CLIFFORD CHANCE

2022/3 CORPORATE REPORTING AND AGM SEASON
NEW DEVELOPMENTS AND PRACTICAL ADVICE

2022/3 CORPORATE REPORTING AND AGM SEASON

As we start the New Year, preparations are already in full swing for many listed companies for the 2022/3 Corporate Reporting and AGM season. This year companies are getting to grips with new requirements around diversity and climate-related disclosures, reflecting the ever-increasing importance of these issues to investors, other stakeholders and wider society. The challenge for companies, particularly in relation to climate-related disclosures and net zero commitments, is to satisfy investors' need for more information whilst ensuring that disclosures are balanced and sufficiently granular to ensure that they cannot be construed as greenwashing.

With regard to the AGM meeting itself, the major change this year is the relaxation of the Pre-emption Group's guidelines, giving listed companies more flexibility to seek approval to disapply pre-emption rights. Companies also of course need to bear in mind the latest FRC guidance around shareholder engagement, not only at the AGM itself but before and after the meeting as well.

In this briefing, we cover the latest reporting requirements and best practice guidance that companies will need to consider when preparing their 2022 annual reports and the top five questions that we are discussing with clients who are preparing for their 2023 AGM.

Contact the team

Our UK Corporate Transactions and Advisory team is ranked Band 1 both for its Corporate Governance work and for its M&A capabilities. We advise many listed companies in relation to corporate governance, annual reporting requirements and AGM preparation. Please contact any of us with your queries in this area.

David Pudge
Corporate Partner
London
T: +44 207006 1537
E: david.pudge@cliffordchance.com

Alanna Hunter
Corporate Partner
London
T: +44 207006 4393
E: alanna.hunter@cliffordchance.com

Dominic Ross
Corporate Partner
London
T: +44 207006 1063
E: dominic.ross@cliffordchance.com

Katherine Moir
Corporate Partner
London
T: +44 207006 3688
E: katherine.moir@cliffordchance.com

Sonia Gilbert
Incentives Partner
London
T: +44 207006 2041
E: sonia.gilbert@cliffordchance.com

Kate Norgett
Corporate Governance Director
London
T: +44 207006 2023
E: kate.norgett@cliffordchance.com

Steven Fox
Corporate Partner
London
T: +44 207006 4827
E: steven.fox@cliffordchance.com

Faeezah Tailor
Lawyer
London
T: +44 207006 2697
E: faeezah.tailor@cliffordchance.com

NEW REPORTING REQUIREMENTS AND GUIDANCE

New diversity and inclusion reporting requirements

The Listing Rules and Disclosure Guidance and Transparency Rules have been amended to include new disclosure requirements for listed companies for financial years starting on or after 1 April 2022. The FCA is, however, encouraging voluntary compliance for those companies with financial years beginning on or after 1 January 2022.

In summary, the new Listing Rules require reports to include:

- a 'comply or explain statement' on whether the company has achieved certain board diversity targets
- numerical data on sex or gender identity and ethnic diversity of the company's board, senior board positions and executive management
- an explanation of the company's approach to data collection for the purposes of these disclosures.

In addition, pursuant to amendments to the DTRs, companies will need to ensure that their existing disclosure regarding their diversity policies addresses key board committees and consider amending their diversity policies to refer to diversity more broadly, for example by extending policies to cover sexual orientation, disability and socio-economic background as well as sex/gender and ethnicity.

The board diversity targets (which are substantially in-line with the targets set by the FTSE Women Leader's Review and the Parker Review) are: at least 40% of the board are women; at least one of the senior board positions (chair, SID, CEO and CFO) is held by a woman; and at least one member of the board is from a minority ethnic background.[1]

Whether a decision is made to report voluntarily or not this year, companies should still start preparations for the first year of formal reporting (see box to the right).

Increasingly investors want to see true accountability and tangible evidence of the actions the board is taking. Glass Lewis and ISS have updated their proxy voting guidelines accordingly (see chart below).

⊗	Failure to meet Hampton-Alexander or Parker Review targets	**Vote against Nomco chair***
⊗	Failure to report against or meet/ make progress towards meeting targets set by new diversity Listing Rules	**Vote against Nomco chair* (from FY 2024)**

*or other directors on a case by case basis

1 Excluding white ethnic minority groups. The definition of ethnic minority is taken from the categories used by the Office for National Statistics, which is broader than the definition used in the Parker Review.

