HERBERT SMITH FREEHILLS

Corporate briefing

Consolidated corporate update

This consolidated corporate update summarises the major developments in UK corporate law and regulation which have occurred over the last six months and which will be of relevance to UK listed companies.

JULY – DECEMBER 2022
London

On the horizon: summaries of the most material developments expected in the next 6-12 months

Reform of Companies House – transforming Companies House from a largely passive recipient of information into an active gatekeeper – see item A1 below.

Hill Review package of reforms – implementing wide-ranging changes to the UK listing and prospectus regimes, including the Financial Services and Markets Bill and Secondary Capital Raising Review recommendations – see items C4, D2 and D3 below.

Audit and corporate governance reform – establishing the new "ARGA" and introducing amendments to the UK Corporate Governance Code – see item F2 below.

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A. Company law

1. Reform of Companies House

In September 2022, the Government laid the Economic Crime and Corporate Transparency Bill (ECCT Bill) in Parliament containing, among other things, draft amendments to the Companies Act 2006 to facilitate the reform of Companies House.

Enhanced role and greater powers for Companies House

The reforms will result in the biggest change in the role of Companies House since it was created, turning it from a largely passive recipient of information into an active gatekeeper. Under the draft Companies Act provisions in the ECCT Bill, Companies House will:

- **Power to query information** – be given the power to query any filings (including company names) that appear erroneous, anomalous or suspicious, and which may impact the integrity of the register or the wider business environment. It will also have the power to request further evidence and/or to reject the filing;

- **Power to remove information from the register** – have the power to remove material from the register more swiftly and in wider circumstances than is currently the case; and
- **Digital filing of information** – be able to require all information to be filed electronically.

Identity verification

Identity verification requirements will be introduced for all new and existing company directors (and equivalents for other entities), people with significant control (PSCs) and those filing information with Companies House. UK company formation agents that register with Companies House will be able to conduct these checks. Directors and PSCs who do not verify their ID will commit a criminal offence and/or incur a civil penalty. Companies that have an unverified director will also commit an offence.

Limited partnerships

The ECCT Bill also contains provisions introducing registration and transparency requirements for limited partnerships, following reforms proposed by the Government in April 2018 to strengthen the legal framework and limit the risk of limited partnerships being used for illicit activities.

Amendments to the new Register of Overseas Entities owning UK property

The new Register of Overseas Entities owning UK property was introduced by the Economic Crime (Transparency and Enforcement) Act 2022 (ECA), which received royal asset in March (see item A2 below). Under the ECCT Bill, the ECA will be amended to expand the scope of the offences under it for delivering false or misleading information to Companies House.

The ECCT Bill will now proceed through the Parliamentary scrutiny process and will likely become law in the first half of this year. It is expected to be brought into force at a later date, so that Companies House can fully prepare for the reforms. An easy reference snapshot of the Companies House reform proposals can be found here.

2. Register of Overseas Entities owning UK property

The new Register of Overseas Entities owning UK property, introduced by the ECA, came into effect on 1 August 2022.

Under the ECA, overseas entities that own, or have a lease of more than seven years over, land or property in the UK have to be listed on a public register maintained by Companies House. Any overseas entity that becomes, or has since 1 January 1999 become, the registered owner of any UK land must go on the register.

In-scope overseas entities are required to:

- take steps to identify their beneficial owner(s);
- register basic information about themselves and their beneficial owner(s) at Companies House – and that information must first have been verified by a “relevant person” (such as an accountant or regulated company-service provider); and
- update that information annually (or confirm that the information on the register is up-to-date), again with that information first having been independently verified.

Failure to register, or comply with the duty to update the information, in most cases will affect the ability of an overseas entity to sell or lease the land, or create a charge over it, as the other party would be unable to register the transaction with the Land Registry. The ECA also sets out various sanctions that could be imposed on the entity, including fines for directors if they fail to comply.

Companies House has issued some guidance and BEIS has published technical guidance, providing assistance on navigating the requirements on registration and verification. For further detail on the regime please see our briefing; we have also published a snapshot on how the regime will impact land transactions.

