she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:

-  the likely consequences of any decision in the long term,
-  the interests of the company's employees,
-  the need to foster the company's business relationships with suppliers, customers and others,
-  the impact of the company's operations on the community and the environment,
-  the desirability of the company maintaining a reputation for high standards of business conduct, and
-  the need to act fairly as between members.

Remember though that this is not an exhaustive list and not every one of these matters will be relevant in every case.

Discharging this [s.172] duty is not just about how you make decisions as a director yourself. It also means bearing in mind stakeholder factors and other relevant inputs to your decisions or responsibilities in setting strategy, in developing policies, in creating a corporate culture and in guiding and delegating to management and employees.

GC100 Guidance on Directors Duties: Section 172 and Stakeholder Considerations (October 2018)

CONSIDERATION OF STAKEHOLDER INTERESTS

NEW STAKEHOLDER REPORTING REQUIREMENTS APPLICABLE TO FINANCIAL YEARS STARTING ON OR AFTER 1 JANUARY 2019

The Companies (Miscellaneous Reporting) Regulations 2018

Strategic Report:

- All UK companies that are required to prepare a strategic report must, unless they qualify as medium-sized*, include a statement describing how the directors have had regard to the matters set out in s.172(1)(a)-(f) Companies Act 2006 during the financial year under review (**s. 172 statement**).

Directors' Report:

- All UK companies that satisfy two or more of the following (i) turnover more than £36m; (ii) balance sheet more than £18m and (iii) more than 250 employees to include information on how the directors have had regard to the need to foster the company's business relationships with suppliers, customers and others (**business relationships statement**).
- All UK companies with more than 250 UK employees to include information on how the directors have engaged with employees (**employee engagement statement**).

* See sections 465 – 467 Companies Act 2006 to determine which companies qualify as medium-sized and those companies excluded from being treated as such.

UK Corporate Governance Code 2018 (Provision 5)

The board should understand the views of the company's other key stakeholders and describe in the annual report how their interests and the matters set out in s. 172 Companies Act 2006 have been considered in board discussions and decision-making.

For engagement with the workforce, one or a combination of the following methods should be used:

- a director appointed from the workforce;
- a formal workforce advisory panel;
- a designated non-executive director.

If the board has not chosen one or more of these methods, it should explain what alternative arrangements are in place and why it considers that they are effective.

S. 172 statement publication requirements

Given the overlapping requirements of the new reporting requirements, companies may choose to include all the information in their Strategic Report provided they include a statement in the Directors' Report stating they have done so.

Unquoted companies must publish the s.172 statement on a website that is maintain by or on behalf of the company and the website must identify the company in question. Publication of the annual report online will meet this requirement. Quoted companies are already required to make available their annual report and accounts online.

Consider your group companies

Remember that the new statutory reporting requirements apply to both public and private UK companies (including subsidiary companies) that meet the qualifying thresholds.

Such companies will need to prepare their own s.172 statement, business relationships statement and employee engagement statement. Subsidiary companies preparing their s.172 statement may wish to make reference to group statements and policies. In circumstances where a subsidiary meets the qualifying requirements for a s.172 statement, but not the parent company, where the parent prepares consolidated group accounts, the parent will qualify through the process of consolidation and therefore must prepare its own s.172 statement.

Publication of the subsidiary company annual report on the parent company's website will meet the s. 172 publication requirements. If, however, only the s.172 statement is being published, ensure information cross-referenced to in the s.172 statement is also included on the website and that the website identifies the group company to which the statement relates.

Note that there is also a new statutory reporting requirement for large UK companies to include a statement of their corporate governance arrangements in their directors' report (large for these purposes means companies with (a) more than 2,000 employees; or (b) a turnover of more than £200m and a balance sheet total of more than £2bn). Listed companies are excluded from this requirement where they are required by DTR 7.2 to make a corporate governance statement.

