IN-DEPTH

Corporate Governance

EDITION 14

Contributing editor

Will Pearce

Davis Polk & Wardwell LLP

Corporate Governance

EDITION 14

Contributing Editor

Will Pearce

Davis Polk & Wardwell LLP

In-Depth: Corporate Governance (formerly The Corporate Governance Review) is a useful overview of the corporate governance regimes in key jurisdictions worldwide. Through the lens of recent trends and developments, it examines the most consequential rules relating to board composition and practices; director duties; reporting and disclosure requirements; corporate responsibility; shareholder rights and duties; and much more.

Generated: April 19, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

Contents

Editor's Preface
Will Pearce
Davis Polk & Wardwell LLP

Brazil
Marcelo Viveiros de Moura, **Marcos Saldanha Proença**, **Miguel de Padua Berardinelli Arraes**
Pinheiro Neto Advogados

China
Weiheng Jia, **Vicky Li**
Han Kun Law Offices

Finland
Risto Ojantakanen, **Helena Wist**, **Sini Lilja**
I&O Partners Attorneys Ltd

Germany
Carsten van de Sande, **Sven H Schneider**
Hengeler Mueller

Greece
Pavlos Masouros
Masouros & Partners Attorneys at Law

Hong Kong
Robert Ashworth, **James Parkin**, **Clement Cheung**
Freshfields Bruckhaus Deringer

Ireland
Paul White, **Michelle McLoughlin**
A&L Goodbody

Italy

Maurizio Delfino, **Niccolò Casartelli**

Studio Legale Delfino e Associati Willkie Farr & Gallagher LLP

Japan

Mitsuhiro Harada, **Tatsuya Nakayama**, **Yohei Omata**, **Takuma Kanasaki**

Nishimura & Asahi (Gaikokuho Kyodo Jigyo)

Portugal

Paulo Olavo Cunha, **Cristina Melo Miranda**

Vieira de Almeida & Associados

Singapore

Andrew M. Lim, **Richard Young**, **Lee Kee Yeng**, **Gabriel Lee**, **Jerald Soon**

Allen & Gledhill LLP

United Arab Emirates

Alex Ghazi, **Sabaa Mahmood**

Al Tamimi & Company

United Kingdom

Will Pearce, **Neil Sharpe**, **Sophie Vacikar Bessisso**

Davis Polk & Wardwell LLP

USA

Adam O Emmerich, **William Savitt**, **Yasmina Abdel-Malek**, **Samantha M Altschuler**

Wachtell, Lipton, Rosen & Katz

Explore on **Lexology**

Editor's Preface

Will Pearce
Davis Polk & Wardwell LLP

Over the past 40 years, corporate governance rules applicable to publicly traded companies have developed around the world, building on the basic corporate law framework governing the relationship between a company, its directors and its shareholders. These rules have taken a different form and legal status depending on the jurisdiction in question, usually ranging from mandatory compliance, or voluntary compliance with mandatory regular public disclosure of non-compliance, through to simple voluntary compliance with best practice or investor expectations.

In general terms, a common framework for corporate governance rules now seen across many jurisdictions comprises some combination of mandatory compliance with corporate law and stock exchange rules (the former focused on substance and the latter focused on disclosure) and voluntary compliance with guidance or best practice recommendations from national or supranational accounting or governance bodies or organisations representing investors.

Initially, corporate governance rules – led in large part by action taken by the Securities and Exchange Commission in the US, following the collapse of Penn Central in 1970 and other corporate scandals of the 1970s and 1980s, and by the publication of the UK's Corporate Governance Code by the Cadbury Committee in 1992 – focused on best practice recommendations for the composition of public company boards (including the important role of independent non-executive directors); the role, responsibilities and composition of board committees; and, in the UK, the separation of the roles of CEO and chair.

Driven by accounting scandals, audit failures and a perceived lack of checks and balances on the risk taken by public company boards, including the collapse of Enron, which declared bankruptcy in 2001, corporate governance rules sought to strengthen the powers and expectations of and oversight exercised by audit committees and the role of internal audit, notably through the adoption of Sarbanes–Oxley in the US in 2002.

Over the 15 years that followed, investor focus switched to the risks taken by and rewards offered to executive management, ultimately resulting in a number of jurisdictions adopting some form of 'say-on-pay' regime to help guard against outsized compensation packages driving excessive risk-taking. Investors also demanded greater gender diversity on public boards, with a consensus view emerging that a more balanced board would offer better decision-making and improved long-term stewardship of public companies for the benefit of all investors. Having made significant progress on gender diversity, a similar approach (with industry-set targets for representation and regular public disclosure of progress) has been adopted in a number of jurisdictions to help progress ethnic diversity.

Most recently, the 'g' of governance has been joined by the 'e' of environmental and the 's' of social, with traditional governance teams at investors now expecting public companies to take a more holistic ESG approach to business. This has driven a number of jurisdictions to require mandatory disclosure by public companies on environmental issues; the pay gap between executive management and the 'average' employee; and sustainability, supply chain and modern slavery issues.

To assist public companies, advisers and market participants alike, who are seeking to navigate this ever-evolving landscape, we are delighted to present the 14th edition of Lexology In-Depth: Corporate Governance (previously known as *The Corporate Governance Review* of The Law Reviews).

In this edition, we have included chapters covering 14 different jurisdictions. Each chapter provides an overview of the applicable corporate governance regime, roles and responsibilities of directors, details of required public disclosures of corporate governance-related matters, the rules of engagement with shareholders and the extent to which a public company can defend a takeover, together with an update of recent and forthcoming developments.

While every author has taken care to make this review comprehensive, up to date and accurate as at the publication date, please remember that each chapter provides only a summary and overview of a large body of law, regulation and market practice. If readers wish to explore specific issues that are of interest or pertinent to them, we suggest they seek detailed advice from suitably experienced counsel. Contact details for the authors are set out at the end of this review.

Finally, thanks to all of the authors, my colleague Sophie Vacikar Bessisso and Jialiang Hu at Lexology for helping to pull together this edition.

Will Pearce
Davis Polk & Wardwell London LLP
London
February 2024

Davis Polk

Will Pearce will.pearce@davispolk.com

Davis Polk & Wardwell LLP

Read more from this firm on Lexology

United Kingdom

Will Pearce, Neil Sharpe and Sophie Vacikar Bessisso
Davis Polk & Wardwell LLP

Summary

INTRODUCTION
YEAR IN REVIEW
CORPORATE LEADERSHIP
CORPORATE DISCLOSURE
ENVIRONMENTAL, SOCIAL AND GOVERNANCE
SHAREHOLDERS
OUTLOOK AND CONCLUSIONS
ENDNOTES

Introduction

In recognition of the need for flexibility in this particular area, the corporate governance framework for listed companies in the United Kingdom is based on a combination of statutory provisions and a voluntary compliance and disclosure regime comprising laws, regulations, codes of best practice and guidelines developed by various regulatory bodies and interest groups, underpinning the notion that a purely statutory framework would not be effective.

Prescribed corporate governance rules and requirements derive predominantly from the Companies Act 2006 (the Companies Act) and regulation published by the Financial Conduct Authority (FCA) in the form of the Listing Rules and the Disclosure Guidance and Transparency Rules (DTRs). The Companies Act sets out the duties of directors and how they may be held to account, rules regarding their appointment and removal, the requirements for annual reports and accounts, and the approval of the same by shareholders. The Listing Rules and the DTRs impose certain governance requirements that a company must meet to seek admission of its shares to the Official List of the FCA and the Main Market of the London Stock Exchange (particularly where it has a controlling shareholder) and build on the statutory content requirements for annual reports and accounts published by listed companies and related continuous market disclosures.