3. Directors' duties – Supreme Court ruling on duty to creditors

October 2022 saw the Supreme Court publish its long-awaited judgment in *BTI 2014 LLC v Sequana SA and others* ([2022] UKSC 25) which discussed when directors of a company in financial difficulties should consider the interests of the company's creditors. The majority of the Supreme Court:

- affirmed the existence of the duty to consider the interests of creditors;
- clarified that it is engaged where the directors know, or ought to know, that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable; and
- explained that where interests of creditors are engaged and diverge from those of shareholders:
    - if liquidation is inevitable, creditors' interests are paramount; and
    - prior to that, there will be a fact-sensitive balancing exercise to weigh up the competing interests by reference to the degree of distress.

For further discussion of the case, including the facts and best practice advice for boards, see the briefing published by our Restructuring, Turnaround and Insolvency team.

B. Mergers and acquisitions

1. Changes to presumption on acting in concert under the Takeover Code

In December 2022, the Takeover Panel published the final changes to the definition of "acting in concert" and the circumstances in which the Panel will presume parties to be acting in concert with each other (RS 2022/2). The main focus is the Panel's approach to groups of companies and investment entities.

The changes, which are particularly relevant for investment entities, fund managers, private equity portfolio companies and joint ventures, will take effect on 20 February 2023 and will apply to all companies and transactions from that date.

Parties will be acting in concert if they co-operate to obtain or consolidate control of a company, or frustrate the successful outcome of a bid for the company. Under the Takeover Code, certain categories of people are presumed to be acting in concert. The Panel is replacing the current presumption in relation to groups of companies with two new presumptions:

- under the first, companies will be presumed to be acting in concert if one controls the other or is under the same control as it. Control for these purposes is where a company is interested in 30% or more of the voting rights, or a majority of the equity share capital, of the other company; and
- under the second, companies will be presumed to be acting in concert with each other if one is interested in 30% or more of the other company's equity share capital.

The impact of the changes in practice means that:

- the threshold at which entities within a group are presumed to be acting in concert will be raised from 20% to 30%;
- the Panel will look at both voting rights and equity interests; and
- the rules will apply equally to limited partnerships, trusts, individuals and other legal or natural persons.

2. Takeover Panel consultations

The Takeover Panel published two consultation papers in October 2022.

The offer timetable in a competitive situation

In PCP 2022/3, the Panel sought to clarify how the offer timetable applies in certain competitive situations, including:

- **Official authorisation or regulatory clearance required** – Where one or more official authorisations or regulatory clearances is required by one or both of the bidders, the Panel will not normally introduce an auction procedure under Rule 32.5 until after the last condition relating to a relevant official authorisation or regulatory clearance has been satisfied or waived by each of the bidders.
- **Competing scheme and offer** – Where one competing offer is by way of scheme and the other by way of a contractual offer, Day 60 (the last date on which all conditions to an offer must be satisfied or waived) on the contractual offer will normally be set for a date after the shareholder meetings and before the court sanction hearing in relation to the scheme.

Miscellaneous amendments

In PCP 2022/4, the Panel proposed a number of miscellaneous changes to the Takeover Code, including:

- **Derogations and waivers for companies in financial distress** – The Panel will be given greater flexibility to grant a derogation or waiver from the requirements of the Code in exceptional circumstances, for example to facilitate a rescue of a company that is in serious financial difficulty.
- **Announcement following rumour and speculation of untoward movement in share price** – Note 2 on Rule 2.2 currently says that a potential bidder will not normally be required to make an announcement under Rule 2.2(d) if the Panel is satisfied that the price movement, rumour or speculation results from a public statement (such as a disclosure of a purchase of shares). This Note will be deleted. The Panel will, however, have discretion as to whether to require an announcement in that situation, depending on the specific circumstances of a particular case.

Both consultations close on 13 January 2023. The Panel expects to publish response statements in spring 2023, with the rule changes coming into force one month later.

3. New and updated guidance on National Security and Investment Act 2021

In July 2022, the Department for Business, Energy and Industrial Strategy (BEIS) published new Market Guidance Notes on the National Security and Investment Act 2021 (NSI Act) which came into force in January 2022.

