Linklaters

November 2016

UK Corporate Update.

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Companies urged to increase Boardroom ethnic diversity

A report seeking to increase the ethnic diversity of UK Boards has been published by the Parker Review Committee. The Committee was set up following the success of the push to increase gender diversity, led by Lord Davies from 2011. Linklaters partner Tom Shropshire is a member of the Committee and Linklaters helped to produce the report.

The report shows that a disproportionately low number of Board positions in FTSE companies are held by directors of colour, especially when looking at UK-based directors of colour. Of the 8% of FTSE 100 directorships held by directors of colour, only 1.5% of are UK citizens, despite the fact that 14% of the total UK population is from a non-white ethnic group. Seven companies account for over 40% of the directors of colour, whilst 53 of the FTSE 100 do not have any directors of colour at all.

The report also notes that the composition of the UK population and its workforce has changed dramatically over the past 40 years and is expected to continue to evolve. The UK is predicted to become the most diverse country in Western Europe by 2051, with over 30% of the population potentially coming from ethnic minority or migrant backgrounds.

The purpose of the report

The aim of the report is to enhance diversity of all kinds in order to strengthen decision-making in the Boardroom and maintain the global competitiveness of UK firms. To achieve this the report, entitled Beyond One by '21, makes a number of draft recommendations. It also contains appendices designed to help Boards, including key questions to consider, warning signs or "red flags", a resource toolkit and case studies (to be included in the final report).

Recommendations

The recommendations target three key areas and are as follows:

Increasing the ethnic diversity of UK Boards

> Each FTSE 100 Board should have at least one director of colour by 2021 and each FTSE 250 Board by 2024.

> Nomination committees of all FTSE 100 and 250 companies should require their human resources teams or search firms to identify and present qualified people of colour to be considered for Board vacancies.

> The principles of the Standard Voluntary Code of Conduct for executive search firms, used for gender-based recruitment, should be extended to apply to the recruitment of minority ethnic candidates as FTSE 100 and 250 Board directors.

Developing candidates for the pipeline and plan for succession

> FTSE 100 and 250 companies should develop mechanisms to identify, develop and promote people of colour within their organisations to build a pipeline of Board capable candidates and make sure management and executives appropriately reflect the importance of diversity to their organisation.

> Led by Board Chairs, existing FTSE 100 and 250 Board directors should mentor and/or sponsor people of colour within their companies to ensure their readiness to assume senior managerial or executive positions internally, or non-executive Board positions externally.

> Companies should encourage and support candidates from diverse backgrounds, including people of colour, to develop their experience and skills by taking on Board roles internally (e.g. on subsidiaries), as well as Board and trustee roles with external organisations (e.g. for trusts and charities).

Enhancing transparency and disclosure

> A description of the Board's policy on diversity should be set out in a company's annual report and should include a description of the company's efforts to increase ethnic diversity within its own organisation, including at Board level.

> Companies that do not meet Board composition recommendations by the relevant date should disclose in their annual report why they have not been able to achieve compliance.

Next steps

There will be a consultation period for comments to be taken and a further report with final recommendations and findings of the Review is to be published in 2017. The Committee anticipates that it will be possible to reach an ethnically diverse mix similar to that of the overall adult working population by 2021 and that progress made should be assessed at the end of 2021.

Companies will find that the draft recommendations are familiar as they are similar to those made under the Davies initiative to increase the number of women on Boards. It also seems likely that the final recommendations will be substantially similar to these initial proposals. As all listed companies, under the UK Corporate Governance Code, are already tasked with considering diversity within their organisations, companies may wish to begin to consider now the situation of their organisation, using the material in the report to guide their approach.

Click here for the press release, from where you can download a copy of the report.

Report calls for more women in leadership roles

The Hampton-Alexander Review has published a report on improving the gender balance in the leadership of FTSE companies. The Review builds on the work of the Davies Review in increasing the number of women on FTSE boards and extends its scope to include executive committees and direct reports to the executive committees of FTSE 350 companies. The report provides a progress report on women on boards of the FTSE 350 as at 1 October 2016.