The most notable code of practice in the context of corporate governance is the UK Corporate Governance Code (the Governance Code),[2] the current version of which was published in July 2018 by the Financial Reporting Council (FRC), the UK's independent regulator of auditors, accountants and actuaries,[3] and which will continue to apply until 1 January 2025.[4] The Governance Code provides guidance on five key topics: board leadership and corporate purpose; division of board responsibilities; board composition, succession and evaluation; audit, risk and internal compliance; and remuneration. Under the Listing Rules, companies with a premium listing on the Main Market of the London Stock Exchange are required to report on their compliance with the Governance Code on a 'comply or explain basis'. This requires the inclusion of a statement in such companies' annual reports on how they applied the 18 principles of the Governance Code and an explanation as to whether, throughout the accounting period, they complied with all relevant provisions of the Governance Code.[5]

While the focus of this chapter is on the rules and requirements as they relate to UK incorporated premium listed companies, which are subject to the most stringent corporate governance requirements, it is worth noting that smaller publicly traded companies (including those traded on AIM) are expected to follow the Quoted Companies Alliance Corporate Governance Code (last published in 2023)[6] comprising 10 corporate governance principles and related guidance, and large private companies are expected to follow the Wates Corporate Governance Principles for Large Private Companies (published in 2018),[7] in each case in addition to meeting their statutory obligations.

In recognition of the need for flexibility in this particular area, the corporate governance framework for listed companies in the United Kingdom is based on a combination of statutory provisions and a voluntary compliance and disclosure regime comprising laws, regulations, codes of best practice and guidelines developed by various regulatory bodies

and interest groups, underpinning the notion that a purely statutory framework would not be effective.

Prescribed corporate governance rules and requirements derive predominantly from the Companies Act 2006 (the Companies Act) and regulation published by the Financial Conduct Authority (FCA) in the form of the Listing Rules and the Disclosure Guidance and Transparency Rules (DTRs). The Companies Act sets out the duties of directors and how they may be held to account, rules regarding their appointment and removal, the requirements for annual reports and accounts, and the approval of the same by shareholders. The Listing Rules and the DTRs impose certain governance requirements that a company must meet to seek admission of its shares to the Official List of the FCA and the Main Market of the London Stock Exchange (particularly where it has a controlling shareholder) and build on the statutory content requirements for annual reports and accounts published by listed companies and related continuous market disclosures.

The most notable code of practice in the context of corporate governance is the UK Corporate Governance Code (the Governance Code),[2] the current version of which was published in July 2018 by the Financial Reporting Council (FRC), the UK's independent regulator of auditors, accountants and actuaries,[3] and which will continue to apply until 1 January 2025.[4] The Governance Code provides guidance on five key topics: board leadership and corporate purpose; division of board responsibilities; board composition, succession and evaluation; audit, risk and internal compliance; and remuneration. Under the Listing Rules, companies with a premium listing on the Main Market of the London Stock Exchange are required to report on their compliance with the Governance Code on a 'comply or explain basis'. This requires the inclusion of a statement in such companies' annual reports on how they applied the 18 principles of the Governance Code and an explanation as to whether, throughout the accounting period, they complied with all relevant provisions of the Governance Code.[5]

While the focus of this chapter is on the rules and requirements as they relate to UK incorporated premium listed companies, which are subject to the most stringent corporate governance requirements, it is worth noting that smaller publicly traded companies (including those traded on AIM) are expected to follow the Quoted Companies Alliance Corporate Governance Code (last published in 2023)[6] comprising 10 corporate governance principles and related guidance, and large private companies are expected to follow the Wates Corporate Governance Principles for Large Private Companies (published in 2018),[7] in each case in addition to meeting their statutory obligations.

Year in review

A number of reforms were expected to be implemented by the government and the FRC (or its successor) in the coming years, including the replacement of the FRC by the Audit, Reporting and Governance Authority (ARGA),[8] the introduction of new corporate reporting regulations that were expected to amend Part 15 of the Companies Act to introduce additional corporate reporting requirements on certain large UK companies, including the requirement for an annual resilience statement, a distributable profits figure and distribution policy statement, a material fraud statement and a triennial audit and assurance policy statement (Corporate Reporting Regulations)[9] and revisions to the Governance Code.

As regards the replacement of the FRC by ARGA, as at the date of this publication, the required legislation to set up ARGA has not yet been passed. While it seems unlikely that the required legislation will be passed this year, the government nevertheless reiterated its intention to set up ARGA when parliamentary time allows.

With respect to the Corporate Reporting Regulations, following their publication in draft form, the government subsequently announced in October 2023 their withdrawal, after consultation with companies raised concerns about imposing additional reporting requirements. The government confirmed that instead of going ahead with the Corporate Reporting Regulations, it will 'pursue options to reduce the burden of red tape to ensure the UK is one of the best places in the world to do business'.[10]

With respect to the Governance Code, following its consultation on revisions to the Governance Code in May 2023,[11] the FRC published a revised version of the Governance Code on 22 January 2024.[12] The FRC noted that the revised Governance Code takes a 'targeted approach, focusing on a limited number of changes' (rather than taking forward the original 18 proposals that had been consulted on) 'to ensure the right balance is struck between UK competitiveness and positive outcomes for companies, investors and the wider public'.[13] The most significant addition in the revised Governance Code is the requirement in Provision 29 for boards to make a declaration in their annual reports of the effectiveness of their material controls as at the balance sheet date;[14] this, however, will not require companies to seek external review by auditors[15] as the Sarbanes–Oxley Act 2002 requires in the US. The revised Governance Code will apply to financial years beginning on or after 1 January 2025, save for new Provision 29, which will apply to financial years beginning on or after 1 January 2026.[16]

In 2023, we have also seen a range of climate-related developments, including the International Sustainability Standard Board (ISSB)'s issuance of its inaugural global sustainability disclosure standards, publication by the Taskforce on Nature-related Financial Disclosures of its final recommendations for nature-related risk management and disclosure and the Transition Plan Taskforce's publication of its final climate transition plans disclosure framework. While compliance with these climate-related developments is not yet mandatory for UK listed companies, they are likely to inform the development of further climate-related legal and regulatory requirements for UK listed companies in the future.

A number of reforms were expected to be implemented by the government and the FRC (or its successor) in the coming years, including the replacement of the FRC by the Audit, Reporting and Governance Authority (ARGA),[8] the introduction of new corporate reporting regulations that were expected to amend Part 15 of the Companies Act to introduce additional corporate reporting requirements on certain large UK companies, including the requirement for an annual resilience statement, a distributable profits figure and distribution policy statement, a material fraud statement and a triennial audit and assurance policy statement (Corporate Reporting Regulations)[9] and revisions to the Governance Code.

As regards the replacement of the FRC by ARGA, as at the date of this publication, the required legislation to set up ARGA has not yet been passed. While it seems unlikely that the required legislation will be passed this year, the government nevertheless reiterated its intention to set up ARGA when parliamentary time allows.

With respect to the Corporate Reporting Regulations, following their publication in draft form, the government subsequently announced in October 2023 their withdrawal,

after consultation with companies raised concerns about imposing additional reporting requirements. The government confirmed that instead of going ahead with the Corporate Reporting Regulations, it will 'pursue options to reduce the burden of red tape to ensure the UK is one of the best places in the world to do business'.[10]

With respect to the Governance Code, following its consultation on revisions to the Governance Code in May 2023,[11] the FRC published a revised version of the Governance Code on 22 January 2024.[12] The FRC noted that the revised Governance Code takes a 'targeted approach, focusing on a limited number of changes' (rather than taking forward the original 18 proposals that had been consulted on) 'to ensure the right balance is struck between UK competitiveness and positive outcomes for companies, investors and the wider public'.[13] The most significant addition in the revised Governance Code is the requirement in Provision 29 for boards to make a declaration in their annual reports of the effectiveness of their material controls as at the balance sheet date;[14] this, however, will not require companies to seek external review by auditors[15] as the Sarbanes–Oxley Act 2002 requires in the US. The revised Governance Code will apply to financial years beginning on or after 1 January 2025, save for new Provision 29, which will apply to financial years beginning on or after 1 January 2026.[16]

In 2023, we have also seen a range of climate-related developments, including the International Sustainability Standard Board (ISSB)'s issuance of its inaugural global sustainability disclosure standards, publication by the Taskforce on Nature-related Financial Disclosures of its final recommendations for nature-related risk management and disclosure and the Transition Plan Taskforce's publication of its final climate transition plans disclosure framework. While compliance with these climate-related developments is not yet mandatory for UK listed companies, they are likely to inform the development of further climate-related legal and regulatory requirements for UK listed companies in the future.