Under the NSI Act, the UK Government was given the power to scrutinise a wide range of transactions on national security grounds and notification of relevant transactions in 17 specified sectors became mandatory – see our briefing for more detail on the regime. BEIS has published updated guidance on these 17 sectors (as well as new guidance on the application of the NSI Act to new build downstream gas and electricity assets).

The Guidance Notes aim to answer questions and provide advice based on the first six months of the NSI Act's operation, with particular focus on whether certain scenarios require mandatory notification, when the regime will apply and practical issues when making a notification. Topics covered include:

- **Group reorganisations** – The guidance reaffirms that an internal corporate reorganisation can be a qualifying transaction even if the ultimate beneficial owner of the entity remains the same.
- **Voting rights** – Under the NSI Act, in the 17 specified sectors the acquisition of voting rights that enable a person to "secure or prevent the passage of any class of resolution governing the affairs" of the target entity must be notified. The guidance says that contractual rights that have similar effect (such as those taken by minority investors when providing early-stage investment) are not covered by the concept of voting rights in the NSI Act and so notification in relation to the acquisition of such rights is not mandatory. They may however give the acquirer material influence, in which case the acquirer may choose to voluntarily notify the transaction as the Secretary of State has the power to call the transaction in.
- **Indirect acquisitions of control** – Investors may acquire control over qualifying entities indirectly, where there is an unbroken chain of majority stakes down to an entity of interest. For example, if Company A acquires 51% of the shares in Company B, which in turn already holds 51% of the shares of Company C, Company A acquires indirect control over Company C and the NSI Act regime will be engaged.

BEIS intends to publish a series of NSI Act Market Guidance Notes, with the next tranche expected in early 2023.

C. Listing regime

1. Director fined for unlawful disclosure of inside information

The Financial Conduct Authority (FCA) fined Sir Christopher Gent (SCG), the former non-executive Chair of ConvaTec Group Plc, £80,000 in August 2022 for unlawfully disclosing inside information in breach of Article 14(c) of the (then) EU Market Abuse Regulation. The fine follows a warning notice issued to SCG in September 2021.

The FCA found that:

- acting in his capacity as a member of the board, SCG disclosed inside information relating to the revision of financial guidance and the CEO's retirement to two of ConvaTec's major shareholders before this information had been announced to the market.
- given his training and experience, SCG should have realised that the information he disclosed was, or may have been, inside information and that it was not within the normal exercise of his employment to disclose it.
- the disclosures could not properly be regarded as part of permitted discussions of a general nature regarding the company's business and market developments between its management and its shareholders.
- SCG acted negligently in disclosing the information, notwithstanding that:
    - ConvaTec had not formally classified either piece of information as inside information at the time he disclosed it;
    - there were confidentiality obligations imposed on one of the shareholders under a relationship agreement;
    - SCG understood that ConvaTec's brokers had advised that the financial guidance information was not sufficiently precise at that time to require a market announcement; and
    - the executive director responsible for giving ConvaTec legal advice and overseeing its compliance with the market abuse regime and one of ConvaTec's brokers knew of SCG's plans to call the shareholders and convey the information.
- there was no evidence that SCG traded on the information or that he intended to make personal gain, or avoid loss, from making the disclosures.

2. Company censured and fines for breaches of Listing Rules and MAR

The FCA censured Carillion plc in June 2022 and provisionally fined three of the company's former executive directors in July 2022, for breaches of the Listing Rules and UK Market Abuse Regulation (MAR).

Carillion went into liquidation in January 2018. In July 2017, it had announced a provision of £845 million, of which £375 million related to projects in Carillion Construction Services (CCS), effectively wiping-out Carillion's profits over the previous six years. The company's share price fell by 39% on the day of the announcement and by 70% within three days. Its announcements in the period prior to that announcement, including a trading update in December 2016, financial results in March 2017 and AGM statement in May 2017, had given no indication that such a provision was likely to be required.

