

DIVERSITY AND INCLUSION ON LISTED COMPANY BOARDS AND EXECUTIVE COMMITTEES: FCA CONSULTATION ON NEW REPORTING REQUIREMENTS

On 28 July 2021, the FCA launched a consultation ([CP21/24](#)) on proposals to improve transparency for investors on the diversity of listed company boards and their executive management teams. The proposals address the lack of standardised and mandatory transparency in this area by establishing better, comparable information on the diversity of boards and executive management against the background of a growing interest in ESG matters in investment decision-making, as well as wider social concerns. The FCA's aim is to promote greater diversity and inclusion on boards over time.

The proposals would amend the: (i) Listing Rules (**LRs**) to require listed companies to publish annually a 'comply or explain statement' on whether they have achieved certain proposed targets for gender and ethnic minority representation on their boards and data on the gender and ethnicity composition of their boards and most senior level of executive management; and (ii) Disclosure Guidance and Transparency Rules (**DTRs**) to require companies to ensure any existing disclosure on diversity policies addresses key board committees and also considers broader aspects of diversity, such as ethnicity, sexual orientation, disability and lower socio-economic background.

Proposed changes to the LRs

In-scope companies: The new LR requirements would apply to UK and overseas companies with equity shares, or certificates representing equity shares (such as GDRs), admitted to the premium or standard segment of the FCA's Official List, including closed-ended investment funds and sovereign-controlled companies. Open-ended investment companies, shell companies

Key issues

- Proposed changes to the LRs introducing new reporting requirements in respect of: (i) board diversity targets relating to gender and ethnicity on a 'comply or explain' basis; and (ii) standardised data on the composition of boards and most senior level of executive management by gender and ethnic background.
- Proposed board diversity targets of at least: (i) 40% of the board should be women; (ii) one of the senior board positions (Chair, CEO, SID or CFO) should be a woman; and (iii) one board member should be from a non-white ethnic minority background.
- Proposed changes to the DTRs to widen the range of examples of diversity aspects for issuers to consider in their board diversity policy to include ethnicity, sexual orientation, disability and lower socio-economic background.
- LR proposals impact UK and overseas issuers with equity shares on premium or standard listing segments of the FCA's Official List; DTR proposals impact certain UK issuers admitted to UK regulated markets and, through the LRs, certain overseas listed companies.

(as defined in LR 5.6.5AR) and issuers of debt securities, securitised derivatives or miscellaneous securities would be excluded.

Proposed new LR requirements: The FCA is consulting on creating new LRs that would require in-scope companies to publish in their annual financial reports:

- a 'comply or explain statement' on whether they have achieved certain targets proposed by the FCA (see below) for gender and ethnic minority representation on their boards; and
- tables containing standardised numerical data (as set out in the annex at the end of this briefing (**Annex**)) on the gender and ethnic diversity of the company's board, senior board positions (Chair, Chief Executive Officer (**CEO**), Senior Independent Director (**SID**) and Chief Financial Officer (**CFO**)) and executive management team (see the definition in the box).

New board diversity targets: The FCA proposes that the new statement should disclose against the following targets on board diversity, as at a specific reference date selected by the company during the relevant accounting period:

- at least 40% of the board are women (including any individual self-identifying as a woman);
- at least one of the senior board positions (Chair, CEO, SID or CFO) is held by a woman (including any individual self-identifying as a woman); and
- at least one member of the board is from a non-white ethnic minority background (as categorised by the Office for National Statistics (**ONS**) – see Table 2 of the Annex).

Current voluntary regimes: Most FTSE 350 companies currently provide data under the Hampton Alexander review on FTSE women leaders and the Parker review on ethnic diversity of UK boards. See the box for information on the progress made by FTSE 350 companies against the targets set by these reviews.

The proposed 40% reporting target for women on boards goes further than the target of women making up 33% of FTSE 350 boards set under the Hampton Alexander review. This reflects that FTSE 350 companies have already met the Hampton Alexander review target and the FCA wants to set a reporting target which builds on where companies are in their current performance – therefore, the proposed targets may have the potential to inject new momentum and encourage greater ambition with respect to the representation of women on boards.

The proposed reporting target on representation of ethnic minorities is in line with that set under the Parker review, which aims to encourage more FTSE 350 companies to meet the Parker review target.

Additional LR guidance: The FCA proposes to include new guidance in the LRs to the effect that in-scope companies may also wish to include the following information in their annual financial reports:

- a brief summary of any key policies, procedures and processes that the company considers contribute to improving the diversity of its board and executive management;

Definition of "executive management"

'the executive committee or most senior executive or managerial body below the board (or where there is no such 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)'

The Hampton Alexander review

- The number of women on FTSE 350 boards has risen from 682 to 1026 in five years.
- FTSE 100, 250 and 350 companies all reached the target of women making up 33% of boards by the end of 2020.