Diversity reporting - key points to consider:

1. Do you want to report voluntarily in your 2022 annual report?
2. What practical steps do you need to take e.g. in relation to data collection?
3. Do existing board diversity policies take account of the key board committees and broader diversity aspects?
4. If not, how should policies be updated?
5. Identify employees who constitute executive management (in most cases this will be the executive committee).
6. Consider existing diversity ratios and steps required to achieve and/ or maintain the relevant targets.
7. How will data capture be managed and are there processes in place for capturing the required data?
8. Have you considered the GDPR issues with requesting such information?

Helpful links:

30% Club guidance

FRC Navigating Barriers Report

New Climate Reporting Requirements

Last year was the first year when premium listed companies had to include TCFD disclosures in their annual reports or explain why they had not done so. This year these requirements have been extended to standard listed companies and new guidance has been included in the Listing Rules.

This year premium and standard listed companies will need to consider:

- the implications of the TCFD's new Guidance on Metrics, Targets and Transition Plans (published in 2021)
- the guidance in new LR 9.8.6F (G) relating to disclosure of transition plans

Companies may also want to consider the findings of the FCA and FRC reviews of the first year of TCFD disclosures under the Listing Rules. In particular, the FRC's thematic review identifies areas in need of improvement and gives examples of better practice to assist companies in preparing their disclosures including: (i) balancing the discussion between climate-related risks and opportunities; (ii) explaining how different climate change scenarios and their subsequent climate commitments (including net zero commitments) may impact the valuation of assets and liabilities; and (iii) consideration of different sectors and geographies within the business.

The FCA and the FRC reviews each note that net zero commitments were often unclear and potentially misleading (both regulators being on high alert for greenwashing). Last month the FRC issued a further report on net zero commitments, with the aim of helping companies avoid falling foul of greenwashing accusations and the UK's Transition Plan Taskforce has also recently published draft guidance to help companies when preparing their transition plans.

The FRC has also announced its areas of supervisory focus for 2023/24 including a further thematic review of TCFD disclosures focusing on disclosures relating to metrics and targets for companies in four relevant sectors and whether net zero commitments are adequately addressed in companies' financial statements.

For FYs starting on or after 6 April 2022, certain large (listed and unlisted) UK companies will be required by the Companies Act 2006 to include mandatory climate-related disclosures (based on the TCFD disclosures) in their strategic reports. The good news for listed companies is that disclosures which satisfy the Listing Rule requirements are likely to be sufficient to meet the new Companies Act 2006 requirements (as per BEIS guidance).

Glass Lewis and ISS have updated their proxy voting guidelines in relation to companies that are significant GHG emitters* (see chart below).

⊗	Failure to provide thorough TCFD disclosures	**Vote against chair of the board/ chair of relevant committee****
⊗	Inadequate board oversight of climate-related issues	**Vote against chair of the board/ chair of relevant committee****
⊗	Inappropriate GHG emissions reduction targets***	**ISS only: Vote against chair of the board**

*applies to companies identified by Climate 100+

**or other directors as appropriate

***At this time, "appropriate GHG emissions reductions targets" will be medium term GHG reduction targets or Net Zero-by-2050 GHG reduction targets for a company's operations (Scope 1) and electricity use (Scope 2). Targets should cover the vast majority of the company's direct emissions.

TCFD reporting - key points to consider:

1. Has the company identified which category of metric is relevant for its business and sector?
2. Would your climate-related targets be considered effective?
3. Are the metrics the company uses: (i) decision useful; (ii) clear and understandable; (iii) reliable, verifiable, and objective; and (iv) consistent over time.
4. Are they aligned with wider company strategy and risk-management?
5. Is there accompanying contextual narrative to the metrics which provides an explanation of the data and the basis on which the data has been prepared?
6. Is the company's transition plan fit for purpose?
7. Does the company's transition plan consider the UK's commitment to a net zero economy (with LR 9.8.6F (G) encouraging UK-based companies to disclose whether and to what extent they have done so when developing and disclosing their transition plan or to explain why they have not done so)? It should also account for industry specific nuances and be credible in its aims.