The report contains a number of recommendations, including that:

> FTSE 350 companies should aim for a minimum of 33% women's representation on their boards by 2020.

> FTSE 100 companies should aim for a minimum of 33% women's representation across their executive committee and in the direct reports to the executive committees by 2020.

> FTSE 350 companies should voluntarily publish details of the number of women on the executive committee and in the direct reports to the executive committee on an annual basis in their annual reports or on a website and submit this data to the Review.

> The FRC should amend the UK Corporate Governance Code to require FTSE 350 companies to disclose the gender balance on their executive committee and in direct reports to the executive committee in their annual report.

There are also recommendations for institutional investors to evaluate the gender balance of FTSE 350 investee companies and develop related voting policies.

Click here for the report.

Reporting and AGMs 2016/17: recent developments and guidance

Our new Reporting and AGMs 2016/17 publication aims to help listed companies which are starting to prepare their annual reports and plan for the next AGM. The publication summarises recent developments and guidance and identifies issues of interest for the next reporting and AGM season. For easy reference, we have also included links to some useful sources of information.

Our longer AGM Alert client publication will still be published as usual in January with a more detailed analysis of trends and including guidance which is typically published at the end of the calendar year.

Click here for the publication, available to subscribers to our Knowledge Portal.

US proxy voting adviser clarifies approach to over-boarding

Institutional Shareholder Services (ISS), the US proxy voting adviser, has announced updates to its Proxy Voting Guidelines for the UK and Ireland. The changes are intended to address ongoing concerns about directors' remuneration and clarify the ISS approach to the number of directorships held by individuals. There are also some changes specifically for smaller companies.

Over-boarding

As before, the policy states that ISS may recommend a vote against directors who appear to hold an excessive number of board roles at publicly-listed companies. New wording has been provided and is intended to remove any confusion about what is acceptable. An excessive number of board roles is now defined as follows:

> Directors who hold more than five non-chair non-executive director positions.

> A non-executive chairman who, in addition to this role, holds (i) more than three non-chair non-executive director positions, (ii) more than one other non-executive chair position and one non-chair non-executive director position, or (iii) any executive position.

> Executive directors holding (i) more than two non-chair non-executive director positions, (ii) any other executive positions, or (iii) any non-executive chair position.

New language also expands on what the consequences of over-boarding are for chairs. As before, the policy provides that an adverse vote recommendation will not be applied to a director within a company where he/she serves as CEO; instead, any adverse vote recommendations will be applied to his/her additional seats on other company boards. The policy now also goes on to say that the same is also valid for chairs, except (i) where they exclusively hold other chair and/or executive positions or (ii) where they are elected as chair for the first time. According to ISS the revised policy works on the broad basis that a chair role is equivalent to two non-executive director roles.

Remuneration

The sections on remuneration have been updated to reflect the focus on UK remuneration in 2016. ISS explains that it has taken into account:

> the number of high-profile defeats for remuneration report (and, in one case, remuneration policy) resolutions during the last AGM season,

> the publication of the report by the Executive Remuneration Working Group set up by the Investment Association on proposals for changes to the current pay model, and

> the call by the new Prime Minister for corporate governance reform, including, binding votes on remuneration report resolutions and higher levels of pay disclosure.

Investors are also looking ahead to the 2017 AGM season when many UK companies will be seeking shareholder approval for new binding remuneration policies. As a result, changes to the policy are intended to reflect some of the main issues expected to be relevant for 2017.

Changes include:

> New introductory wording to directly address the recommendation of the Executive Remuneration Working Group for companies to consider pay models which do not fully align with the typical structure found in the UK market and related changes to the specific sections on the remuneration policy and remuneration report resolutions.

> The extension of the policy to potentially recommend against the chair of the remuneration committee in the event of a serious breach of good practice to reflect the position of some investors that the committee chair should be held directly accountable where major remuneration issues have been identified. This approach is consistent with the PLSA (Pensions and Lifetime Savings Association) voting guidelines which historically formed the basis for the ISS voting guidelines.