Corporate leadership

i Board structure and practices

Composition and structure of the board

UK company law is largely silent on the exact composition of a board, so practice for a UK incorporated premium listed company is derived from the Governance Code. In line with the statutory duties of directors, the Governance Code emphasises that a successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society.[17] This requires that the board comprise directors with an appropriate balance of skills, experience, independence and knowledge of the company to enable it to discharge its duties and responsibilities effectively. Ancillary to this requirement, the board should include an appropriate combination of executive and non-executive directors (and, in particular, independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision-making.[18] The Governance Code also recommends that at least half of the board, excluding the chair, comprise independent non-executive directors.[19]

The corporate governance regime in the UK is based on the principle of a unitary board. While executive directors are engaged by the company on a full-time basis to manage the day-to-day business of the company, with non-executive directors performing a supervisory function in relation to the company, non-executive directors of UK incorporated companies take part in board meetings equally as executive directors, as part of a single board. This can be contrasted with the corporate governance framework in other European countries, including Germany, where the supervisory and executive functions of the board are split into two tiers, with a 'supervisory board' for non-executive directors and a 'management board' for the executive directors.

The board is collectively responsible for the long-term success of the company, and decisions are ordinarily taken by the board as a whole, either at board meetings (by a majority) or by way of a directors' written resolution in accordance with the company's articles.[20] Neither the Companies Act nor the Governance Code prescribes the frequency of directors' meetings; therefore, this will depend on the specific circumstances of the company as to when decisions arise that need to be taken by the board. The FRC Guidance on Board Effectiveness (2018)[21] contains general guidance on this topic, and notes that meeting regularly is essential for the board to discharge its duties effectively and to allow adequate time for consideration of all of the issues falling within its remit.[22]

Roles of the chair and the senior independent director

The Governance Code also emphasises the importance of the role of the chair of the board and the role of the senior independent director. The chair is responsible for leading the board and for the board's overall effectiveness in directing the company.[23] The chair should be independent on appointment, demonstrate objective judgement throughout their tenure and promote a culture of openness and debate. The Governance Code makes it clear that there should be a clear division of responsibilities between the leadership of the board and executive leadership of the company and, consequently, that the role of chair of the board and the role of chief executive officer should not be exercised by the same individual. If, exceptionally, the roles of chair and chief executive officer are combined, major shareholders should be consulted ahead of the appointment, and the board should set out its reasons to all shareholders at the time of the appointment and publish these reasons on the company website.[24] The role of the senior independent director is to provide a sounding board for the chair and serve as an intermediary for the other directors and shareholders.[25]

Employee representation and engagement

The Governance Code emphasises that a director may also be appointed to the board from the company's workforce, by way of ensuring effective engagement with the company's employees. It also sets out two additional options that boards may consider adopting as a stand-alone option or in combination with one or more of the alternatives for engagement with the workforce, including having a formal workforce advisory panel and designating a non-executive director. If the board has not chosen one or more of these options, it should explain what alternative arrangements are in place and why it considers that they are effective. In practice, most companies tend to designate a non-executive director for engagement with the company's employees.[26]

Board committees

Under English company law, directors are able to delegate their powers to specific individuals or to committees of the board if the company's articles of association allow it or if authorised by shareholders; otherwise, they will be subject to the principle of collective decision-making, as there is no underlying authority in the Companies Act or under common law. Generally, the type of power to be delegated will be a matter for the board to consider (having regard to their duties), unless otherwise specified in the company's articles or in a shareholder resolution. With regard to premium listed companies, the Governance Code recommends for boards to set up audit, remuneration and nomination committees, with the FRC Guidance on Board Effectiveness (2018) also encouraging the consideration of having a separate risk committee, where appropriate.

A nomination committee should lead the process for appointments, ensure that plans are in place for orderly succession to both the board and senior management positions, and oversee the development of a diverse pipeline of candidates. A majority of members of the committee should be independent non-executive directors and the chair of the board should not chair the committee when it is dealing with the appointment of their successor.[27]

The board should also establish an audit committee of a minimum of three independent non-executive directors.[28] The chair of the board should not be a member and the board should satisfy itself that at least one member has recent and relevant financial experience. An audit committee should monitor the integrity of the company's financial statements, review the company's internal financial controls and internal control and risk management systems (unless expressly addressed by a separate board risk committee or by the board itself) and monitor and review the effectiveness of its internal audit function.[29]

A remuneration committee should have delegated responsibility for determining the policy for executive director remuneration and setting the remuneration for the chair, executive directors and senior management. It should also review workforce remuneration and related policies and the alignment of incentives and rewards with culture, taking these into account when setting the policy for executive director remuneration. A remuneration committee should comprise a minimum of three independent non-executive directors. In addition, the chair of the board can be a member of the remuneration committee only if he or she was independent on appointment and cannot chair the committee. Finally, before appointment as chair of the remuneration committee, the appointee should have served on a remuneration committee for at least 12 months (i.e., including on a remuneration committee of a different company).[30]

It is important to note that while the board may make use of board committees to assist its consideration of various matters, including appointments, succession, audit, risk, remuneration and market disclosure, it retains responsibility for, and endorses, final decisions in all of these areas.[31]

Remuneration of directors and senior management

Under the Companies Act, a board's remuneration policy for its directors is subject to a binding vote of shareholders by way of an ordinary resolution, which must be proposed at least every three years.[32] If awards or payments are made by the board in contravention of

the shareholder-approved policy, the payment or award is treated as having no effect, the director who received the payment or award will be required to repay it to the company, and the directors who authorised the payment or award may be liable to indemnify the company for any loss resulting from it.[33] The requirement that the board's remuneration policy is subject to a binding shareholder vote is particularly significant in the context of shareholder activism, as it provides an effective means for shareholders to express their dissatisfaction with the performance of the executive directors or the remuneration committee, or both.

In addition to the binding shareholder vote on pay, shareholders also have an annual advisory vote with regard to the directors' remuneration report, which includes a report on, inter alia, how the remuneration policy was implemented during the previous year.[34]

This remuneration framework is supported by the Governance Code, which emphasises that remuneration schemes and policies should enable the use of discretion to override formulaic outcomes and include *malus* and clawback provisions that would enable the company to recover and withhold payments or awards and specify the circumstances in which it would be appropriate to do so. The revised Governance Code that will apply to financial years beginning on or after 1 January 2025 asks companies to include in their annual reports on remuneration a description of their *malus* and clawback provisions, including: (1) the circumstances in which *malus* and clawback provisions could be used; (2) a description of the period for *malus* and clawback and why the selected period is best suited to the organisation; and (3) whether the provisions were used in the last reporting period and, if so, a clear explanation of the reasons for their use.

More broadly, the Governance Code emphasises that remuneration policies and practices should be designed to support strategy and promote long-term sustainable success of the company, and provides guidance with respect to certain key elements, including that:

1. executive remuneration should be aligned to company purpose and values and be clearly linked to the successful delivery of the company's long-term strategy;
2. remuneration of non-executive directors should be determined in accordance with the company's articles or, alternatively, by the board, and should not include share options or other performance-related elements;
3. levels of remuneration for the chair and all non-executive directors should reflect the time commitment and responsibilities of the role;
4. a formal and transparent procedure for developing policy on executive remuneration and determining director and senior management remuneration should be established;
5. directors should exercise independent judgement and discretion when authorising remuneration outcomes, taking account of company and individual performance and wider circumstances; and
6. no director should be involved in deciding their own remuneration outcome.[35]

ii Directors

Directors' duties

The general principle under English law is that all directors, whether executive or non-executive, owe the same fiduciary duties and a duty of care, skill and diligence to the company. This principle applies equally to any director appointed by a major shareholder, and it has been confirmed by the courts that, in the event of a conflict, a nominee director's primary loyalty is to the company, and the company's interest must ultimately prevail over that of the appointing shareholder.

The seven core duties of directors under the Companies Act are:

1. to act in accordance with the company's constitution and exercise powers only for the purposes for which they were conferred;
2. to act in good faith and promote the success of the company for the benefit of its members as a whole;
3. to exercise independent judgement;
4. to exercise reasonable care, skill and diligence;
5. to avoid conflicts of interest;
6. to not accept benefits from third parties; and
7. to declare an interest in a proposed transaction or arrangement with the company.-[36]

It is worth noting that these duties rank equally and, except as otherwise provided, more than one duty may apply in any given case.[37] Companies are also free to impose additional requirements on directors by including specific provisions in the company's articles; however, a dilution of the duties or adoption of lesser standards is generally not permitted.