Helpful links:

FCA Review of TCFD Disclosures

FRC Review of TCFD Disclosures

FRC Report Net Zero Disclosures

TPT Draft Disclosure framework

FRC areas of supervisory focus

BEIS Guidance

FRC Guidance on Corporate Reporting against UK Corporate Governance Code

The FRC's Annual Review of Corporate Governance reporting examines the quality of reporting against the UK Corporate Governance Code. Overall, the review notes that the number of companies taking advantage of the flexibility of the Code to "explain" rather than "comply" has increased, but companies still need to provide more meaningful explanations for departures from the Code.

The review focuses on the importance of good governance in uncertain economic times (in particular the outcomes and impact of policies and practices), shareholder and stakeholder engagement, risk management and internal controls and audit quality (in particular auditor independence and effectiveness) (see key messages below). Risk management and internal controls are expected to be the subject of a consultation on changes to the Code and related guidance in Q1 2023, and the FRC is currently consulting on minimum standards for audit committees – so these areas will remain in the spotlight throughout 2023.

The review also highlights the need for: improved reporting on modern slavery (for example, on the outcomes of supplier audits and whether any issues were found and/or resolved); climate change reporting and the need for climate expertise on boards; chair independence and tenure; board diversity and improved reporting of diversity policies (for example, progress against targets and actions taken to improve diversity); and remuneration.

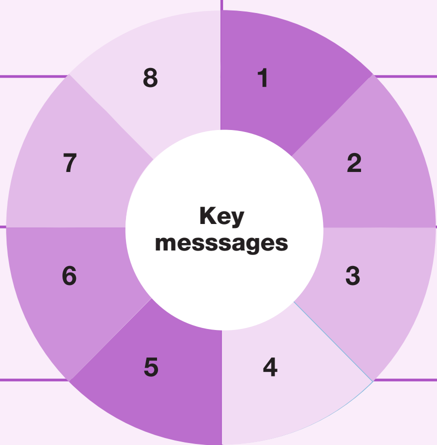
"In uncertain economic times, how companies govern themselves is more important than ever"

Sir Jon Thompson, CEO Financial Reporting Council

Helpful links:

FRC Review of Corporate Governance Reporting

FRC Guidance - key messages



1. Avoid repetition, ambiguity and long boilerplate statements. Provide clear and specific information
2. Explain effects of policies and procedures; highlight outcomes and impacts of initiatives/actions and link to purpose, strategy and values
3. How did the board engage with shareholders/stakeholders; feedback received and impact it had on board discussions and decision-making
4. Clear and meaningful explanation of non-compliance with the Code
5. Diversity policies to include targets/objectives; explain actions taken to implement and progress on achieving objectives
6. Ensure experience, expertise and knowledge of climate-related issues at board and executive level
7. Explain process to identify and manage emerging risks; monitoring of risk management systems and changes made to ensure effectiveness
8. How do culture and executive remuneration align with purpose, strategy and values?

Remuneration

The recommendations and guidance coming from investor bodies and regulators on remuneration and expectations for 2023 have not raised too many surprises but there are some areas of focus for UK listed companies to consider.

In terms of remuneration decisions for 2022, the Investment Association has probably been the most vocal body and has highlighted various areas likely to be of concern to investors (see below).

Investment Association areas of concern to investors:

- balancing incentivising executive performance with the impact of the cost of living crisis on employees/stakeholders
- windfall gains arising from LTIP grants made in 2020 during the Covid-19 pandemic and how those are dealt with by committees (for example, by use of discretion)
- use of ESG performance measures and ensuring they are suitably aligned with company strategy, robust and measurable
- alignment of executive and workforce pension contributions (with IVIS red topping remuneration policies/reports where this has not been achieved).

When it comes to remuneration reporting, key messages from the FRC's Annual Review of Corporate Governance Reporting are set out on the right.

FRC remuneration reporting – key points to consider:

1. Provide specific explanations and directly refer to corporate purpose and values when discussing executive remuneration arrangements.
2. Explain how the framework is designed to align with purpose and values, and what the benefits are.
3. Engage with shareholders to allow them to raise concerns and provide their views on the remuneration policy and the annual outcome.
4. Explain how the remuneration committee or the board engaged with shareholders to consult on remuneration matters; and explain what impact such engagement has had on remuneration policy and outcomes.
5. Describe how the company engaged with the workforce to explain how executive remuneration aligns with wider company pay policy (for example, dedicated meetings/forums to engage with the workforce on remuneration, etc.)