> The introduction of methodology developed by ISS for European companies for the assessment of remuneration resolutions.

Smaller companies

For smaller companies, changes have been introduced to clarify that the ISS policy on AIM companies also applies to other companies.

Further changes also aim to introduce a more rigorous standard and bring the policy into line with the Quoted Companies Alliance Code by specifying that audit and remuneration committees should be fully independent. ISS considers that this change is significant and, therefore, it will be phased in over two years. This means that for AGMs in 2017, ISS will recommend a vote in favour of non-independent members of audit and remuneration committees, with the new policy formally taking effect from February 2018.

Application

The updates were published on 21 November 2016 and the revised policy applies to company meetings from 1 February 2017.

Click here for a copy of the ISS EMEA policy updates, which include the UK and Ireland. A press release and executive summary are also available.

FRC ranks Stewardship Code signatories to promote better reporting

The Financial Reporting Council has announced that it has categorised signatories to the Stewardship Code into tiers based on the quality of their Code statements. There are nearly 300 signatories to the Code of which more than 120 are in Tier 1. Since the start of this exercise in December 2015 the number of Tier 1 signatories has increased significantly from approximately 40.

The FRC reported that it was pleased with the response from signatories and that over 200 signatories had approached the FRC to discuss improving their reporting against the Code.

The FRC will remove asset managers who have not achieved at least Tier 2 status after six months from the list of signatories on the basis that their reporting does not demonstrate commitment to the objectives of the Code. The FRC also welcomes further contact from signatories, particularly those in Tier 3, to discuss improvements to reporting.

The FRC had originally announced that there would be two tiers to distinguish between signatories which meet or do not meet reporting expectations. Asset managers have now been categorised into three tiers and asset owner and service provider signatories into two tiers. The assessment of the FRC represented by each tier is as follows:

Tier 1: Signatories provide a good quality and transparent description of their approach to stewardship and explanations of an alternative approach where necessary.

Tier 2: Signatories meet many of the reporting expectations but report less transparently on their approach to stewardship or do not provide explanations where they depart from provisions of the Code.

Tier 3: Significant reporting improvements need to be made to ensure the approach is more transparent. Signatories have not engaged with the process of improving their statements and their statements continue to be generic and provide no, or poor, explanations where they depart from provisions of the Code.

Click here for the FRC's announcement.

Large public interest entities to prepare non-financial information statement from 1 January 2017

Regulations to implement the Non-Financial Reporting Directive (2014/95/EU) in the UK have been laid before Parliament. They will take effect seven days after they are made and will apply in relation to financial years commencing on or after 1 January 2017.

Non-Financial Information Statement

The Regulations amend Part 15 of the Companies Act 2006 by inserting two new sections:

> Section 414CA sets out the requirement for large public interest entities (banks, insurers, financial services and listed companies) with over 500

employees to prepare a non-financial information statement as part of their strategic report.

> Section 414CB sets out the content of the non-financial information statement. This includes disclosure (to the extent necessary for an understanding of the company's development, performance and position and the impact of its activity) of environmental, social and employee related matters, respect for human rights and anti-corruption and bribery matters, a description of the policies pursued by the company in relation to such matters, the outcome of such policies, a description of the principal risks relating to the matters and how the company manages such risks. If the company does not pursue policies in relation to such matters, it must give a clear and reasoned explanation for not doing so. A brief description of the business model must also be included.

There is overlap with the enhanced business review that quoted companies (irrespective of their size or the number of their employees) are required to produce as part of the strategic report. To prevent duplication, the Regulations provide that compliance with new Section 414CB(1)-(6) is deemed to fulfil some of the requirements for non-financial information contained in Section 414C (content of a strategic report). In some respects, the new requirements go beyond the current strategic report in requiring the disclosure of anti-corruption and bribery matters and information on policies and principal risks in relation to the non-financial matters.

The implementation of the Regulations will be supported by guidance on the strategic report from the Financial Reporting Council.