The FCA found that overly aggressive contract accounting judgements had been applied to maintain CCS's reported revenues and profitability and that the deterioration in financial performance had been reported to the executive directors, who did not disclose it to the board or audit committee. Carillion had therefore breached the following provisions in the period up to the announcement on 10 July 2017, and the executive directors were knowingly concerned in its breaches:

- **Listing Principle 1** – by failing to take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations under the Listing Rules;
- **Premium Listing Principle 2** – by failing to act with integrity towards its holders and potential holders of its premium listed shares;

- **Listing Rule 1.3.3R** – by failing to take reasonable care to ensure that its announcements were not misleading, false or deceptive and did not omit anything likely to affect the import of the information; and
- **Article 15 of MAR** – by disseminating information in its announcements that gave false or misleading signals as to the value of its shares in circumstances where it ought to have known that the information was false or misleading.

Had Carillion been solvent and not in liquidation, it would have been fined £37.9 million. The fines for the executive directors, who are appealing against the decision, were £397,800 for the former CEO, £318,000 for the former finance director (in office until December 2016) and £154,400 for the subsequent finance director.

3. Company fined for breach of Listing Rules

In December 2022, the FCA fined Metro Bank PLC £10 million for breaches of Listing Rule 1.3.3R (misleading information not to be published). This follows the warning notice issued in January 2022 (published in March 2022).

The FCA also provisionally fined Metro Bank's former CEO and former CFO £223,100 and £134,600, respectively, for being knowingly concerned in Metro Bank's breach. Both individuals have referred their Decision Notices to the Upper Tribunal.

In summary, the FCA determined that:

- Metro Bank, a premium listed company, published inaccurate information concerning its risk weighted assets (RWA) in an announcement issued on 24 October 2018 and its former CEO and CFO were knowingly concerned in the breach;
- in the period leading up to the announcement, Metro Bank had acknowledged the RWA error internally and recognised that it should be remediated – by 11 September 2018, Metro Bank had also received confirmation from independent external consultants that an incorrect risk weighting had been applied;
- at the time of the announcement, an ongoing review was being conducted to determine the amount of the necessary correction, but Metro Bank was aware that it would be substantial. Despite this, Metro Bank failed to consider the need to address these matters in the announcement or otherwise qualify the inaccurate RWA figure, or to seek appropriate advice; and
- in publishing the announcement, Metro Bank breached Listing Rule 1.3.3R by failing to take reasonable care to ensure that it was not misleading, false or deceptive and did not omit anything likely to affect the import of the information.

4. Financial Services and Markets and Retained EU Law Bills published

A Financial Services and Markets Bill was published in July 2022 as part of the Government's Future Regulatory Framework Review (FRF Review).

For listed companies the most interesting aspects of the Bill are that once passed it will revoke the UK Market Abuse Regulation and UK Prospectus Regulation – both of which are part of "EU retained law" post-Brexit (see further below). The FCA will then have the power to set the detailed rules on the definition and disclosure of inside information, and when a prospectus is required and what it should contain. See item D2 below.

The Government has since also laid the Retained EU Law (Revocation and Reform) Bill in Parliament in September 2022. In order to avoid leaving gaps in the UK legal system when the UK withdrew from the EU, the body of EU law in force at the end of 2020 was imported into UK law, and the UK legislation that implemented EU law was retained, under the European Union (Withdrawal) Act 2018 (with necessary amendments). This body of law is called "retained EU law". If passed as drafted, the Bill will:

- **Sunset retained EU law** – sunset the majority of retained EU law so that it expires on 31st December 2023, unless specifically preserved. The Bill includes an extension mechanism for the sunset of specified pieces of retained EU law until 2026 should it be required;
- **Modification of retained EU law** – make it easier to amend retained EU law, giving ministers powers to amend retained EU law by secondary legislation;

- **End the supremacy of retained EU law** – reverse the current situation that retained direct EU legislation takes priority over domestic UK legislation passed prior to Brexit (where they are incompatible); and
- **Departure from EU caselaw** – give the UK courts greater discretion to depart from the body of retained EU case law.