Directors' duties will apply not only to formally appointed directors but also to anyone acting as a 'shadow director'[38] (meaning an individual who has not been formally appointed as director but in accordance with whose directions or instructions the directors of a company are accustomed to act).[39]

Generally, duties of a director will come to an end when the director ceases to hold office, with the exception of the duty to avoid conflicts of interest and the duty not to accept benefits from third parties, as regards the exploitation of any property, information or opportunity gained, or any actions or omissions, while in office.[40]

In performing the duty to promote the success of the company, directors of UK incorporated companies are required to have regard to a range of factors, including:

1. the likely consequences of any decision in the long term;
2. the interests of the company's employees;
3. the need to foster the company's business relationships with suppliers, customers and others;
4. the impact of the company's operations on the community and the environment;
5. the desirability of the company maintaining a reputation for high standards of business conduct; and

6. the need to act fairly as between the members.[41]

In addition, large UK incorporated companies are required to describe in their strategic report (which forms part of the annual report) how the directors have regard to these matters when performing their duty to promote the success of the company.[42]

Directors' duties are owed to the company, and it would therefore be for the company, acting via its directors, to bring proceedings for a breach of duty.

In certain circumstances, shareholders may bring proceedings in the name and on behalf of the company, by way of derivative action.[43] Only a single share needs to be held for this purpose, and it can even be acquired after the event in question. However, permission of the court is required for a shareholder to continue a derivative claim, and the shareholder bringing the claim is responsible for funding the action unless the court orders the company to reimburse its costs. Remedies granted by the court will be for the benefit of the company. It is also worth noting that a breach of a director's duty under the Companies Act may generally be authorised or ratified by shareholders, or relief may be granted by the court.

Aside from their general duties under the Companies Act, directors will also be required to comply with a range of additional legal and regulatory requirements, including securities law, antitrust and competition law, and environmental, health and safety laws.

Appointment, term of office and succession

The Governance Code provides that appointments to the board should be subject to a formal, rigorous and transparent procedure and that an effective succession plan should be maintained for the board and senior management. Both appointments and succession plans should be based on merit and objective criteria and, within this context, should promote diversity of gender, social and ethnic backgrounds, and cognitive and personal strengths.[44] Responsibility for leading the board appointment process and ensuring a diverse pipeline for succession should be delegated to a nomination committee, which should ensure that both the board and its committees have a relevant combination of skills, experience and knowledge, and make recommendations to the board.[45]

The Governance Code emphasises that all directors should be subject to annual re-election by shareholders, with the Companies Act generally requiring that each director's election be voted on separately.[46] This is intended to ensure that shareholders are free to reject individual candidates.

In addition, premium listed companies that have a 'controlling shareholder' (meaning any person who, together with its concert parties, controls at least 30 per cent of the votes of the company) are required by the Listing Rules to have a dual voting structure in place for the election or re-election of independent non-executive directors to ensure that they are approved separately by both the shareholders as a whole and independently of any controlling shareholder.[47]

Notwithstanding any agreement to the contrary between the company and the director, directors of a UK incorporated company may always be removed by ordinary resolution under the Companies Act;[48] therefore, there is no concept of a classified or US-style 'staggered' board in the UK.

The Governance Code also provides that the chair of the board should not remain in post beyond nine years from the date of their first appointment to the board (with the ability to extend this for a limited time, with a clear explanation, to facilitate effective succession planning and the development of a diverse board), and that consideration should be given to the length of service of the board as a whole and membership refreshed regularly.

Board diversity

The most notable pieces of 'guidance' in the UK as regards board diversity, which have driven positive progress in recent years, are two independent UK initiatives: the FTSE Women Leaders Review (previously, the Hampton-Alexander Review) and the Parker Review, which made a series of recommendations and created a set of voluntary targets for certain companies to further gender and ethnic diversity at board and senior management levels.

The key recommendations of the Hampton-Alexander Review[49] included that companies should aim for at least 33 per cent representation of women on FTSE 350 company boards and at least 33 per cent representation of women in executive leadership teams of FTSE 100 companies by 2020. The women on boards target was achieved in the aggregate for the FTSE 350 at the end of 2020, but the women in leadership target fell just short of the 33 per cent target for the aggregated FTSE 350 at 29 per cent.

The FTSE Women Leaders Review, which subsequently replaced the Hampton-Alexander Review, recommended FTSE 350 companies having 40 per cent of women on boards and leadership teams and having at least one woman in the role of chair or senior independent director or one woman in the chief executive or chief financial officer role in the company by the end of 2025. An FTSE Women Leaders Review update report published in February 2024[50] found that the FTSE 350 (in aggregate) had made further progress in 2023, moving up to 42.1 per cent representation of women on boards[51] (an all time high and up from 40.2 per cent in 2022, a point at which the recommended target had been met by the FTSE 350 (in aggregate), three years ahead of the target end date).[52] The update report also shows improvements in representation of women on FTSE 350 leadership teams,[53] which in 2023 stood at 34.5 per cent[54] (up from 33.5 per cent in 2022).[55]

The Parker Review[56] recommended that boards of FTSE 100 companies should have at least one director from a minority ethnic background on boards by December 2021 and FTSE 250 companies meeting the target by December 2024. In its update report from March 2023,[57] the Parker Review also set additional targets, for both FTSE 350 companies and certain large private companies, as regards senior management, notably that:

1. each FTSE 350 company should have, by December 2023, set its own percentage target for senior management positions (comprising members of the executive committee and senior managers who report directly to them) that will be occupied by ethnic minority executives in December 2027. In addition to the Parker Review collecting the set targets, FTSE 350 companies will be expected to report their chosen target in their annual reports published in 2024; and
2. 50 of the UK's largest private companies have been set the target of having at least one ethnic minority director on their main board by December 2027, with each such private company also being asked to set its own target, by December 2024, for

the percentage of ethnic minority executives within its senior management team in December 2027.

In terms of ethnic diversity on UK boards, a Parker Review update report published in March 2024[58] showed that at the end of 2023, 96 per cent of FTSE 100 companies had met the December 2021 board target (the same percentage as last year), with 79 per cent of FTSE 250 companies that submitted data meeting the December 2024 target at the end of 2023 (up from 67 per cent in 2022). For the FTSE 250 in aggregate, including the companies that did not submit data, 70 per cent met the target in 2023 (up from 60 per cent in 2022). In addition, 61 per cent of the private companies that submitted data met the newly set board target at the end of 2023, ahead of the December 2027 deadline. For the 50 private companies in aggregate, including the companies that did not submit data, 44 per cent met the target as at December 2023.

In terms of ethnic diversity within senior management positions, the update report also showed that averaging the data of the 82 FTSE 100 companies that provided their December 2023 data, ethnic minority executives made up 13 per cent of their senior management. FTSE 250 companies reported a similar figure with ethnic minority executives comprising 12 per cent of their senior management. Regarding targets that the reporting FTSE 100 and FTSE 250 companies have set for the ethnic minority share of their senior management teams in December 2027, the reporting FTSE 100 companies set an average target of 17 per cent (with targets ranging from 5 per cent to 45 per cent across the 48 FTSE 100 companies that have set targets in December 2023), and FTSE 250 companies set an average target of 15.5 per cent (with targets ranging from 5 per cent to 50 per cent across the 50 FTSE 250 companies that set targets in December 2023).

In addition to the requirement that companies include in their annual reports a description of their diversity policy, its objectives, how it is being implemented and the results, the Listing Rules support the above recommendations by requiring premium and standard listed companies to include a narrative statement (on a 'comply or explain' basis) in their annual reports, setting out whether the listed company has met the specific gender and ethnicity targets set out in the Listing Rules,[59] as at a specific reference date chosen by the company, within its accounting period. If any of the specified targets are not met by the listed company, it needs to include a statement explaining the reasons. Companies also need to provide numerical data, in the form of two prescribed tables set out in the annexes to the Listing Rules, on the diversity of the board and executive management by gender and ethnicity, as well as information on the approach taken to collect the data required for these diversity disclosures. The rules started to apply to accounting periods beginning on or after 1 April 2022 (with reporting against these requirements being seen in annual reports published from the second quarter of 2023).