Another aspect of the Non-Financial Reporting Directive, the requirement for issuers to disclose information about their diversity policy is being implemented by the Financial Conduct Authority (see Minor amendments made to DTRs below).

Accounting Directive

The regulations also remedy a gap in the transposition of Article 23(1) Directive 2013/34/EU and ensure that the parent company of a small group cannot benefit from an exemption from the requirement to prepare group accounts if a member of the group is established in an EEA State and is a public interest entity within the meaning of the Accounting Directive.

Further information

The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 can be found here. An explanatory note can be found here.

Investment Association publishes guidelines on viability statements

The Investment Association has published guidelines setting out the expectations of institutional investors in relation to viability statements prepared by companies under Provision C2.2 of the UK Corporate Governance Code.

The guidelines cover the period of the assessment, the prospects and risks to be considered by directors when assessing viability, and recommended disclosures about stress testing and qualifications and assumptions, In particular:

> the Investment Association's members consider that viability statements should address a longer time frame than the three or five years currently favoured by companies to reflect the long-term nature of equity capital and directors' fiduciary duties;

> directors should state clearly why they have suggested a particular time frame. This should reflect their company's business and sector and not only its business cycle but its investment cycle as well;

> where companies have different plans to cover short, medium and long-term horizons, disclosures around prospects should address long-term strategic plans and look longer than the period over which the viability statement is assessed;

> directors should not limit their consideration of viability to medium or long-term risks but also consider the current state of affairs;

> the viability assessment should address the sustainability of dividends;

> directors should distinguish risks that impact performance from those that threaten operations and the company's existence. The viability assessment should focus on the latter;

> the directors' assessment of prospects is separate from their assessment of viability. The assessment of prospects may be particularly relevant for industries with long-term contracts or assets, such as pension providers and extractive industries;

> the viability statement should state clearly why disclosed risks are important and how they are managed and controlled. It was helpful to rank risks low, medium or high and whether the risk had increased or decreased in likelihood from the prior year;

> in relation to stress testing, investors would welcome (i) more transparency as to the specific scenarios considered and the likely outcomes and (ii) a description of specific actions taken or which may be necessary;

> investors would also welcome companies outside the financial sector undertaking reverse stress tests (assessing scenarios that would mean the business model is no longer viable and their plausibility) and a disclosure of the scenarios considered;

> qualifications should be distinguished from assumptions and should be specific to the company. They should not include matters that are highly unlikely to arise or have a significant impact on the company.

The Investment Association's Institutional Voting Information Service, IVIS, will use the guidelines to monitor companies' viability statements.

The guidelines can be found here.

Investment Association calls on companies to stop quarterly reporting

The Investment Association has published a public position statement calling for companies to cease reporting quarterly and to refocus reporting on strategic issues.

The requirement to report quarterly was removed from the DTRs in December 2014 following an earlier amendment to the Transparency Directive. Since then, 30 FTSE 100 companies and 139 FTSE 250 companies have ceased to publish quarterly reports.

The Investment Association regards quarterly reporting as a distraction that shifts company resources away from long-term strategic considerations. It calls on companies to cease reporting quarterly and focus on improved reporting on long-term strategy and capital management. If companies do, however, wish to continue to report quarterly, they should publicly explain

their position and disclose how it is relevant to the achievement of long-term strategy.

IVIS will monitor which companies continue to report quarterly and the explanations they provide.

The Investment Association's statement can be found here.

FRC calls on companies to improve use of alternative performance measures in reports

The Financial Reporting Council has published the findings of its thematic review of the use of alternative performance measures by 20 listed companies in their June 2016 interim statements.

Background

When EU-listed companies publish figures which are not based on IFRS or GAAP measures (e.g. EBITDA, free cash flow, sales per square metre, underlying profit or net debt), these are known as alternative performance measures. APMs include any numerical measure of historical, current or future financial performance, which relates to the financial position, comprehensive income or cash flows, other than a measure defined by the applicable financial reporting framework (such as IFRS).