Both the Financial Services and Markets and Retained EU Law Bills will now proceed through the Parliamentary scrutiny and voting processes.

5. Primary Market Bulletin 42 and Market Watch 71

The FCA published market guidance for issuers, on a range of topics, in Primary Market Bulletin 42 and for firms, on insider lists, in Market Watch 71 in December 2022.

Primary Market Bulletin No. 42

Topics covered in Primary Market Bulletin 42 include:

- **Unlawful disclosure of inside information** – The FCA describes the situations and types of behaviour that crop up repeatedly in enquiries by the FCA's Primary Market Oversight department into suspected unlawful disclosures of inside information by issuers, directors, advisers and other parties. It flags in particular social and mainstream media, the leak of information around fundraisings and analyst briefings.
- **TCFD reporting** – The FCA reminds standard and premium listed companies of the guidance published by the FCA and the Task Force on Climate-Related Financial Disclosures (TCFD) on TCFD reporting (see our briefing here), including the TCFD's Guidance for All Sectors and, where relevant, the Supplemental Guidance for the Financial Sector and Non-Financial Groups (as cross-referred to in LR 9.8.6BG and LR 14.3.28G). The FCA also comments on areas for improvement from its review of the first year of premium listed companies' TCFD reports, particularly around net zero commitments and transition planning.
- **NSI Act** – When acquisitions are subject to review or assessment, or where interim or final orders are made, under the NSI Act, companies should consider their obligation to disclose inside information under the UK Market Abuse Regulation.

Market Watch 71

In Market Watch 71 the FCA made several observations about changes in advisory firms' insider lists since the publication of Market Watch 60. It noted that the number of individuals on firms' permanent insider lists has on average reduced and reminds firms they must follow the mandatory template for insider lists and, in particular, include all relevant personal information for the individuals on the list.

D. Capital markets

1. Financial Services and Markets Bill 2022-23 published

See item C4 above.

2. Illustrative framework for the new UK prospectus regime published

HM Treasury published a policy statement setting out its approach to the repeal of financial services retained EU law in December 2022. As part of this, it also published an illustrative statutory instrument on public offers and admissions to trading (SI) which demonstrates how it will make its proposed changes to the prospectus and public offers regime.

The policy statement forms part of the "Edinburgh reforms" – a package of reforms aimed at driving growth and competitiveness in the UK financial services sector. The SI covers the majority of the changes announced by the Government in March 2022, in response to its consultation on the UK prospectus regime. Key points to note are:

- prospectuses will remain a key feature of an IPO in the UK;
- the FCA will be given discretion to determine when a prospectus is required but, for a listed issuer, a public offer to its existing shareholders would not of itself require a prospectus;
- the overarching requirement for a prospectus to contain "necessary information" will be retained, but the FCA will be given power to make rules on the detailed disclosure requirements, opening the door

to a more proportionate disclosure regime for secondary issues (if a prospectus is required at all); and

- liability for forward-looking information in a prospectus will be aligned with liability for other listed company published information: liability will only be incurred when those involved are reckless.

Our detailed briefing on the UK prospectus regime reform proposals is available here.

Next steps

The Treasury intends to deliver the Edinburgh reforms in tranches, with the prospectus regime being among the first tranche of rules to be reformed using the new powers in the Financial Services and Markets Bill (see item C4 above).

The exact drafting, design and format of the SI is not final and will continue to develop before the legislation is laid before Parliament once the Financial Services and Markets Bill has received royal assent (expected in spring 2023). The Treasury says it expects to make significant progress on Tranches 1 and 2 by the end of 2023.

3. Secondary Capital Raising Review recommendations

In July 2022, the recommendations of the UK Secondary Capital Raising Review were published.

The Review was launched in response to a recommendation of the Lord Hill UK Listing Review (see our snapshot for more detail on the status of the Hill Review recommendations) and makes a number of specific recommendations which will make secondary capital raises much quicker, easier and cheaper.