Corporate disclosure

i Overview of disclosure regime

Premium listed companies are subject to a range of periodic reporting and continuous disclosure obligations under the Companies Act and related legislation or under a combination of the Listing Rules, DTRs and UK Market Abuse Regulation, including:

1. periodic financial reporting including publication of a half-yearly report and annual financial report and accounts;
2. specific disclosures with respect to significant corporate and related-party transactions, capital raisings and other changes to a company's share capital, and changes to the board or any of its directors' details; and
3. disclosure of inside information in relation to a company's securities.

These disclosure obligations are enforced through review of financial disclosure by the FRC and review of compliance with continuing obligations by the FCA and supported by statutory prohibitions on market misconduct, including market abuse, insider trading and market manipulation.

ii Periodic financial reporting

The most notable periodic financial reporting obligation is prescribed by a combination of the Companies Act, Listing Rules and DTRs, pursuant to which a UK premium listed company is required to prepare and publish audited annual financial statements and to make those available to shareholders within four months of the financial year end and in time for the annual general meeting.[60]

The audited financial statements form one part of the company's annual report, which, in addition to the financial statements, must include elements of narrative reporting. The remaining components of the annual report are the strategic report, the directors' report, the directors' remuneration report and an auditor's report (with respect to the annual financial statements and the auditable parts of the directors' remuneration report, the strategic report and the directors' report).

In providing guidance on the preparation of the strategic report, the FRC has emphasised that the purpose of the strategic report is to provide information for shareholders and help them to assess how the directors have performed their duty to promote the success of the company and, in doing so, had regard to the matters set out in the Companies Act.[61] The strategic report should reflect the board's view of the company and provide context of the related financial statements. In addition, the strategic report must include an explanation of the main trends and factors affecting the company, a description of its principal risks and uncertainties, and an analysis of the development and performance of the business, including key performance indicators.[62]

In contrast, a directors' report[63] is to provide narrative reporting on certain prescribed items, to supplement the company's financial statements in its annual accounts, and the directors' remuneration report[64] is to provide information to investors on various aspects of directors' remuneration, to provide transparency with regard to, and links between, executive performance and executive pay.

In addition, the DTRs require the publication of a half-yearly financial report no later than three months after the end of the six-month reporting period, which must contain

a condensed set of financial statements, responsibility statements and an interim management report, which, in turn, must include (at least) an indication of important events that have occurred during the six-month reporting period (and their impact on the condensed set of financial statements) and a description of the principal risks and uncertainties for the remaining six months of the financial year.[65]

Environmental, social and governance

i Risk management and internal controls

Effective risk management continues to be a key theme in the context of corporate social responsibility. One of the key principles of the Governance Code is that the board should establish procedures to manage risk, determine the nature and extent of the principal risks the company is willing to take in order to achieve its long-term strategic objectives, and oversee the internal control framework.[66] Detailed guidance around risk management is included in the FRC Guidance on Risk Management, Internal Control and Related Financial and Business Reporting (September 2014),[67] which listed companies should be aware of.

ii Climate-related disclosure

There continues to be significant focus on developing climate-related financial disclosure requirements. In 2022, the UK became the first G20 country to make it mandatory for Britain's largest businesses to disclose their climate-related risks and opportunities in line with the Task Force on Climate-related Financial Disclosures[68] (TCFD).[69] For financial years beginning on or after 6 April 2022, the Companies Act has introduced mandatory (TCFD-aligned) climate-related financial disclosures for UK incorporated large listed companies, large private companies and limited liability partnerships.[70]

In addition, the Listing Rules require both premium and standard listed companies to include a statement in their annual reports that sets out whether the annual report (or another document) contains disclosures consistent with the TCFD recommendations and recommended disclosures, or to explain the reasons why if they have not made such disclosures.[71] The FCA issued guidance emphasising that it expects all in-scope companies ordinarily to be able to make climate-related financial disclosures consistent with the TCFD recommendations.[72] The government has also provided commentary, in the form of non-binding guidance, on the interaction between the two regimes, noting that, since both sets of requirements are based on the TCFD recommendations and disclosures, there is a 'high degree of consistency in the requirements', and that where a UK incorporated listed company is subject to both sets of requirements, 'disclosure in a manner consistent with all of the TCFD recommendations and recommended disclosures for the purposes of the Listing Rules is likely to involve the use of similar information to the disclosure required under the Companies Act and is therefore normally likely to meet the necessary requirements'.[73]

In terms of climate-related developments in 2023, in June 2023, the ISSB published its inaugural global sustainability disclosure standards IFRS S1 (General Requirements for Disclosure of Sustainability-related Financial Information) and IFRS S2 (Climate-related

Disclosures), which are aimed at setting a global sustainability standards baseline and assisting companies in disclosing their sustainability and climate-related risks and opportunities. IFRS S1 was designed to provide a 'set of disclosure requirements to enable companies to communicate to investors about the sustainability-related risks and opportunities they face over the short, medium and long-term; while IFRS S2 sets out specific climate-related disclosures and is designed to be used in conjunction with IFRS S1'.[74] The two reporting standards are effective for annual reporting periods beginning on or after 1 January 2024; however, with respect to the UK, the standards are yet to be assessed and endorsed by the government. It is expected that IFRS S1 and IFRS S2 will be endorsed and adopted in the UK by way of creation of the 'UK Sustainability Disclosure Standards' (UK SDS). In its guidance, the government confirmed that the UK SDS will 'form the basis of any future requirements in UK legislation or regulation for companies to report on risk and opportunities relating to sustainability matters, including risks and opportunities arising from climate change'.[75] It is expected that the Secretary of State for Business and Trade will consider the endorsement of IFRS S1 and IFRS S2, to create the UK SDS, by July 2024.[76] Once endorsed, the government confirmed that 'the UK SDS may be referenced in any legal or regulatory requirements for UK entities, but that decisions to require disclosure will be taken independently by the UK government for UK registered companies and limited liability partnerships, and by the FCA for UK listed companies'.[77]

In September 2023, the Taskforce on Nature-related Financial Disclosures published its final recommendations for nature-related risk management and disclosures (the TNFD Recommendations),[78] which include 14 recommended disclosures and a suite of additional implementation guidance, to assist companies in 'identifying, assessing, managing and disclosing nature-related dependencies, impacts, as well as risks and opportunities'. The TNFD Recommendations build on the TCFD recommendations and are consistent with the ISSB global sustainability standards in order to 'enable integrated climate-and-nature-related reporting'.[79] As at the time of writing, adoption of the TNFD Recommendations is voluntary, and it remains to be seen whether TNFD-aligned disclosures will be incorporated into legal or regulatory requirements of UK entities.

Finally, in October 2023, the UK Transition Plan Task Force, which was launched by HM Treasury in 2022 to develop a 'gold standard for best practice climate transition plans', published its final disclosure framework and implementation guidance (the TPT Disclosure Framework), which is aimed at 'helping organisations set out a credible and robust climate transition plan as part of annual reporting on forward business strategy'.[80] It is worth noting that the TPT Disclosure Framework has been designed to be consistent with and build on the ISSB sustainability disclosure standards, in particular IFRS S2, by providing disclosure recommendations that entities can use as guidance in reporting on the transition plan-related aspects of IFRS S2.[81]

With respect to these climate-related developments, the FCA is expected to consult in the first half of 2024 on its proposals to implement disclosure rules referencing the UK-endorsed IFRS S1 and IFRS S2 for listed companies.[82] On the assumption that the government's IFRS S1 and IFRS S2 endorsement process is completed within the anticipated time frame, the FCA intends to finalise its policy position by the end of 2024, with a view to bringing the new requirements into force for accounting periods on or after 1 January 2025 (with the first reporting beginning from 2026).[83] At the same time as consulting on its approach with respect to the ISSB standards, the FCA intends to

consult on its guidance that will set out its expectation for listed companies' transition plan disclosures (drawing on the TPT Disclosure Framework).[84]

Shareholders

i Shareholder rights and powers

Equality of treatment

Equality among shareholders is a dominant feature within the UK corporate governance framework for listed companies.

