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UK Quoted Company Newsletter September 2018

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NEW MANDATORY CORPORATE REPORTING REQUIREMENTS

In July 2018, the final [Companies \(Miscellaneous Reporting\) Regulations 2018](#) (SI 2018/860) (the Regulations) were published. Most of the provisions in the Regulations come into force on 1 January 2019 and apply to relevant companies with financial years beginning on or after that date, so requiring reporting from 2020 onwards.

As we mentioned in our June 2018 newsletter, the statutory reporting obligations in the Regulations involve new, mandatory (not comply or explain) disclosures in annual reports, and in some cases on websites, by quoted and other types of public and private companies in the following areas.

MISCELLANEOUS REPORTING REGULATIONS – KEY AREAS

- | | |
|---|--|
| • | Directors' duty to promote the success of the company (strategic report) |
| • | Engagement with employees and other stakeholders (directors' report or strategic report) |
| • | Remuneration including pay ratios (directors' remuneration report) |
| • | Corporate governance arrangements (directors' report and website) |

The final form Regulations have been approved by Parliament in the same form as the draft Regulations. For more detail, see our [June 2018 client briefing](#) on the draft Regulations.

Thought should be given to any new arrangements that companies may need to put in place for 2019 to enable reporting in 2020. The fact that shareholders will in future have more detailed information than ever on which they can challenge companies means that companies need to be prepared and record-keeping will be increasingly important.

UK CORPORATE GOVERNANCE CODE JULY 2018

In July 2018, the Financial Reporting Council (the FRC) issued its new [UK Corporate Governance Code](#) (the new Code) and revised [Guidance on Board Effectiveness](#) (the new Guidance).

NEW CODE HIGHLIGHTS

BROADER DEFINITION OF GOVERNANCE AND EMPHASIS ON THE IMPORTANCE OF:

- Positive relationships between companies, shareholders and other stakeholders.
- A clear purpose and strategy aligned with healthy corporate culture.
- High quality board composition and a focus on diversity.
- Remuneration which is proportionate and supports long-term success.

DESIGNED TO:

- Set higher standards of corporate governance to promote transparency and integrity in business.
- Attract investment in the UK for the long term, benefitting the economy and wider society.

The new Code applies to all companies with a premium listing, whether incorporated in the UK or elsewhere. It applies to companies with accounting periods beginning on or after 1 January 2019. Unless companies choose to comply early, the first reporting will be seen in 2020 (other than provision 4 on reporting on significant dissenting votes which should be applied in 2019 and other than as regards new remuneration policies, or changes to existing ones, in 2019 which should be developed with reference to the new Code and new Guidance).

The key areas of change in the new Code remain broadly as discussed in the FRC's December 2017 consultation, and as set out below. However, companies will be pleased to see in particular that the FRC has rowed back quite significantly on its initial proposals as regards independence of the board and the chair. The key change here, in provision 19, is that the chair of the board should not remain in post beyond nine years from the date of his or her first appointment to the board. This is subject to a limited relaxation to facilitate effective succession planning and the development of a diverse board, particularly in cases where the chair was an existing non-executive director on appointment as chair.

NEW CODE: KEY AREAS OF CHANGE

- Structure of the new Code and the new Guidance
- Culture and purpose
- Stakeholder and workforce engagement
- Independence of the chair
- Remuneration
- Overboarding
- Succession planning, diversity and the nomination committee
- Action after significant dissenting votes
- Removal of some of the FTSE 350/small company exemptions

Both the new Code and the new Guidance are considerably restructured with new and updated content. In addition, the FRC has said that it intends to escalate its monitoring of practice and reporting under the new Code. For more on the new Code, see our [July 2018 client briefing](#).

Ashurst client seminar - Corporate Governance 2019

We are hosting a seminar – **Corporate Governance 2019: navigating the new requirements – on Tuesday 16 October 2018, 8.30 a.m. – 9.30 a.m.** The main topics will be the Regulations and the new Code.