The Chancellor of the Exchequer confirmed in his Mansion House speech shortly after publication that all the recommendations had been accepted in full. The Pre-emption Group, FRC and FCA, as well as BEIS and the Treasury, must now implement them as appropriate. Those of most interest include:

- **Facilitating bigger placings** – The Review recommended that the Pre-Emption Group change their Statement of Principles on disapplications of pre-emption rights. This has since been implemented (see item F1 below).
- **No prospectus for most rights issues** – The threshold in the UK Prospectus Regulation for when a prospectus is required for an admission of shares to trading should be increased from 20% of a company's existing share capital to 75%. Alongside the proposed amendments to the definition of "offer to the public" – which will exclude offers to existing shareholders from the definition – as part of the ongoing prospectus regime reform, this will mean most secondary capital raises will not need a prospectus, nor require a sponsor or FCA involvement. This is being progressed through the Financial Services and Markets Bill (see items C4 and D2 above).
- **Timetable for a fundraising** – The Companies Act 2006 notice period for shareholder meetings other than AGMs should be reduced to seven clear days, to reduce the timetable for capital raisings where shareholder approval is required. The period for which an offer must be kept open should be reduced to seven business days (from the current ten business days), which will also require an amendment to the Companies Act.
- **Retail investors** – Due consideration should be given to retail investors on all capital raisings and how to involve them in an offer as fully as possible.
- **Dematerialisation** – All shareholders should hold their listed company shares in dematerialised/digitised form to make all listed company actions, including capital raises, quicker and easier. The Treasury has published terms of reference for a digitisation taskforce to drive forward the modernisation of the UK's shareholding framework.

E. Corporate reporting

1. Impact of the EU Corporate Sustainability Reporting Directive on UK companies

The EU Corporate Sustainability Reporting Directive (EU) 2022/2464 (CSRD) was published in the Official Journal of the European Union in December 2022 and will enter into force on 5 January 2023.

Notwithstanding the UK's withdrawal from the EU, the CSRD may impact UK companies because of its extra-territorial application.

Companies within scope will be required to include detailed sustainability disclosures in their narrative reports. These disclosures build on, and significantly expand, the disclosures required under the EU Non-Financial Reporting Directive 2014/95/EU (NFRD), which have been implemented in the UK through sections 414CA and 414CB of the Companies Act 2006.

Broadly, the disclosures obligations in the CSRD may apply to UK-incorporated companies in two situations:

- where the company has securities listed on an EU regulated market; or
- where the company has a net turnover in the EU of over €150 million for each of the last two consecutive financial years and has either:
    - an EU subsidiary which has securities listed on an EU regulated market, or is classed as a large undertaking (that is, it meets two of the following criteria: (i) total assets of €20 million; (ii) net turnover of €40 million; and (iii) an average of 250 employees over the financial year); or
    - an EU branch which has generated a net turnover of more than €40 million in the previous financial year.

The application of the CSRD is being phased in. As these reporting requirements are being introduced by a directive, they will need to be implemented by each EU Member State within 18 months of the CSRD coming into force.

2. FRC reviews of reporting in 2021/22

In October and November 2022, the Financial Reporting Council (FRC) published two reviews of company reporting.

Review of corporate governance reporting

The FRC's annual review of corporate governance reporting discusses the quality of reporting against the UK Corporate Governance Code in 2022 and its expectations for 2023.

Looking at the corporate governance reports of 100 FTSE 350 and Small Cap companies, the FRC found that only 27 claimed full compliance with the Code, compared with 58 in 2020 and 36 in 2021. The FRC noted that more companies are using the flexibility of the "comply or explain" nature of the Code, offering greater detail when reporting departures, but states that companies should be transparent in their reports by naming the specific Code provision(s) that have not been complied with. Other key messages included:

- **Risk management and internal controls** – Over half of the companies provided a statement to confirm that their risk management and internal control systems were effective or that no weaknesses or inefficiencies have been identified. However, many of those companies did not explain the steps taken to assess those systems.
- **Workforce engagement** – The FRC noted that disclosures on outcomes of workforce engagement were almost exclusively in relation to flexible working matters. The most common engagement mechanism was having a designated non-executive director. The FRC said that companies should explain why they have chosen their engagement mechanism and how they monitor it to ensure that it is effective.
- **Shareholder and wider stakeholder engagement** – Wider stakeholder engagement was generally of a good standard but there was minimal disclosure of specific board members' engagement with major shareholders. The FRC stated that good reporting should include details of how the board engaged with the shareholders and stakeholders (methods of engagement, those involved, the frequency of engagement and topics discussed), what the feedback was and the impact it had on board discussions and decision-making.