Premium listed companies must ensure that they treat all holders of the same class of shares equally in respect of the rights attaching to those shares.[85] Further, a listed company must not selectively disclose information to third parties, including to shareholders. Instead, information must be made available to all shareholders at the same time. In certain circumstances, companies may look to inform major shareholders of significant proposals so as to seek their views ahead of proceeding with the proposal; however, disclosing any non-public inside information to selected shareholders will generally preclude the relevant shareholders from dealing in the company's securities until such time when the disclosed information is no longer treated as price-sensitive, inside information.

Separately, in the event of a proposal to acquire 30 per cent or more of voting rights of a company subject to the City Code on Takeovers and Mergers (the Takeover Code), an offer is required to be made to all shareholders on the same terms.[86]

Reservation of certain matters for shareholders

Although the board is responsible for the management of the company and the company's powers are generally exercised by the board acting collectively, certain matters are reserved for shareholders of a UK company under the Companies Act and must be approved by ordinary resolution (passed by a simple majority) or special resolution (passed by a 75 per cent majority). An ordinary resolution is the more common and is used, inter alia, to authorise directors to allot shares, approve the directors' remuneration policy, remove directors from office, ratify board decisions and, for premium listed companies, approve significant transactions or transactions with related parties. Special resolutions, on the other hand, are required to disapply pre-emption rights, reduce a company's share capital (which is commonly used to create distributable reserves) or amend the company's articles of association. Generally, voting is based on the principle of 'one share, one vote'.

Ability to make a shareholder proposal

In addition, if a shareholder (or shareholders) of a UK company wishes to make a proposal, it can require the company to call a general meeting under the Companies Act, provided that it holds at least 5 per cent of the paid-up share capital that carries voting rights

(excluding treasury shares). If a valid requisition request is made, the board must call a general meeting within 21 days and the meeting itself must be held not more than 28 days after the date of the notice of the meeting. Where the board fails to do so, the shareholder who requisitioned the meeting (or, where more than one shareholder, any of them representing more than half of the total voting rights of the requisitionists) may himself or herself call the meeting.[87]

Additional rights are available to a shareholder (or shareholders) holding at least 5 per cent of the total voting rights (excluding voting rights attached to treasury shares) and to any group of 100 shareholders with the right to vote on the resolution (provided that each holds, on average, £100 of paid-up share capital). The latter may be satisfied by an activist shareholder holding less than 5 per cent voting rights by splitting its shares between nominee accounts. A shareholder satisfying these criteria is permitted to require resolutions to be put before an annual general meeting of a public company or to require the company to circulate a statement to shareholders.[88]

Consultation if adverse shareholder vote

Finally, the Governance Code emphasises that when 20 per cent or more of votes have been cast against the board recommendation for a resolution, the company should explain, when announcing voting results, what actions it intends to take to consult shareholders in order to understand the reasons behind the result. The board is then required to provide an update on the views received from shareholders and actions taken by no later than six months after the shareholder meeting, in addition to providing a summary in its annual report.[89]

Information relating to shareholder dissent can be viewed in the public register[90] published by the Investment Association, which details companies in the UK FTSE All Share that have received significant opposition by shareholders to a resolution or a written statement, or any resolution withdrawn before a shareholder vote. This helps to identify which companies are acknowledging shareholder dissent and how they are addressing their shareholders' concerns.

ii Shareholders' duties and responsibilities

Limited duties and responsibilities

Shareholders of English companies are subject to very few restrictions by way of duties and responsibilities with regard to their shareholding. Generally, except in limited circumstances (such as with regard to amending articles of association or voting on a proposed transaction in which a controlling shareholder is interested), there is no restriction on shareholders exercising their voting rights to promote their own interests and, unlike directors, shareholders do not owe any fiduciary duties to the company or other shareholders.

Notification of interests

Under the DTRs, shareholders are required to give notice of an acquisition of shares within two trading days where they acquire (directly or indirectly through other group entities), in aggregate, 3 per cent or more of the voting rights in a UK company to which DTR 5 applies. A further notice has to be given each time a percentage holding above 3 per cent increases or decreases through 1 per cent thresholds (rounding down to the nearest whole percentage point).[91]

Controlling shareholders

For premium listed companies with a 'controlling shareholder', there is a mandatory requirement under the Listing Rules to have a relationship agreement in place to ensure that the controlling shareholder complies with certain legally binding undertakings set out in the Listing Rules.[92]

Market guidance

Shareholders are expected by custom and market practice to follow and respect institutional investor guidelines, the Governance Code and the UK Stewardship Code, last published by the FRC in 2020, which sets out good practice for institutional investors seeking to engage with boards of listed companies and also applies on a comply or explain basis.[93]

iii Shareholder activism

Shareholder activism continues to grow in prevalence in both the UK and, more generally, Europe. While shareholder activism in the US has tended to be viewed as more adversarial, hostile or opportunistic in nature, in the UK there is growing support for activist investors, particularly as many have taken a more collaborative approach to activism and engaged with companies privately instead of taking public action at the outset. Activists in the UK are not restricted to any particular industries. Natural targets are characterised by poor share price performance compared with industry peers, high cash reserves, businesses that can be sold or spun off, corporate governance concerns or a receptive shareholder base. Companies that regularly engage with their major shareholders are less vulnerable to challenge from an activist shareholder. US hedge funds and alternative investors with event-driven strategies are often considered to be the principal shareholder activists in the UK. However, in recent years, long-term institutional investors have become increasingly involved in activist campaigns (outside takeover or merger arbitrage situations) and, on occasion, have formed alliances with hedge funds or alternative investors for this purpose. The apparent behavioural shift of institutional shareholders is due to a number of factors, including the publication of best practice guidance aimed at promoting effective engagement between institutional shareholders and listed companies and the introduction of 'say-on-pay' legislation.

iv Takeover defences

Notwithstanding a rise in shareholder activism in the UK generally, structural or 'poison pill' defences are not prevalent in the UK, and their adoption would likely constitute a breach

of fiduciary duties by the directors of a UK company. Further, in the context of a possible takeover offer for a UK listed company, the Takeover Code prohibits a target company's board from denying its shareholders the opportunity to decide on the merits of a bid, and prohibits the board from taking certain actions without shareholder approval during the course of an offer or if it believes that an offer might be imminent, which would include issuing shares, selling material assets or entering into non-ordinary course contractual arrangements.

In any event, shareholder consent would be required to implement any poison pill involving an amendment to the company's capital structure or rights attaching to its share capital, which is unlikely to be granted by UK institutional investors, and for companies with or seeking a premium listing, it is unlikely to be consistent with the requirements of the Listing Rules.

v Engagement with shareholders

The Governance Code recommends that companies ensure satisfactory dialogue with shareholders as one of its main principles.[94] This is supported by guidance published by shareholder representative groups, including the Investment Association and Pension and Lifetime Savings Association, which recommend that dialogue takes place at regular intervals throughout the year.

Best practice guidance also recommends that directors be involved in shareholder engagement efforts; they should be accessible to shareholders and should make themselves available to engage on any issues (whether or not related to a vote at a company's general meeting). While, in practice, most shareholder contact is with the chief executive officer and finance director, the Governance Code emphasises the role of the chair and senior independent director for maintaining shareholder relations. In particular, the chair must ensure that the board as a whole has a clear understanding of the views of shareholders.[95]

Outlook and conclusions

Putting the corporate reporting, governance and climate-related developments that we have seen in 2023 to one side, in terms of future developments affecting UK listed companies more broadly, the FCA had been consulting on its proposed reforms to the UK listing regime, including its proposal for the creation of a single listing category for shares in commercial companies (to replace the current premium and standard listing segments) as well as modified and simplified eligibility and ongoing rules applicable to UK listed companies.[96] Under the FCA's proposals,[97] premium listed issuers of equity shares in commercial companies would automatically transfer to the new 'commercial companies category', while their standard listed counterparts for whom it is their only or 'primary' equity listing would not. Instead, the FCA is proposing to create a new 'transition category' for such existing standard listed issuers of equity shares in commercial companies, which would maintain the status quo for these companies (i.e., with the continuing obligations under Listing Rule 14 remaining unaffected). As outlined in the FCA's consultation paper,[98] the proposed 'transition category' would not have an end date at the point of implementation of the category, meaning there would not be a deadline for standard listed issuers to

transfer out of the category (instead, these issuers will be able to apply to transfer to the 'commercial companies category' as and when they are ready and eligible to do so). The 'transition category' would, however, be closed to new applicants and to transfers from other categories, and the FCA would continue to review its use and relevance. As regards the time frame for these proposed reforms, it is expected that the FCA will publish a revised set of UK Listing Rules via a policy statement at the start of the second half of 2024, with a very short period between publication and implementation of the new rules. UK listed companies and other relevant stakeholders should therefore keep a close watch on the anticipated developments.

