

COVID-19 Corporate Update: UK Public Companies

April 3, 2020

Corporate

COVID-19 has created many challenges for both public companies and a range of regulators tasked with ensuring market functionality and integrity. In the past few weeks, Government, regulators and advisory bodies relevant to the capital markets have moved to act quickly where they can to announce new measures or provide guidance aimed to address areas of particular and immediate concern. In other areas, shorter term actions have been announced and later supplemented with more detail when the way forward is clearer. As the national and global response to COVID-19 and its economic effects evolves, further measures are likely to follow.

I. Corporate Reporting

Publication of Annual Accounts

The unprecedented events of the COVID-19 outbreak mean that public companies may face difficulties in preparing and approving their annual audited accounts within normal legal and regulatory reporting deadlines. In response, the Government and regulators have announced temporary measures to grant relief to companies facing the challenges of corporate reporting.

- **Filing of accounts at Companies House:** Public companies are required to file their annual audited accounts with Companies House within six months of the end of their financial year. Companies House [announced on 25 March 2020](#) that businesses can apply for a three month extension for filing their accounts. Companies will need to submit an application, but those citing issues around COVID-19 will automatically be granted an extension.
- **Publication of accounts by Main Market-listed companies:** Companies with shares listed on the London Stock Exchange's Main Market are required to publish their annual financial reports at the latest four months after the end of each financial year, in accordance with the Disclosure and Transparency Rules. The FCA [announced a Statement of Policy on 26 March 2020](#) that it will not take any steps to suspend the listing of any company for breach of the relevant rule, provided that they publish financial statements within six months of their year-end, effectively awarding a two month extension. ESMA also [published a public statement on 27 March 2020](#) stating that national competent authorities are not expected to prioritise supervisory actions against issuers in respect of the upcoming deadlines regarding annual financial reports and half-yearly financial reports. Where a public company listed on the Main Market anticipates a delay beyond the four month deadline, it should inform the FCA and release an RNS announcement informing the market of the delay, the reasons for such delay and, to the extent possible, the estimated publication date.

- **Publication of accounts by AIM companies:** AIM companies are obligated to publish their accounts without delay and in any event not later than six months after the end of the financial year to which they relate. The London Stock Exchange [announced in an Inside AIM briefing on 26 March 2020](#) that AIM companies will be able to apply (through their nominated advisers) to AIM Regulation for a three month extension to the reporting deadline under AIM Rule 19.
- **Guidance for companies on reporting:** On 26 March 2020, the FCA and the Financial Reporting Council together with the Prudential Regulation Authority, [published a joint statement](#) highlighting their approach to reporting in the current period and various measures to support corporate reporting, particularly financial reporting. Among other matters, the joint statement refers to FRC guidance in relation to the preparation of audited accounts, possible modifications to the audit statement and material uncertainties faced by companies in determining their viability. Listed companies are advised to review their timetables for financial reporting and make appropriate use of the additional time afforded to ensure accurate and carefully prepared disclosures.

[ESMA has also recommended](#) that listed companies should provide qualitative and quantitative information on the actual and potential impacts of COVID-19 on their financial situation and economic performance in their financial reports (to the extent these have not yet been finalised).

Publication of Preliminary Financial Statements

The FCA asked listed companies to observe a moratorium on the publication of preliminary financial statements for at least 2 weeks commencing on 21 March 2020. The practice of issuing preliminary financial statements in advance of the full audited annual accounts is common in the UK market, but the moratorium reflects concern that this practice is currently adding unnecessary pressure on companies as they battle with an array of operational, financial and sector-related issues. This moratorium does not apply to AIM companies. The FCA has confirmed that the moratorium is voluntary and that listed companies are not prevented from making preliminary statements where they are able to do so and consider this appropriate. The FCA has subsequently announced that the moratorium will end on 5 April 2020.

Corporate Governance Reporting

On 24 March 2020, the Government Equalities Office and the Equality and Human Rights Commission [suspended enforcement of the gender pay gap reporting deadlines](#) and companies will no longer be expected to report their data for the year 2019/20.

Other corporate governance reporting requirements, including new reporting requirements in force for accounting periods commencing on or after 1 January 2019 such as the section 172 statement and statements on engagement with employees and other stakeholders, remain in force and we are not aware of any proposals to suspend or roll back these obligations at the present time.

II. Ongoing disclosure obligations under MAR

In its [Primary Market Bulletin \(Issue No. 27\)](#) published on 17 March 2020 and updated on 30 March 2020, the FCA reiterated that listed companies should continue to comply with their obligations under MAR. The bulletin advises that, in light of the rapidly changing commercial environment, listed companies should continue to evaluate whether they have inside information—that is, non-public information that is precise, relates to the company or its securities, and

which, if made public, would be likely to have a significant effect on its share price. Such information must be announced to the market, unless a delay can be justified in accordance with the rules.