The report also covered modern slavery and climate change reporting, chair independence and tenure, board diversity and remuneration.

Review of corporate reporting

The broader review of corporate reporting provides an overview of the work of the FRC's corporate reporting review (CRR) team and sets out the FRC's view on the current state of corporate reporting in the UK.

Despite the challenging environment caused by economic and geopolitical uncertainty, the FRC noted that the quality of corporate reporting by FTSE 350 companies had not declined. Improvements were seen in the reporting of areas such as judgement and estimation uncertainty, revenue and alternative performance measures (APMs). The FRC disclosed that:

- around 250 companies were reviewed by the CRR team during this review cycle, resulting in just over 100 companies being contacted for further information or explanation. These numbers are similar to those seen in the 2020/21 review cycle;
- the number of companies required to refer to these CRR enquiries in their next annual report (Required References) almost doubled compared to the previous review cycle, with the majority of these Required References relating to cash flow statements; and
- other topics frequently raised with companies included income taxes, APMs, financial instruments, impairment of assets and strategic report and other Companies Act 2006 matters.

F. Corporate governance

1. AGMs – new guidelines on disapplying pre-emption rights

The Pre-Emption Group (PEG) published a revised Statement of Principles for the disapplication of pre-emption rights along with new template resolutions in November 2022, implementing one of the recommendations of the Secondary Capital Raising Review (SCRR) (see item D3 above).

The revised Principles state that:

- **Disapplications of up to 20%** – Investors will support companies that propose a special resolution at their AGM seeking:
  - a general disapplication of statutory pre-emption rights over up to 10% of the company's issued share capital, where the proceeds of the share issue can be used for any purpose; plus
  - an additional authority over up to another 10% of issued share capital, where the proceeds must be used to fund an acquisition or a specified capital investment (announced contemporaneously with the issue or occurring in the previous 12 months).

  In both cases, a further authority of up to 2% of issued share capital can be sought, but this can only be used for a "follow-on offer" (see below). For any urgent, exceptional circumstances before a company seeks the new, more permissive authorities at its next AGM, issuers are advised to follow the transitional arrangements in the SCRR.

- **Post-transaction reports** – Companies should, within a week of a non-pre-emptive issue carried out under any general disapplication, publish a report, via an RIS announcement, setting out prescribed details of the transaction. There is a standard form for the report set out in the Principles. In addition to an RIS announcement, an issuer must submit the report to PEG's new Pre-Emption Database and include the information in its next annual report.

- **Retail and other existing investors** – Where a company issues shares non-pre-emptively for cash, it should give due consideration to enabling retail and other existing shareholders who are not allocated shares in that placing to participate. In particular, they recommend the use of a retail investor platform and/or a "follow-on offer". A follow-on offer should:
  - be made to all existing shareholders, other than those involved in the placing;
  - entitle shareholders to subscribe for shares up to a cap of not more than £30,000 each, at the same or a lower price than the placing; and

- be open for a period that is sufficient to allow shareholders to become aware of the offer and reach an investment decision.

Institutional Shareholder Services (ISS) and Glass Lewis support the revised Statement of Principles and will not recommend votes against resolutions seeking such authorities (see item F3 below).

2. Audit and corporate governance reform

In July 2022, the FRC published a position paper setting out the steps it will take to implement reforms to audit and corporate governance. This follows the publication of the Government's response to its consultation on the reforms in May 2022.