Putting the corporate reporting, governance and climate-related developments that we have seen in 2023 to one side, in terms of future developments affecting UK listed companies more broadly, the FCA had been consulting on its proposed reforms to the UK listing regime, including its proposal for the creation of a single listing category for shares in commercial companies (to replace the current premium and standard listing segments) as well as modified and simplified eligibility and ongoing rules applicable to UK listed companies.[96] Under the FCA's proposals,[97] premium listed issuers of equity shares in commercial companies would automatically transfer to the new 'commercial companies category', while their standard listed counterparts for whom it is their only or 'primary' equity listing would not. Instead, the FCA is proposing to create a new 'transition category' for such existing standard listed issuers of equity shares in commercial companies, which would maintain the status quo for these companies (i.e., with the continuing obligations under Listing Rule 14 remaining unaffected). As outlined in the FCA's consultation paper,[98] the proposed 'transition category' would not have an end date at the point of implementation of the category, meaning there would not be a deadline for standard listed issuers to transfer out of the category (instead, these issuers will be able to apply to transfer to the 'commercial companies category' as and when they are ready and eligible to do so). The 'transition category' would, however, be closed to new applicants and to transfers from other categories, and the FCA would continue to review its use and relevance. As regards the time frame for these proposed reforms, it is expected that the FCA will publish a revised set of UK Listing Rules via a policy statement at the start of the second half of 2024, with a very short period between publication and implementation of the new rules. UK listed companies and other relevant stakeholders should therefore keep a close watch on the anticipated developments.

Endnotes

1 Will Pearce is a corporate partner, Neil Sharpe is an executive compensation counsel and Sophie Vacikar Bessisso is a corporate associate at Davis Polk & Wardwell London LLP. ^ Back to section

2 See https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf. ^ Back to section

3 See https://www.frc.org.uk/directors/corporate-governance. ^ Back to section

4 Save for existing Provision 29, which will continue to apply until 1 January 2026. ^ Back to section

5 LR 9.8.6R(5) and LR 9.8.6R(6). ^ Back to section

6 See https://www.theqca.com/corporate-governance/. ^ Back to section

7 See https://www.frc.org.uk/directors/corporate-governance/governance-of-large-private-companies. ^ Back to section

8 See 'Financial Reporting Council: 3-Year Plan 2023-2026' (March 2023) available at https://media.frc.org.uk/documents/Financial%20Reporting%20Council%3A%203%2-0Year%20Plan%202023%20/26.pdf. ^ Back to section

9 'Restoring trust in audit and corporate governance', Department for Business, Energy and Industrial Strategy (May 2022) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079594/restoring-trust-in-audit-and-corporate-governance-govt-response.pdf. ^ Back to section

10 See https://www.gov.uk/government/news/burdensome-legislation-withdrawn-in-latest-move-to-cut-red-tape-for-businesses. ^ Back to section

11 See 'UK Corporate Governance Code Consultation Document' (May 2023) https://media.frc.org.uk/documents/Corporate_Governance_Code_Consultation_document.pdf. ^ Back to section

12 See UK Corporate Governance Code (January 2024) available at https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/uk-corporate-governance-code/. Note also that the FRC published updated guidance that accompanies the revised UK Corporate Governance Code (January 2024) on 29 January 2024. The new guidance combines the previously published FRC guidance: The Guidance on Board Effectiveness, Guidance on Audit Committees and Guidance on Risk Management Internal Controls and Related Financial and Business Reporting. For the revised guidance, see https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/corporate-governance-code-guidance/. ^ Back to section

13 See https://media.frc.org.uk/documents/UK_Corporate_Governance_Code_2024_Key_Changes.pdf. ^ Back to section

14 See Provision 29 of the revised UK Corporate Governance Code (January 2024). ^ Back to section

15 See paragraphs 274 and 275 of the revised UK Corporate Governance Code Guidance (January 2024) available at https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/corporate-governance-code-guidance/#section.7eba31e6. ^ Back to section

16 Until then, Provision 29 of the existing UK Corporate Governance Code (July 2018) will continue to apply. ^ Back to section

17 Principle A, UK Corporate Governance Code (July 2018). ^ Back to section

18 Principle G, UK Corporate Governance Code (July 2018). ^ Back to section

19 Provision 11, UK Corporate Governance Code (July 2018). ^ Back to section

20 See Article 115 of Diageo plc Articles of Association adopted on 28 September 2023 for an example of written board resolutions passed by majority. ^ Back to section

21 See https://www.frc.org.uk/getattachment/61232f60-a338-471b-ba5a-bfed25219147/2018-Guidance-on-Board-Effectiveness-FINAL.PDF. Note that updated FRC guidance that accompanies the revised UK Corporate Governance Code (January 2024) was published by the FRC on 29 January 2024. ^ Back to section

22 Paragraph 28, Financial Reporting Council Guidance on Board Effectiveness (July 2018). ^ Back to section

23 Principle F, UK Corporate Governance Code (July 2018). ^ Back to section

24 Provision 9, UK Corporate Governance Code (July 2018). ^ Back to section

25 Provision 12, UK Corporate Governance Code (July 2018). ^ Back to section

26 Provision 5, UK Corporate Governance Code (July 2018). See also 'Gathering the views of the workforce', FRC Guidance on Board Effectiveness (2018). ^ Back to section

27 Provision 17, UK Corporate Governance Code (July 2018). ^ Back to section

28 With the exception of companies below FTSE 350 throughout the year immediately prior to the reporting year, which require only two. See Provision 24, UK Corporate Governance Code (July 2018). ^ Back to section

29 Provisions 24 and 25, UK Corporate Governance Code (July 2018). Note that Provisions 25 and 26 have been updated in the revised UK Corporate Governance Code (January 2024) to reflect the 'Minimum Standard: Audit Committees and the External Audit' and to remove duplicative language. ^ Back to section

30 Provisions 32 and 33, UK Corporate Governance Code (July 2018). ^ Back to section

31 Paragraph 62, FRC Guidance on Board Effectiveness (July 2018). ^ Back to section

32 Section 439A of the Companies Act 2006, as amended. ^ Back to section

33 Sections 226B and 226E of the Companies Act 2006, as amended. ^ Back to section

34 Section 439 of the Companies Act 2006, as amended. ^ Back to section

35 Principles P, Q and R and Provisions 32 to 41, UK Corporate Governance Code (July 2018). ^ Back to section

36 Sections 171 to 177 of the Companies Act 2006, as amended. ^ Back to section

37 Section 179 of the Companies Act 2006, as amended. ^ Back to section

38 Section 170 of the Companies Act 2006, as amended. ^ Back to section

39 A body corporate is not to be regarded as a shadow director of any of its subsidiary companies for the purposes of 'certain specified provisions' under the Companies Act by reason only that the directors of the subsidiary are accustomed to act in accordance with its directions or instructions (Section 251(3) of the Companies Act 2006, as amended). ^ Back to section

40 Section 170 of the Companies Act 2006, as amended. ^ Back to section

41 Section 172(1) of the Companies Act 2006, as amended. See also 'GC100 guidance on directors' duties: section 172 and stakeholder considerations' (October 2018) available at https://uk.practicallaw.thomsonreuters.com/Browse/Home/About/GC100 for market guidance on compliance with the requirements of Section 172. ^ Back to section

42 Sections 172(1) and 414CZA of the Companies Act 2006, as amended. ^ Back to section

43 Sections 260 to 269 of the Companies Act 2006, as amended. ^ Back to section

44 Principle J, UK Corporate Governance Code (July 2018). Note that Principle J has been amended in the revised UK Corporate Governance Code (January 2024), to promote diversity, inclusion and equal opportunity, without referencing specific groups. The list of diversity characteristics has been removed to indicate that diversity policies can be wide-ranging. ^ Back to section

45 Provision 17, UK Corporate Governance Code (July 2018). ^ Back to section

46 Provision 18, UK Corporate Governance Code (July 2018), and Section 160 of the Companies Act 2006, as amended. ^ Back to section