The Parker review

- 74 FTSE 100 companies had ethnic minority representation on their boards as at November 2020, compared to 52 in January 2020.
- By March 2021, a further seven FTSE 100 companies reported that they had appointed a director from an ethnic minority group, showing there is still time to act to meet the 'One by 2021' target.
- FTSE 250 companies have until 2024 to appoint at least one ethnic minority director to their boards.

- any mitigating factors or circumstances which make achieving diversity on the company's board more challenging (e.g. the size of the board or the country where the company's main operations are located); and
- any risks the company foresees in meeting (or continuing to meet) the board diversity targets (see above) in the next accounting period, or any plans to improve the diversity of the company's board.

Proposed changes to the DTRs

In-scope companies: The proposed changes to the DTRs would impact certain UK issuers with securities admitted to trading on a UK regulated market and, through the LRs, certain overseas listed companies (subject to existing exemptions for small and medium companies).

Current DTR requirements: The FCA is proposing to expand DTR 7.2.8AR, which currently requires an issuer's corporate governance statement to contain a description of the diversity policy applied to the issuer's administrative, management and supervisory bodies with regard to aspects such as, for instance, age, gender or educational and professional backgrounds. The existing DTR also requires the issuer to outline the objectives of the diversity policy, how the policy has been implemented and the results in the reporting period. Where no such policy is applied, the issuer must explain why this is the case.

Proposed new DTR requirements: The FCA is proposing to expand DTR 7.2.8AR to indicate that a company's disclosure on its diversity policy (where it has one) should also:

- include the diversity policy applied to the company's remuneration, audit and nominations committees; and
- cover broader diversity aspects such as, for instance, ethnicity, sexual orientation, disability and socio-economic background.

Additional DTR guidance: The FCA is also proposing to add guidance that in-scope companies may, where appropriate, include numerical data on the diversity of the board and board committees referred to above in their description of the results in the reporting period.

Implementation issues

The FCA acknowledges that companies must collect data within the prevailing data protection regime (e.g. the UK General Data Protection Regulation (**UK GDPR**) and potentially, in some cases, another jurisdiction's data protection regime) and must have a lawful basis for collecting and processing personal data. Personal data revealing racial or ethnic background or concerning a person's sexual orientation or health (including disability) are 'special categories of personal data' under the UK GDPR and other data protection laws and subject to additional restrictions. While there are helpful provisions within the UK GDPR and the UK Data Protection Act 2018 to allow processing of special category personal data for equality of opportunity monitoring purposes, in other jurisdictions the enhanced protections applicable to such data can be more restrictive and it will not always be possible to provide all the expected information. Companies with establishments outside the UK which provide data to meet these requirements may also need to consider international data transfer restrictions, both for the internal processing (depending upon the company structure and internal data transfer mechanisms) and in the event that any data provided to the FCA remains

personally identifiable. In addition, companies will need to ensure compliance with wider data protection requirements, which in the UK (and many other jurisdictions) would include: (i) updating applicable privacy notices; (ii) minimising data processing so as not to go beyond what is proportionate, taking account of the FCA's requirements and recommendations; and (iii) ensuring the data is protected by adequate safeguards, for example in relation to security, accuracy and storage limitation.

Furthermore, companies will only be able to provide numerical data in as far as it does not create any legal issues around equality and employees will need to be willing to provide their personal information on wider diversity aspects, which may be an additional hurdle for companies to overcome.

Next steps and beyond

The consultation closes on 20 October 2021 and the FCA aims to publish a policy statement along with the final LRs and DTRs before the end of 2021. The FCA proposes that the new LRs and DTRs would apply to accounting periods beginning on or after 1 January 2022, meaning that companies would first make the additional disclosures in annual financial reports published for that year in spring 2023. However, the FCA encourages companies to consider making disclosures on a voluntary basis in annual financial reports published before then.

The FCA also states in the consultation paper that diversity will be an ongoing focus for the FCA. With the increased transparency and better data on diversity, the FCA will be able to assess whether and how best to take further steps to promote greater diversity of company boards, for example, the FCA may in the future look to expand reporting and targets to also cover sexual orientation, disability and lower socio-economic background. The FCA may also seek to widen the scope of the targets to levels below executive management.

ANNEX

Table 1: Gender reporting categories

Gender	Number of Board Members	% of Board	Number of senior positions on the board (CEO, CFO, SID or Chair)	Number in executive management	% of executive management
Men (including those self-identifying as men)					
Women (including those self-identifying as women)					
Non-binary					
Not-specified/prefer not to say					

Table 2: Ethnicity categories

ONS ethnicity category	Number of Board Members	% of Board	Number of senior positions on the board (CEO, CFO, SID or Chair)	Number in executive management	% of executive management
White British or White Other					
Mixed/Multiple Ethnic Groups					
Asian/Asian British					
Black/African/Caribbean/Black British					
Other Ethnic Group					
Not specified/prefer not to say					

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