S. 172 STATEMENT: TELLING YOUR STORY

USE THE S.172 STATEMENT TO TELL READERS ABOUT THE ENGAGEMENT YOU ARE HAVING WITH YOUR KEY STAKEHOLDERS

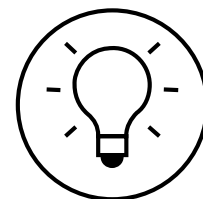
Key Disclosures			
<p>1 Identify the key stakeholder groups and other relevant issues or factors that the board has had regard to</p>		<p>2 Describe the main methods of engagement with key stakeholder groups</p>	
Suggested disclosures	Practical considerations	Suggested disclosures	Practical considerations
<p>Description of the key stakeholders.</p> <p>Explanation of why the key stakeholders are relevant to the long-term success of the company.</p> <p>Consider including a statement of what the board believes to be the key concerns of each key stakeholder group.</p> <p>Explanation of any other issues or factors (e.g. environmental impact of company's operations, relationship with regulators) the directors consider relevant in complying with s.172 and how they have formed that opinion.</p>	<p>Would including a key stakeholder map allow investors to see the dependencies of each part of the business on each of the key stakeholder groups?</p> <p>Look beyond stakeholder groups such as employees, customers and suppliers. Other key stakeholders may include government, regulators, bond holders, banks and other creditors, trade unions and community groups.</p> <p>Ensure key concerns of key stakeholder groups reflect the feedback obtained from relevant stakeholders.</p>	<p>Description of the company stakeholder engagement policy (if any).</p> <p>Details of main methods used to engage with the different key stakeholder groups and who has responsibility for such engagement.</p> <p>Description of the methods for ensuring feedback is given back to those stakeholder groups with which the company has engaged.</p> <p>Explanation of the method(s) the company has adopted for workforce engagement.</p> <p>If not a formal workforce advisory panel, designated NED or workforce director, explain what alternative arrangements are in place, how they operate and why the board considers they are effective.</p>	<p>If the company does not have a stakeholder engagement policy consider whether one should be put in place.</p> <p>Consider where to include details of stakeholder engagement. Does the company prepare a separate stakeholder or sustainability report for inclusion in the Strategic Report where this information will be set out?</p> <p>Include case studies to illustrate examples of stakeholder engagement.</p> <p>Whilst the statutory requirement is to consider employees, the UK Corporate Governance Code and the FRC Guidance on the Strategic Report encourages companies to consider workforce issues more generally (e.g. contractors etc).</p>
<p><i>“how you consider the benefit of shareholders as a whole and how you have regard to the factors specified in section 172 will be for you and your board to judge in the context of your company's own business and circumstances and the environment in which it is operating.”</i></p> <p><i>GC100 Guidance on Directors Duties: Section 172 and Stakeholder Considerations (October 2018)</i></p>			