Invites have been sent out. If you would like to receive the invitation to this event, please email events@ashurst.com



INSOLVENCY AND CORPORATE GOVERNANCE: GOVERNMENT RESPONSE

In August 2018, the Department for Business, Energy & Industrial Strategy (BEIS) published the Government's [response](#) to its consultation on insolvency and corporate governance. As mentioned in our March 2018 newsletter, BEIS had sought views on a number of proposals focusing on reducing the risk of major corporate failures occurring through poor governance or stewardship, and improving the insolvency framework in such situations.

The Government plans to take forward a number of specific actions, subject to further consultation where necessary on the details of its proposals. Proposals in the corporate governance arena include the following.

INSOLVENCY AND CORPORATE GOVERNANCE CONSULTATION: KEY CORPORATE GOVERNANCE PROPOSALS:

- Strengthening transparency requirements around group structures, including emphasising the importance of directors having a thorough understanding of corporate governance throughout the group, setting stronger expectations that directors keep complex group structures under review and requiring groups to explain their corporate and subsidiary structures
- Strengthening shareholder stewardship, including identifying how to incorporate stewardship within the mandates of asset managers and establishing a new mechanism for investors to escalate concerns about the management of a company
- Strengthening the framework on dividend payments, including looking at the prevalence of the practice of companies avoiding an annual shareholder vote on dividends by only declaring interim dividends
- Improving board effectiveness and strengthening directors' training and guidance, including identifying ways of improving the quality and effectiveness of board evaluations and developing a code of practice for external board evaluations

In the insolvency arena, the Government intends to take forward a number of measures

albeit with some compromises on the initial proposals. Measures include: ensuring greater accountability of group directors when selling large subsidiaries in distress; enhancing the powers of insolvency practitioners in relation to value extraction schemes designed to remove value at the expense of creditors; and a variety of measures to increase protections for creditors and achieve a fairer balance in insolvencies. For more on the insolvency aspects, see our September 2018 [client briefing](#).

Further details of all the proposals to be taken forward will follow in the Autumn.

GUIDANCE ON THE STRATEGIC REPORT

At the end of July 2018, the FRC published its final form [Guidance on the Strategic Report](#), following its August 2017 consultation.

The updated Guidance aims to encourage companies to consider wider stakeholders and broader matters that impact companies' performance over the longer term. Although the FRC has not undertaken a fundamental review, some significant amendments have been made, including the following.

- Updating in light of the EU Directive on disclosure of non-financial and diversity information to integrate non-financial information into the strategic report.
- Updating for the new requirement to report on how the directors have had regard to the matters set out in section 172(1) (a) to (f) of the 2006 Act. A new, short section in the guidance addresses the new section 172 reporting that now features in section 414CZA of the 2006 Act. It considers the issues, factors and stakeholders that the directors may consider relevant and how they affect principal decisions. (Note that guidance from the GC100 on section 172 reporting is still awaited.)
- Making targeted improvements to certain areas of the guidance to reflect key developments in corporate reporting.

BOARD DIVERSITY REPORTING

In September 2018, the FRC published a [report on board diversity reporting](#) by Professor Ruth

Sealy from the Exeter University Centre for Leadership, concluding, amongst other things, that more companies need to treat diversity as part of business strategy.

The report looks at the extent and manner of reporting by FTSE 350 companies in their annual reports on diversity at board and senior management levels. The report looks specifically at the following areas, including identifying examples of reporting that lead the way in terms of quality.

BOARD DIVERSITY REPORTING: KEY AREAS COVERED

- Board diversity policy
- Monitoring diversity
- Succession planning and diversity
- Board evaluation and diversity
- Focus on the pipeline

Overall, the report states that while some companies demonstrate a deeper understanding of diversity as an issue of strategic importance, many need to develop a clearer strategy to drive greater diversity at senior management level.

Specifically on the issue of reporting against B.2.4 of the current Code, which asks for (i) a description of the nomination committee's process for board appointments, (ii) the board's policy on diversity including gender, (iii) measurable objectives set for implementing that policy and (iv) progress on achieving the objectives, the report says that only 15 per cent of FTSE 100 companies and 6 per cent of FTSE 250 companies discuss all four elements. The report says that while the trend is upwards, given the increased prominence of diversity this lack of reporting is surprising.