The review was prompted by concerns expressed by a number of stakeholders, and the FRC, on companies' APM disclosures, together with the coming into force of ESMA's APM Guidelines on 3 July 2016.

Findings

The FRC found that companies' explanations for the use of APMs were generally cursory or boilerplate. It also questioned some of the definitions used for adjusted profit and expressed concern about the exclusion of certain items, such as share-based payment and restructuring costs.

The FRC will take account of the findings of the thematic review in its review of reports and accounts for years ending 31 December 2016 onwards. In particular, it will question companies where:

> good explanations for the use of APMs and for any changes made in the APMs used are not provided;

> good explanations as to why items have been excluded from adjusted measures of profit are not provided and, in particular, where an item is excluded from adjusted profit that the FRC has not seen others exclude;

> a description such as non-recurring is used but does not appear to apply in the circumstances;

> there is no discussion of either the IFRS results themselves or of the adjustments made to those results to arrive at adjusted profit; and

> the IFRS results are not highlighted at an early point in the narrative.

The FRC's review can be found here. Click here for ESMA's Guidelines on APMs.

FRC calls for clearer reporting of tax uncertainties

The Financial Reporting Council's Corporate Reporting Review (CRR) team has called for companies to articulate better how they account for tax uncertainties, following a thematic review of tax reporting in annual reports and accounts.

In December 2015, the FRC wrote to 33 FTSE 350 companies informing them that tax disclosures in their next annual report and accounts would be

reviewed by the CRR. Most companies, particularly in the FTSE 250, responded positively and the FRC found evidence of improvements in the transparency of tax disclosures in the strategic report and effective tax rate reconciliations.

There was, however, scope for companies to articulate better how they account for tax uncertainties by explaining the bases for recognition and measurement. Companies should also consider whether there are significant judgements and estimation uncertainties relating to tax and seek to improve their disclosures in these areas.

The FRC's thematic review on tax disclosures can be found here.

Financial Reporting Lab report: how to improve business model reporting

The Financial Reporting Lab has published a report on business model reporting following a project involving 19 companies, 36 investors and two retail shareholders. It sets out the key of good business model disclosure and highlights matters of particular interest to investors.

The main findings of the report are that:

> business model information is fundamental to investors' analysis and understanding of a company and a lack of good disclosure on the business model raises concerns over the quality of management;

> as business model information provides context to the other information in the annual report most investors want it positioned towards the front of the Strategic Report;

> where a company operates a number of business models, disclosures of each significant business model is desired;

> investors are looking for better natural linkage of business model information to other sections of the Strategic Report, and consistency with disclosure in the annual report; and

> investors are looking for more detail than is currently provided by most companies. Information of particular interest to investors includes information on:

> what the company does and where it sits in the value chain

> the company's competitive advantage

> key assets, liabilities, relationships and resources and how they are maintained

> key revenue and profit drivers and how profits convert to cash.

The Lab report also includes examples of current good practice as well as highlighting how disclosure could be modified to provide more value to investors.

The report can be found here.

ESMA clarifies exchange rate to be used to calculate MAR PDMR dealing threshold

The European Securities and Markets Authority has published a revised version of its Q&A on the EU Market Abuse Regulation. There are various new questions on investment recommendations and one on notification of transactions by persons discharging managerial responsibilities.

Notification of transactions by PDMRs and CAPs

Under Article 19 of MAR, PDMRs and their closely associated persons must notify transactions carried out on their own account to the issuer and the competent authority (and the issuer must notify the market). There is a de minimis threshold in Article 19(8) so that transactions do not have to be notified until they cross a threshold of €5000 per calendar year. A new Question 1 of Section 2 has been added to the Q&A which details the exchange rate to be used to calculate whether the threshold has been crossed when a transaction is carried out in another currency (e.g. pounds sterling or South African Rand). The exchange rate to be used is the official daily spot foreign exchange rate which is applicable at the end of the business day when the transaction is conducted. Where available for the currency in question, the daily euro foreign exchange reference rate as published on the website of the European Central Bank should be used. Click here for the ECB website.