The FCA emphasises that listed companies should be mindful that their own operational response to COVID-19 may in itself amount to inside information and subject to public disclosure under MAR. In similar fashion, ESMA has recommended that companies should disclose as soon as possible any relevant significant information concerning the impacts of COVID-19 on their fundamentals, prospects or financial situation.

In connection with this, the FCA has further indicated that it will continue to apply its existing rules and practice with regard to suspension of trading. As such, the FCA notes that its priorities are to assess risks to the smooth operation of the market and risks of harm to investors, and that issuers are expected to thoroughly evaluate the justification for suspension before submitting a request. The FCA will challenge the need for suspension where it considers that share price and trading volatility are better addressed by a market announcement.

III. Annual General Meetings

As part of its package to combat COVID-19, the Government published compulsory measures (the “**Stay at Home Measures**”) which, among other things, prohibit public gatherings of more than two people. The Stay at Home Measures passed into law with immediate effect on 26 March 2020 and only permit larger gatherings where people form part of the same household or if essential for work purposes.

For public companies, arrangements for holding an annual general meeting (**AGM**) will need to be adapted to take account of the Stay at Home Measures. Public companies are required to hold an AGM within six months of the end of their financial year. At the time of writing, no measures have been announced to extend the period for holding an AGM, although the Government has indicated in various other announcements that it is reviewing possible measures to assist companies with the planning of their AGMs.

Most significantly, the Stay at Home Measures will prevent shareholders from attending the AGM as attendance is not “essential work”. Based on supplementary guidance produced by the Chartered Governance Institute (ICSA) with support from other advisers and governance bodies¹, a suggested approach to holding AGMs in the current period involves the following elements:

- **Place of meeting:** a physical location for holding the AGM is still required and will need to be chosen from among, likely fairly limited, options remaining available. The company’s head office, or another location under its control, may be suitable or advisers may be able to provide access to an appropriate space on a restricted basis. Where all else fails, a household address may be used.

¹ <https://www.icsa.org.uk/assets/files/pdfs/guidance/agms-and-impact-of-covid-19-supplement-w-eb.pdf> (supplementary guidance) and <https://www.icsa.org.uk/assets/files/pdfs/guidance/agms-and-impact-of-covid-19-w-eb.pdf> (original guidance)

- **Forming a quorum and selecting a chairperson:** a minimum number of people (usually two or three shareholders, who may be directors or senior employees) will need to attend the AGM in person to form a valid meeting and should observe social distancing advice (i.e. stay three paces apart) within the meeting place. The attendance of more than two people, where required, will be “essential work” for such individuals. In addition, someone among these attendees will need to chair the meeting and it will usually be most convenient for this to be a director, relying on standing provisions in the company’s articles for his or her selection. Where no director is in attendance, a chairperson can usually be selected from among those present.
- **Director attendance:** there is typically no requirement that all or any particular number of directors attend the AGM and as such no expectation that directors travel to the AGM from within the UK or abroad should arise. Some companies may wish to make arrangements for directors who are physically absent to join the meeting by telephone, although this will not count as formal attendance.
- **Shareholder participation by proxy:** as mentioned, shareholders will be prevented from attending the AGM by the Stay at Home Measures. Under common law powers (which are typically repeated in provisions in company articles), the chairperson has broad authority to act to ensure a meeting is orderly, safe for its attendees and proceeds so that the business of the meeting can be carried out. Such powers may be relied upon to exclude any shareholder or other person (above the quorum) who tries to attend the AGM. Consequently, shareholders should be informed in advance and using unambiguous language that they may not attend the AGM in person and that they should vote on the proposed resolutions by proxy.
- **Other engagement with shareholders:** given that AGMs are often a flagship event for shareholder engagement, companies may wish to consider other methods that allow for shareholders to understand the recent activities of the company and ask questions of directors. There are no specific requirements in this regard, but companies may consider it appropriate (among other possibilities) to: (i) webcast the AGM proceedings or make a video available at a later date, (ii) invite questions from shareholders and arrange for the preparation of a written response from directors (e.g. an online Q&A) before the AGM, (iii) facilitate an online meeting, separate from and not subject to the formalities of the AGM, at which shareholders can raise questions with the directors, or (iv) offer another event later in year when shareholders and directors can meet.