Other points to note - 2023 Proxy adviser guidelines

In addition to the guidance covered above, the Glass Lewis 2023 proxy voting guidelines include:

- a new section on cyber risk – companies should provide clear disclosure regarding the role of the board in overseeing issues related to cybersecurity (as it is considered to be a material risk for all companies); and
- amended guidelines on directors' external commitments/overboarding concerns – with Glass Lewis considering a director to have a potentially excessive commitment level when they (i) serve as an executive officer of any public company while serving on more than one additional external public company board; or (ii) serve as a non-executive director on more than five public company boards in total. Non-executive board chair positions at UK companies will continue to be counted as two board seats.

The ISS 2023 Benchmark Policy Updates include new guidelines on the role of the audit committee (connected with its increased importance as part of the audit and corporate governance reforms proposed by BEIS), in particular the number of committee meetings - where 4 or fewer meetings will be 'noted' as potentially insufficient.

Helpful links:

IA Principles of Remuneration

Glass Lewis Proxy Voting Guidelines

ISS Benchmark Policy Updates

LOOKING AHEAD

There are lots of new developments expected in 2023 and beyond, including the following:

New Modern Slavery Bill

As outlined in the May 2022 Queen's Speech, the proposed Bill will mandate areas to be covered in modern slavery statements; require them to be published on a government-run registry; and introduce civil penalties for non-compliance. It is not yet known when the new Bill will be published but, as mentioned above, modern slavery reporting continues to be an area of focus for the FRC.

Audit and Corporate Governance Reforms

Significant reforms are planned. The FRC is expected to consult on changes to the UK Corporate Governance Code and related guidance in Q1 2023 with the revised Code effective for FYs starting on or after 1 January 2024.

Further reforms requiring legislation including creation of the new regulator, ARGA, will follow (ARGA's new function/powers currently are expected to be created in 2024).

The FRC is currently consulting on minimum standards for audit committees, including a new requirement for audit committees to take account of the need to expand diversity in the audit market when selecting a new auditor.

Future Sustainability/Climate Reporting

The ISSB published exposure drafts of its first two sustainability standards in March 2022 – and is aiming to issue the final versions during the course of 2023.

In Primary Market Bulletin 42, the FCA repeated its commitment to consulting on adapting its climate-related financial disclosure Listing Rules to reference the ISSB's standards once these are finalised and available for use in the UK. The FCA also noted that this would be an appropriate time to consult on moving to a mandatory compliance basis (rather than the current 'comply or explain' basis) and that it intends to consult on strengthening its disclosure expectations for transition plans, drawing on the outputs of the Transition Plan Taskforce, once finalised.

Future EU Sustainability Directives

As part of the European Union's Green Deal, the EU is introducing two new directives, the Corporate Sustainability Reporting Directive (CSRD) and Corporate Sustainability Due Diligence (CSDD) Directive, which will apply to non-EU companies with significant EU activity and, in the case of CSRD, which have a subsidiary/branch in the EU.

CSRD expands the sustainability reporting requirements of the Non-Financial Reporting Directive and will require companies to report according to mandatory EU sustainability reporting standards that are being developed by the European Financial Reporting Advisory Group (EFRAG). There will also be an assurance requirement for reported sustainability information.

CSDD introduces a sustainability due diligence duty on companies to address adverse human rights and environmental impacts in their own operations, their subsidiaries and their value chains.

Clifford Chance briefings on each of the proposals are available (**here**) and (**here**).

PLANNING FOR YOUR 2023 AGM

There is a strong sense that company meetings are now firmly in the post-pandemic world, with new guidance from the FRC in relation to shareholder meetings focused on engagement more holistically and AGM notices no longer including the strongly worded health warnings about physical attendance and the health and safety measures in place at the meeting venue.