Looking ahead, the report notes that the diversity reporting requirement of DTR 7.2.8AR, which is now in force, should lead to both more and better reporting and should also encourage concrete actions to increase diversity at board and senior management levels. In addition, the report notes that the new Code represents a significant increase in emphasis on succession planning and diversity in the management pipeline and on thinking

beyond gender as regards diversity. The report expects that the combination of these two developments will improve the quality of reporting and provide greater insight into how companies approach diversity in practice.

AIM DEVELOPMENTS

Disciplinary notices. In August 2018, the London Stock Exchange (LSE) published a [disciplinary notice](#) in relation to breaches of the AIM Rules for Companies (Rules) by a company which failed to notify without delay information relating to a significant deterioration in the financial performance of certain subsidiaries.

Also in August, LSE published a [disciplinary notice](#) in relation to two separate AIM companies for breaches of the Rules. One company had breached the Rules in relation to disclosure of information via social media that should have been notified via an RIS before it was disclosed via social media. The other company had breached the Rules by failing to provide information to its outgoing nominated adviser and by delaying the disclosure of price sensitive information.

Inside AIM – corporate governance changes. As we mentioned in our March 2018 newsletter, LSE updated [the Rules](#) to provide for new corporate governance requirements and reporting for AIM companies. Among the changes, AIM companies must, from 28 September 2018, disclose on their website the recognised corporate governance code that they apply, how they comply and, where they depart from it, their reasons for doing so.

In July 2018, LSE issued an edition of its [Inside AIM publication on the corporate governance changes](#) addressing some of the common questions that it had received from nominated advisers.

DOCUMENTS ORDERED TO BE PRODUCED TO THE FRC

In September 2018, the FRC issued a [press release](#) regarding its case against Sports Direct International plc (Sports Direct) in relation to the production of documents.

The FRC is investigating, pursuant to its powers under the Statutory Auditors and Third Country Auditors Regulations 2016 and its Audit

Enforcement Procedures, the conduct of auditors in connection with the audit of the financial statements of Sports Direct and in particular the non-disclosure of related party issues linked to a structure for VAT arrangements. In the course of the investigation, the FRC issued notices to Sports Direct requiring the provision of certain documents which Sports Direct refused to hand over on grounds of legal advice privilege. The FRC went to the High Court to compel compliance.

On the key issue of whether production of the documents would infringe Sports Direct's legal advice privilege, the Judge held that the current law states that production of documents to a regulator by a regulated person solely for the purposes of a confidential investigation by the regulator into the conduct of a regulated person is not an infringement of any legal professional privilege of the client of the regulated person in respect of those documents. Therefore, the same is true of the production of the documents to the regulator by the client (i.e Sports Direct) of a regulated person (i.e Sports Direct's auditor). Accordingly, the Judge ordered Sports Direct to hand over a number of documents to the FRC. Sports Direct has been given permission to appeal.

DRAFT ENERGY CONSUMPTION AND EFFICIENCY REPORTING REGULATIONS

In July 2018, [the draft Companies \(Directors' Report\) and Limited Liability Partnerships \(Energy and Carbon Report\) Regulations 2018](#) were published. These form part of the Government's [Streamlined Energy and Carbon Reporting regime](#) replacing the CRC Energy Efficiency Scheme.

The Regulations provide for additional reporting by quoted companies and LLPs on energy consumption and energy efficiency action (on top of existing greenhouse gas emissions reporting). They also introduce emissions, energy consumption and energy efficiency reporting for large unlisted plcs.

If approved in their current form, the regulations will come into force on 1 April 2019 for companies with financial years beginning on or after that date.