Companies may need to seek individual advice on this proposed approach, including any adaptations to it required to comply with specific articles of association or other applicable legal requirements or to address any other modifications that are necessary or desirable to meet investor expectations and other commitments or preferences of the company.

Most problems in arranging AGMs will be faced by those companies that have already given notice of their AGM and may now need to alter the arrangements previously announced, including considering any need to postpone the meeting. Companies who are required to give notice of and hold their AGMs in short order will also need to act quickly to determine the appropriate arrangements and prepare their directors for these novel circumstances.

It is worth noting that the Chartered Governance Institute (ICSA) has suggested that, in the current circumstances, many companies will prefer to give 21 clear days’ notice of their AGM as required by law rather than the 20 working days’ notice that had become market practice. Investor bodies are expected to be relaxed about this, given the overriding circumstances.

Virtual and hybrid AGMs

It may also be possible to hold a virtual AGM, by which there is no physical meeting and all shareholders join by electronic means and exercise their shareholder rights electronically. However, a company would require clear authority under its articles of association to hold a virtual AGM and few companies currently have that authority in place. To date, investor bodies have generally been opposed to the use of virtual-only AGMs and additional procedural and technical hurdles involved in doing so have been off-putting for all but a few companies.

Similarly, a hybrid AGM, involving both a physical meeting with the option for shareholders to attend either physically or remotely (e.g. via phone or using online meeting tools), may be possible as and when the Stay at Home Measures are relaxed for all or some of the population. Investor groups have been generally more relaxed about the use of hybrid general meetings and have noted the possibility of using hybrid AGMs to increase investor participation in company decision making. A hybrid AGM must also be permitted under a company's articles but a proportion of companies have already amended their articles for this purpose.

It remains to be seen whether and how quickly the UK public market approach to virtual AGMs will now change. It is conceivable that some companies (that have not done so already) may now seek authority to hold virtual or hybrid general meetings, perhaps with undertakings from the directors only to use such authorities where absolutely necessary. Having the option to hold virtual or hybrid AGMs may be particularly useful for companies that may require additional general meetings in the near term to address major strategic decisions or capital raising and/or restructuring proposals, and in case social distancing measures remain in place for a protracted period or are relaxed and then reintroduced periodically.

IV. Pre-emption Rights

An important matter dealt with at AGMs is the renewal of certain authorities concerning a company's share capital, including authority to dis-apply pre-emption rights. A disapplication of pre-emption rights allows the company and the directors power to allot new shares up to a certain limit (e.g. a percentage of share capital) without first offering these new shares to existing shareholders.

The Pre-emption Group (**PEG**) provides a [Statement of Principles \(last published in 2015\)](#), which sets out guidance on this subject and offers a framework to facilitate discussion between companies and investors about appropriate thresholds for disapplication. The recommendation of PEG that investors support requests to dis-apply pre-emption rights up to 5% of issued share capital for general corporate purposes and up to a further 5% for specified acquisitions or investments has become the market standard approach.

On 1 April 2020, the PEG [announced a temporary change in policy](#) aimed to provide companies with additional flexibility to raise capital to meet the economic challenges of the COVID-19 outbreak. PEG recommended that investors, on a case-by-case basis, consider supporting issuances by companies of up to 20% of issued share capital without the application of pre-emption rights and for any purpose.

PEG further suggests that, if this additional flexibility is being sought, a company should:

- fully explain the particular circumstances relevant to the company, including how they are supporting their stakeholders;
- consult properly with a representative sample of the company's major shareholders;
- make the issue on a soft pre-emptive basis, to the extent possible—this would mean that institutional shareholders are offered the chance to participate on a pro-rata basis; and
- involve company management in the allocation process.

The change in policy by PEG applies until 30 September 2020. Some companies will want to, and have particular reasons, to request the additional authority at their current AGM. Other companies may wish to request the additional authority at a later date when justified by specific circumstances and in accordance with the procedure available do this within the Statement of Principles.

V. Dividends

As business operations become increasingly impaired by the COVID-19 outbreak, boards of directors may be reconsidering whether declaring a final dividend is still in the best interests of the company. Any changes to the board's recommendation must be communicated to the shareholders as soon as possible. Likewise, if any dividend is to be cancelled and not paid, this should be notified by the company without delay.

Under the Dividend Procedure Timetable 2020, companies are required to pay cash dividends within 30 business days of the record date. As a result of market conditions, London Stock Exchange [announced on 25 March 2020](#) that it will permit a deferral of up to 30 business days for a payment of a dividend, but no more than 60 business days after the record date. Companies must inform the Stock Situations Team of any deferral of a dividend payment without delay.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our UK Corporate practice:

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