Five considerations as you plan for this year's AGM:

1. What is the right format?

Will the meeting be hybrid, physical only or physical with some opportunity for shareholders to follow the event remotely whether in the form of a webcast or "listen only" facility? In considering what the best format is, it is important to consider what is right for your company and its shareholders. This is likely to be influenced by how meetings have been convened in the past including general attendance levels, any calls for hybrid facilities and the level of retail shareholder participation.

In line with the FRC Good Practice Guidance for Company Meetings, companies should ensure that their AGM notices clearly set out details regarding the format of the meeting and what electronic facilities (if any) will be available and what shareholders need to do in order to take advantage of them.

Judging the right size of venue can also be a major challenge as it is not yet clear whether in person attendance will return to pre-pandemic levels and yet many companies have seen a relatively low level of take up of the ability to participate electronically where the AGM has been convened as a hybrid meeting.

2. What are your contingency plans?

Once you have found the right physical venue and secured suppliers for any electronic facilities you intend to use, it is important to think about your contingency plans. Since the pandemic, the list of contingencies has grown significantly beyond the risk of a fire alarm going off and now includes:

- What happens if the electronic facilities fail? Is there back-up Wi-Fi? How will electronic participants receive updates if the electronic platform fails? How long can you legitimately pause the meeting to troubleshoot before adjourning to another day?
- What happens if there is disruption within the venue from activists or threats of disruption? Consider whether additional security staff and procedures are required.

In light of various high profile events during last year's AGM season, the FRC guidance recommends that companies make clear in their AGM notices that unacceptable behaviour – including in relation to the language and line of questioning adopted during Q&A sessions - will not be tolerated at the meeting and will be dealt with accordingly.

3. How will you manage shareholders' Q&A?

One hangover from the pandemic is the explicit invitation in most AGM notices for shareholders to submit questions in advance of the meeting with responses being provided either via the website in advance of the meeting, on the day of the AGM or separately in writing and with FAQs being published via the website following the meeting.

In addition to this, the FRC guidance raises some important points of best practice in respect of the management of Q&A at the meeting itself. In particular:

- Where there is a virtual element, the chair should ensure that questions are taken from all available channels. Companies will need to consider how best to co-ordinate with the chair to ensure this is done in an orderly and easy to follow way.
- Companies should also consider explaining how questions will be grouped where they have been submitted in advance. It may also be helpful to disclose in the AGM notice that the intention is for questions to be grouped by topic to help with the orderly conduct of the meeting.

4. Will you take advantage of the new enhanced pre-emption rights disapplication?

The new Pre-emption Group Statement of Principles now provides companies with greater flexibility to disapply pre-emption rights on an annual basis (up to 10+2% for general purposes and 10+2% for an acquisition or specified capital investment, with the additional 2%s being for follow-on offers to retail shareholders). These changes implement certain recommendations of the Secondary Capital Raising Review, with further changes to the prospectus regime (which would allow companies to use the full 24% without having to issue a prospectus) expected in the not too distant future – as outlined in the government's Edinburgh Reforms. Companies should therefore consider updating their AGM resolutions to reflect the Pre-emption Group's template resolutions in order to seek shareholder approval for this greater flexibility.

The Pre-emption Group Statement of Principles is supported by the Investment Association, the Pensions and Lifetime Savings Association (PLSA), Glass Lewis and ISS. Notwithstanding this broad market support, companies may wish to ascertain the views of their major shareholders (either directly or via their brokers) and also consider whether there has been any historic resistance, or objection, to the pre-emption disapplication resolution at prior AGMs when determining their approach.

5. Will you propose a "say on climate" resolution?

Whilst we have seen a notable increase in the number of 'say on climate' resolutions at the AGMs of FTSE 350 companies over the past four years (going from three in 2019 to 20 in 2022), it is unclear whether this trend will continue as companies and investors focus on other matters, such as the impact of the cost of living and energy crises. This shift in focus could perhaps lead to more resolutions being proposed on topics such as the living wage (as at the J Sainsbury plc 2022 AGM) and/or demonstrations by unions demanding higher wages (as at the Lloyds Banking Group 2022 AGM).

To the extent companies wish to put forward a resolution on 'say on climate' it is important to consider whether this will be advisory only and whether it will be a vote on the company's climate policy or a vote on the reported outcomes of that policy.

Helpful Links:

FRC Guidance for Company Meetings

Pre-emption Group Principles and Resolutions

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