ENERGY AND CARBON REPORTING REGULATIONS: ADDITIONAL REPORTING

- Quoted companies will be required to disclose the annual quantity of energy consumed from activities for which the company is responsible (including the combustion of fuel and the operation of any facility) and from purchases of electricity, heat, steam or cooling for its own use. They must also describe the principal measures (if any) taken to increase energy efficiency.
- Large unquoted companies will be required to disclose greenhouse gas emissions from the purchase of energy for their own use, energy use from activities for which the company is responsible (involving the combustion of gas or the consumption of fuel for the purposes of transport) and any action taken to increase energy efficiency.

There are exemptions from these disclosure requirements if making the statements would be seriously prejudicial to the interests of the company or if the company has used only a small amount of energy in the relevant financial year. There are also exemptions if the company is included in group reports, subject to certain conditions.

Guidance is expected to be published in January 2019.



LAW COMMISSION CONSULTATION ON ELECTRONIC EXECUTION OF DOCUMENTS

In August 2018, the Law Commission published a [consultation](#) on electronic execution of documents. It is seeking views on its provisional conclusions in this area. It is also seeking views on potential options for reform to address any legal uncertainties as to the formalities around the electronic execution of documents, and to ensure that the law governing this area is sufficiently certain and flexible to remain competitive. Responses are required by 23 November 2018.

The consultation asks whether consultees agree with the Law Commission's provisional views that under current law: (i) an electronic signature is capable of meeting a statutory requirement for signature, provided an intention to authenticate is demonstrated, and that a legislative statement to confirm this position is not necessary; and (ii) the presence of a witness requires the physical presence of the witness.

The consultation is also seeking views on whether:

- to create a Government-backed industry working group to provide guidance on practical and technical (not legal) issues relating to the use of electronic signatures;
- to permit witnesses to observe the electronic execution of a deed via video link, and then witness either via a signing platform, or by signing a copy of the document emailed to them immediately after the execution;
- to allow witnessing in real time via an online signing platform, without a video link or any direct communication between the signatory and the witness;
- to move away from the traditional concepts of witnessing and attestation in the context of deeds and replace them with a new legal concept of "electronic acknowledgement" involving the signatory acknowledging to the witness that they have applied their electronic signature to the document, after which the witness signs the document with their own electronic signature to record the signatory's acknowledgement; and
- the Law Commission should undertake a future project to review the law of deeds.



ASHURST PUBLICATIONS IN THE LAST QUARTER

Ashurst has published a number of client updates and briefings in the third quarter of 2018 and a selection of them are collected below.

Corporate

- [The New UK Corporate Governance Code.](#)
- [Global Insurance Focus](#)

Employment and pensions

- [What are the taxing issues when employees receive termination payments?](#)

Business conduct and risk

- [The extraterritorial reach of Serious Fraud Office section 2 notices.](#)
- [Major privilege decision overturned \(ENRC v SFO\).](#)

Tax

- [EU reporting rules on cross-border tax planning.](#)
- [The continuing EU Tax and State Aid saga.](#)

Competition

- [Google hit by record fine of £4.34bn.](#)
- [Resale price maintenance and pricing algorithms: significant fine.](#)
- [General court reject appeals re: cables market-sharing cartel.](#)
- [European Commission updates best practices code for State Aid control.](#)

Dispute resolution

- [Entire agreement clauses: handle with care.](#)
- [Rare rectification order made in private equity deal.](#)

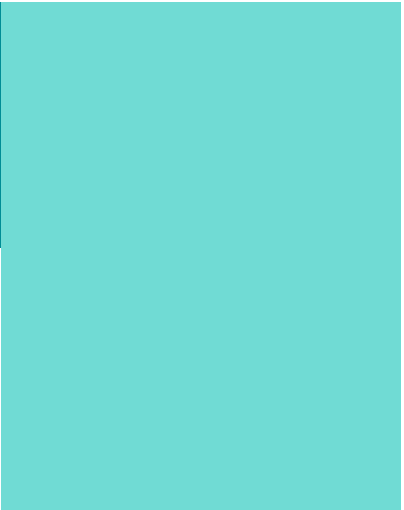
Insolvency

- [Government restructuring and insolvency proposals.](#)



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