The FRC intends to publish a consultation paper on the changes to the UK Corporate Governance Code in the first quarter of 2023, with the expectation that the revisions will apply to financial reporting periods starting on or after 1 January 2024. Changes will include enhancing the disclosures that the board is required to make in relation to the effectiveness of the company's internal control systems and strengthening the provisions of the Governance Code that deal with conditions for withholding executive pay. The FRC will also consult on the necessary changes to the guidance which supports the Governance Code, including its Guidance on Board Effectiveness and Guidance for Audit Committees.

A number of the reforms set out in the Government's response will require primary and secondary legislation, the timing for which is not yet known. The FRC intends to implement the reforms through only one set of changes to the Governance Code and each standard and piece of guidance for which it is responsible, and so recognises that the timing for its consultations will ultimately be driven by the Government's legislative timetable.

See our briefing for more detail on the audit and corporate governance reforms.

As part of the reforms announced in May 2022, the Audit, Reporting and Governance Authority (ARGA) – the new successor regulator to the FRC – will be given power to impose minimum requirements on audit committees of FTSE 350 companies in relation to external audit and monitor compliance. In anticipation of ARGA being given these powers by legislation, the FRC published a draft minimum standard for consultation in November 2022. The standard sets out the responsibilities of the audit committee in relation to the external audit, in particular with regard to the tendering process, the oversight of the external auditors and reporting to investors on these responsibilities in the annual report. Until the necessary legislation is passed and ARGA is in place, the FRC will encourage FTSE 350 companies to comply with the final form standard on a comply or explain basis. The consultation on the standard closes on 8 February 2023.

3. Updated proxy voting guidelines

Institutional Shareholder Services (ISS) and Glass Lewis published updates to their proxy voting guidelines for the 2023 AGM season in November 2022.

ISS Proxy Voting Guidelines

Key changes set out in a policy updates document include:

- **Audit committees** – ISS will note where there have been four or fewer meetings of the audit committee of FTSE 350 companies in the financial year (or three or fewer meetings in the case of FTSE All-share companies); and
- **Board diversity** – For financial years beginning on or after 1 April 2022, ISS may consider recommending votes against the chair of the nomination committee, or other director on a case-by-case basis, of premium and standard listed companies that have not met the new board diversity and inclusion targets introduced by the FCA.

The ISS Proxy Voting Guidelines 2023 will be effective for meetings held on or after 1 February 2023.

Glass Lewis 2023 Policy Guidelines

Key changes set out in the Glass Lewis 2023 Policy Guidelines include:

- **Overboarding** – Glass Lewis will generally recommend voting against the election of an executive director who is serving on more than one public board or taking on more than one non-executive directorship of a FTSE 100 company (or similar level of appointment);
- **Employee representatives** – Glass Lewis does not include directors serving as representatives of employees when calculating what proportion of the board is independent;
- **Director accountability for climate-related issues** – Glass Lewis may recommend voting against the chair of the committee (or board) responsible for oversight of climate-related issues (or the chair of the governance committee if no such committee is responsible) if companies fail to make disclosures in line with the Recommendations of the Task Force on Climate-related Financial Disclosures or have not clearly and explicitly defined board oversight responsibility for climate-related issues; and
- **Combined incentive plans** – Glass Lewis will generally recommend voting against combined incentive plans (in lieu of more traditional structures which have both short and long-term plans) unless certain conditions are met.

Glass Lewis is monitoring several other issues, such as board diversity and cyber risk oversight, with a view to taking action should companies not respond appropriately to these developments.

The revised guidelines will apply to meetings from 1 January 2023.

4. Investment Association Principles of Remuneration for 2023

In November 2022, the Investment Association (IA) published its annual letter to remuneration committee chairs setting out shareholder expectations for 2023, as well as an updated version of its Principles of Remuneration.

In its letter to remuneration committee chairs, the IA highlighted the key areas of focus for its members when considering the remuneration practices of companies in the forthcoming AGM season. Topics covered included salary levels and the cost of living, windfall gains and the use of ESG metrics in executive remuneration. It also noted that IVIS (the Institutional Voting Information Service, which is part of the IA) will red top any remuneration policy or report where executive pension contributions are not aligned to the majority of the workforce.

There are no significant changes to the Principles of Remuneration for this year.

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