Impact for issuers

74% of those who participated in a survey at our MAR seminars in June indicated that they would ignore the de minimis threshold and notify all PDMR and CAP transactions, to avoid the risk of error in calculating the threshold.

Those who are making use of the threshold will need to be sure to use the correct rate, from the date each transaction was conducted (not the date it was notified) and, if the threshold is not passed on the first transaction in a calendar year, keep records of those calculations so that the next transaction that year may be added on to assess whether the threshold is reached at that point.

What are the ESMA Q&A?

The document, which will be updated from time to time, is designed to give ESMA's responses to questions posed by the general public and competent authorities in relation to the practical application of the MAR framework. The purpose of the Q&As is to help consistency between competent authorities and provide extra clarity for market participants. The document is not intended to create an extra layer of requirements.

Click here for the updated ESMA Q&A.

Click here for a video on our Knowledge Portal giving an update on UK market practice under MAR.

FCA to confirm that list of times when disclosure can be delayed is not exhaustive

The Financial Conduct Authority has published a consultation in which it confirms that it will adopt in full the European Securities and Markets Authority's guidelines issued under the Market Abuse Regulation and proposes changes to its Disclosure Guidance in DTR 2 to bring them in line with ESMA's guidelines. The proposed changes include removing the FCA's stance that delaying disclosure of inside information is only likely to be allowed where there is an ongoing negotiation that would be jeopardised by early disclosure, as this conflicts with ESMA's non-exhaustive list of situations when delay might be permissible.

Background

Under Article 17 MAR, an issuer must announce inside information as soon as possible unless it can satisfy three criteria: that immediate disclosure would prejudice the issuer's legitimate interests, that delay is not likely to mislead the public and that confidentiality will be preserved. ESMA issued guidelines under MAR which include a non-exhaustive list of situations where

an issuer might delay to protect its legitimate interests, as well as guidance on misleading the public.

Conflict between ESMA guidelines and DTR 2.5.5G

The FCA's Disclosure Guidance currently contains a statement that, other than in relation to ongoing negotiations, there are unlikely to be other situations in which delay might be possible to protect the issuer's legitimate interests. The FCA consulted previously on removing this statement, but deferred its response until ESMA's guidelines were published. It has now published a new consultation in which it proposes again to delete this statement and confirms that it intends to adopt the ESMA guidelines in full.

This proposal is likely to be welcomed by issuers, as it removes the current uncertainty about whether they can delay disclosure in circumstances other than ongoing negotiations. It will allow issuers to delay in the other circumstances specified in the ESMA guidelines, and it potentially opens the door to delaying disclosure in circumstances not set out in the guidelines, as the list is non-exhaustive. However, there will always be a risk when delaying disclosure in circumstances not set out in the guidelines that the FCA might disagree that the delay was permissible.

Other proposed changes

The consultation paper also proposed other minor changes to DTR 2 to bring it in line with the ESMA guidelines and confirms that the FCA will adopt ESMA's other guidelines for market soundings recipients.

The deadline for responses is 6 January 2017.

Click here for the FCA's consultation paper CP 16/38. Click here for ESMA's guidelines on delaying disclosure of inside information.

Consultation on extension of transparency of corporate ownership rules

The Department for Business, Energy and Industrial Strategy has launched a consultation on extending the UK's register of people with significant control regime to ensure that it satisfies the requirements of Article 30 of the EU Fourth Anti Money Laundering Directive.

The main changes to be made are:

> to extend the scope of the obligations to new forms of legal entity, such as Scottish limited partnerships and open-ended investment companies. UK-incorporated companies admitted to trading on AIM are currently exempt from the PSC regime (as they are subject to transparency obligations under DTR 5) but may need to be brought within scope in order to comply with the Directive.

> to ensure that PSC information available at Companies House is "current". Currently the information on PSCs filed at Companies House only has to be updated annually, in the check and confirm statement process. A six-monthly update requirement is proposed.

This consultation is in addition to an HM Treasury consultation on implementation of the Directive as a whole.

Click here for the consultation.

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