47 LR 6.9.1, LR 9.2.2ER and LR 9.2.2FR. ^ Back to section

48 Section 168 of the Companies Act 2006, as amended. ^ Back to section

49 'Hampton-Alexander Review: FTSE Women Leaders: Improving gender balance in FTSE Leadership' (November 2016) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf. ^ Back to section

50 'FTSE Women Leaders Review: Achieving Gender Balance' (February 2024) available at https://ftsewomenleaders.com/wp-content/uploads/2024/02/ftse-women-leaders-report-feb-2024.pdff. ^ Back to section

51 Information as at 11 January 2024. ^ Back to section

52 As at the date of the update report, 29 FTSE 350 companies were still below the 33 percent by 2020 board target. ^ Back to section

53 Comprises members of the executive committee and direct reports to the executive committee on a combined basis. ^ Back to section

54 Information as at 31 October 2023. ^ Back to section

55 As at the date of the update report, 115 FTSE 350 companies were still below the 33 per cent by 2020 leadership target. ^ Back to section

56 'A Report into the Ethnic Diversity of UK Boards: Sir John Parker: The Parker Review Committee' (12 October 2017) available at https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2017-report-final.pdf. ^ Back to section

57 'Improving the Ethnic Diversity of UK Business: An update report from the Parker Review' (March 2023) available at https://www.ey.com/en_uk/news/2023/03/parker-review-announces-new-targets-to-improve-ethnic-diversity-of-ftse-350-company-boards. ^ Back to section

58 'Improving the Ethnic Diversity of UK Business: An update report from the Parker Review' (March 2024) available at https://parkerreview.co.uk/wp-content/uploads/2024/03/The-Parker-Review-March-2024.pdf. ^ Back to section

59 Under LR 9.8.6R(9), companies need to include a statement setting out whether they have met the following targets on board diversity as at a chosen reference date within their accounting period: (1) at least 40 per cent of the individuals on their boards of directors are women; (2) at least one of the positions of chair, chief executive, chief financial officer or senior independent director is held by a woman; and (3) at least one individual on their board of directors is from a minority ethnic background. ^ Back to section

60 Part 15 (Accounts and reports) of the Companies Act 2006, as amended, DTR 4.1 (Annual financial report) and LR 9.8 (Annual financial report). ^ Back to section

61 Section 172 of the Companies Act 2006, as amended. ^ Back to section

62 Sections 414C, 414CZA, 414CA and 414CB of the Companies Act 2006, as amended, and FRC Guidance on the Strategic Report (June 2022) available at https://www.frc.org.uk/getattachment/343656e8-d9f5-4dc3-aa8e-97507bb4f2ee/Strategic-Report-Guidance_2022.pdf. ^ Back to section

63 Sections 415 to 419A of the Companies Act 2006, as amended. ^ Back to section

64 Sections 420 to 422A of the Companies Act 2006, as amended. ^ Back to section

65 DTR 4.2 (Half-yearly financial reports). ^ Back to section

66 Principle O, UK Corporate Governance Code (July 2018). Note that Principle O has been amended in the revised UK Corporate Governance Code (January 2024) to make boards responsible not only for establishing, but also for maintaining, an effective risk management and internal control framework. ^ Back to section

67 See Guidance on Risk Management, Internal Control and Related Financial and Business Reporting (September 2014) available at https://www.frc.org.uk/getattachment/d672c107-b1fb-4051-84b0-f5b83a1b93f6/Guidance-on-Risk-Management-Internal-Control-and-Related-Reporting.pdf. Note that updated FRC guidance that accompanies the revised UK Corporate Governance Code (January 2024) was published by the FRC on 29 January 2024. ^ Back to section

68 TCFD Recommendations and Recommended Disclosures (June 2017) available at https://www.fsb-tcfd.org/recommendations/. ^ Back to section

69 See https://www.gov.uk/government/news/uk-to-enshrine-mandatory-climate-disclosures-for-largest-companies-in-law. ^ Back to section

70 Companies that fall within the scope include: (1) all UK companies that are currently required to produce a non-financial information statement, being UK companies that have more than 500 employees and either have transferable securities admitted to trading on a UK regulated market or are banking companies or insurance companies (i.e., relevant public interest entities); (2) UK registered companies with securities admitted to AIM, with more than 500 employees; (3) UK registered companies not included in the categories above that have more than 500 employees and a turnover of more than £500 million; (4) large limited liability partnerships (LLPs) that are not traded or banking LLPs and that have more than 500 employees and a turnover of more than £500 million; and (5) traded or banking LLPs that have more than 500 employees. The in-scope companies will be required to include the mandatory disclosures in the 'new' Non-Financial and Sustainability Information Statement in the Strategic Report. See 'Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs', Department for Business, Energy and Industrial Strategy (February 2022) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf. ^ Back to section

71 LR 9.8.6R(8). ^ Back to section

72 See https://www.fca.org.uk/publication/primary-market/tn-802-1.pdf and https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-42 and LR 9.8.6EG(2). ^ Back to section

73 Sections 414CA and 414CB of the Companies Act 2006, as amended, and 'Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs', Department for Business, Energy & Industrial Strategy (February 2022) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf. ^ Back to section

74 See https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/ and https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s1-general-requirements/ and https://www.ifrs.org/issued-standards/ifrs-sustainability-standards-navigator/ifrs-s2-climate-related-disclosures/. ^ Back to section

75 See https://www.gov.uk/guidance/uk-sustainability-disclosure-standards. ^ Back to section

76 ibid. ^ Back to section

77 ibid. ^ Back to section

78 See 'Recommendations of the Taskforce on Nature-related Financial Disclosures' (September 2023) available at https://tnfd.global/wp-content/uploads/2023/08/Recommendations_of_the_Taskforce_on_Nature-related_Financial_Disclosures_September_2023.pdf?v=169511866-1. ^ Back to section

79 ibid. See also https://tnfd.global/wp-content/uploads/2023/10/FINAL-18-09-23-TNFD-final-recommendations-release-1.pdf. ^ Back to section

80 See 'Transition Plan Taskforce, Disclosure Framework' (October 2023) available at https://transitiontaskforce.net/wp-content/uploads/2023/10/TPT_Disclosure-framework-2023.pdf. See also 'TPT Summary Recommendations' available at https://transitiontaskforce.net/wp-content/uploads/2023/10/TPT-Summary-Recommendations.pdf. ^ Back to section

81 ibid. ^ Back to section

82 'FCA Primary Market Bulletin 45' available at https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-45. ^ Back to section

83 ibid. ^ Back to section

84 ibid. ^ Back to section

85 LR 7.2.1A. ^ Back to section

86 Rule 9.1 of the City Code on Takeovers and Mergers, available at https://code.thetakeoverpanel.org.uk/. ^ Back to section

87 Sections 303, 304 and 305 of the Companies Act 2006, as amended. ^ Back to section

88 Sections 338A and 340A of the Companies Act 2006, as amended. ^ Back to section

89 Principle D and Provisions 3 and 4, UK Corporate Governance Code (July 2018). ^ Back to section

90 The register can be accessed at https://www.theia.org/public-register. ^ Back to section

91 DTR 5 (Notification of the acquisition or disposal of major shareholdings). ^ Back to section

92 LR 6.5 (Controlling shareholders). ^ Back to section

93 See https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf. Note that the FRC confirmed that it is due to review the UK Stewardship Code in 2024, see https://www.frc.org.uk/news-and-events/news/2023/11/statement-frc-policy-update/. ^ Back to section

94 Principle D, UK Corporate Governance Code (July 2018). ^ Back to section

95 Provision 3, UK Corporate Governance Code (July 2018). ^ Back to section

96 'FCA Consultation paper (CP23/31), Primary Markets Effectiveness Review: Feedback to CP23/10 and detailed proposals for listing rules reforms' (December 2023), available at https://www.fca.org.uk/publication/consultation/cp23-31.pdf. ^ Back to section

97 ibid. ^ Back to section

98 ibid. ^ Back to section

Davis Polk

Will Pearce will.pearce@davispolk.com
Neil Sharpe neil.sharpe@davispolk.com
Sophie Vacikar Bessisso sophie.vacikarbessisso@davispolk.com

Davis Polk & Wardwell LLP

Read more from this firm on Lexology