S. 172 STATEMENT: TELLING YOUR STORY (CONTINUED)

DEMONSTRATE HOW YOUR DIRECTORS HAVE LISTENED AND ACTED ON STAKEHOLDER FEEDBACK

Key Disclosures			
3 Explain how the board ensures that it is sufficiently informed in order to understand key stakeholders' views		4 Describe how the directors have had regard to stakeholder interests in decision-making and strategy	
Suggested disclosures	Practical considerations	Suggested disclosures	Practical considerations
<p>Description of internal processes for how individual board members and senior managers collate feedback from stakeholder engagements and ensure it is fed back to the board.</p> <p>Details of training given to the board and/or senior management to ensure they understand the directors' s.172 duties.</p> <p>Description of relevant processes for ensuring board papers/presentations highlight any relevant s. 172 factors.</p> <p>Describe how the nomination committee has regard to what stakeholder awareness/expertise is needed in the boardroom when recruiting new directors.</p> <p>Describe how stakeholder engagement is addressed in the new director induction programme.</p>	<p>Consider the metrics and reports received by the board – are they too focussed on financial or operational data? Do they sufficiently address s.172 factors?</p> <p>Ensure relevant training has been provided to board and management on s.172 duties and refresh regularly.</p> <p>Review board papers and any templates for their preparation. Consider whether any additional training is required for managers on preparation of board papers and/or on presenting to the board.</p> <p>Consider whether management reports to the board can be improved to ensure s.172 factors are properly considered and reflected in decision-making.</p> <p>Ensure new directors are provided with relevant information about, and opportunities to meet with, key stakeholder groups.</p> <p>Describe how the Company Secretary assists the board to consider relevant s.172 factors at board meetings.</p>	<p>Describe the principal decisions taken by the board during the financial year.</p> <p>Include details of specific examples of where stakeholder interests were specifically considered.</p> <p>Where there are a range of different stakeholder interests, explain how directors have weighed up the different interests and factors taken into account in making the decision and/or what mitigating action has been taken.</p> <p>Link to the culture of the company and how the board ensures that decisions taken throughout the company are in line with the company's values and objectives.</p> <p>Include details of how s. 172 matters are embedded in decision-making throughout the organization.</p>	<p>Much of this may already be set out in the Strategic Report narrative. Cross-reference where appropriate to avoid necessary repetition.</p> <p>Ensure there is consistency between the principal decisions discussed in the s.172 statement and the review of the business elsewhere in the Strategic Report.</p> <p>Include case studies where possible to illustrate how decision-making takes into account wider stakeholder interests.</p> <p>FRC Guidance on the Strategic Report suggests that if the setting and application of the capital allocation and dividend policies are principal decisions, the s. 172 statement could explain how directors have had regard to the long term and the interests of stakeholders, both in the setting of the capital allocation and dividend policies and then in the application of those policies each year.</p>

GENERAL TIPS



<p>Maintain the cohesion of the narrative of the strategic report by incorporating information into the s.172 statement by cross-reference where appropriate.</p>	<p>Remember the s.172 statement should focus on matters that are of strategic importance to the company: the level of information disclosed should be consistent with the size and complexity of the business.</p>	<p>Consider more broadly whether, given the shift from shareholder to wider stakeholder relationships, the Chair's statement should also make reference to wider stakeholder interests.</p>
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GUIDANCE ON S. 172 STATEMENT REPORTING

<p>FRC Guidance on the Strategic Report (July 2018), section 8.</p>	<p>FRC's Guidance on Board Effectiveness (July 2018), paragraphs 40 – 60.</p>	<p>GC100 Guidance on Directors' Duties – Section 172 and Stakeholder Considerations (October 2018).</p>	<p>ICSA: The Governance Institute/The Investment Association – The Stakeholder Voice in Decision-Making (2017).</p>	<p>BEIS Companies (Miscellaneous Reporting) Regulations 2018 Q&A (November 2018).</p>
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“Companies will need to judge what is appropriate, but the statement should be meaningful and informative for shareholders, shed light on matters that are of strategic importance to the company and be consistent with the size and complexity of the business.”

BEIS Q&A (November 2018)

CONTACTS



DAVID PUDGE
Partner

T +44 20 7006 1537
M +44 7770 586042
E david.pudge
@cliffordchance.com



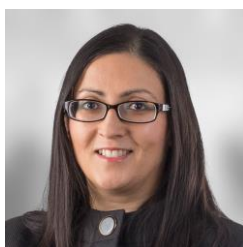
ROBERT CROTHERS
Partner

T +44 20 7006 1427
M +44 7900 167139
E robert.crothers
@cliffordchance.com



KATH ROBERTS
Knowledge Director

T +44 20 7006 1308
M +44 7900 167050
E kathryn.roberts
@cliffordchance.com



KAVITA BASSAN
Senior Associate
Knowledge Lawyer

T +44 20 7006 5826
M +44 7583 080708
E kavita.bassan
@cliffordchance.com

CLIFFORD CHANCE

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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