FT INNOVATIVE LAWYERS EUROPE 2023 WINNER

Pinsent Masons

Boardroom Briefing – January 2025

A brief monthly update on corporate governance and related areas

Financial Reporting Council publishes review of corporate reporting

Having reviewed the 2024 annual reports of a selection of 130 FTSE 350 and Small Cap companies, the FRC published its review of reporting against the 2018 version of the UK Corporate Governance Code. The 2024 version of the Code (2024 Code) applies to accounting periods beginning on or after 1 January 2025.

The FRC found the overall quality of reporting remains strong, but there is still a need for more concise, outcomes-focused disclosures and enhanced reporting on risk management and internal controls. The FRC noted that 25 companies in the sample did not report at all, or did not report clearly, on whether they had reviewed the effectiveness of their internal controls. Provision 29 of the 2024 Code, which applies to accounting periods beginning on or after 1 January 2026 (i.e. 12 months after the rest of the 2024 Code), requires strengthened reporting on risk management and internal controls.

Reporting on stakeholder and workforce engagement continued to be of high quality, the FRC said, but there had been little improvement in the quality of reporting on shareholder engagement. The FRC's review found good quality reporting of directors' multiple board commitments. As we noted in the December 2023 edition, the FRC had decided not to take forward proposals in relation to "over-boarding" into the 2024 Code.

FCA issues MAR guidance in Primary Market Bulletin 52

In a recent bulletin, the FCA sets out guidance for companies on identifying and disclosing inside information under the UK Market Abuse Regulation (MAR) in three common scenarios: offer processes; preparation of periodic financial information; and CEO resignations and appointments.

The FCA reminds companies that information is precise if it indicates a set of circumstances that exist or may reasonably be expected to come into existence. On this basis, the FCA says the receipt of an offer could be inside information before it has been formally considered and recommended by the board. Press speculation and rumour may, depending on its accuracy, amount to inside information and give rise to an announcement obligation under Article 17 UK MAR.

In the FCA's Technical Note 506.2, the starting assumption is that periodic financial information could constitute inside information. Where information is sufficiently precise, it should be disclosed as soon as possible, unless the three conditions to delay are met (immediate disclosure is likely to prejudice the company's legitimate interests, delay is not likely to mislead the public, and the company is able to ensure the information remains confidential).

Where a CEO signals their intention to resign, the company must continually assess the point at which succession developments constitute inside information. The most relevant test is whether the information is precise, the FCA notes, with other factors to consider being length of service of the outgoing CEO, whether a "natural" successor exists and the reasons behind the CEO's resignation.

Companies should be cautious about the language they use to disseminate information during shareholder calls and meetings, the FCA notes, particularly when using communication apps to interact with retail shareholders. The FCA also addressed the dissemination of regulatory information where primary information providers (PIP) services are interrupted. Companies should check that an announcement has been made via their PIP before uploading the information on their own website, to avoid inadvertent unlawful disclosure.

FCA fines PDMR for MAR dealing offences

The FCA has fined a former senior executive at Wizz Air Holdings plc, a Main Market listed company, £123,500 for trading in the company's shares on multiple occasions during closed periods before the announcement of financial results, in breach of Article 19(11) MAR, and for failing to notify the company of personal trades in breach of Article 19(1) MAR. The fine imposed on Mr Andras Sebok was discounted by 30%, reflecting the early agreed settlement with the FCA. This is the first time the FCA has fined a person discharging managerial responsibilities (PDMR) for breaching Article 19(11) and only the second time a PDMR has been fined for failing to disclose personal trades under Article 19(1). We reported on the first occasion, Kevin Gorman, in the February 2020 edition.

HM Treasury publishes response to PISCES consultation

The government has published a response statement and draft regulations regarding PISCES, the proposed secondary market trading platform for the periodic trading of shares in private companies, on which we reported in the April 2024 edition. The main change to the earlier consultation is that there will be no public market style market abuse disclosure regime. Instead, the FCA will create a bespoke PISCES disclosure regime, whereby disclosures and pre- and post-trade transparency data must be shared with all investors participating in a PISCES trading event but will not need to be made public. Subject to feedback, the government intends to introduce PISCES legislation by May 2025.

High Court case clarifies law on investor claims

The High Court struck out claims by certain institutional investors in a case against Barclays Bank plc, in which the investors alleged that Barclays had published misleading information or dishonestly delayed in making important information public. To succeed in such a claim under section 90A/Schedule 10A of the Financial Services and Markets Act 2000, investors must show they relied on the information for the purpose of making their investment decisions. The judge said the reliance test requires the claimants to prove that they read or heard the representation, that they understood it in the sense which they allege was false, and that it caused them to act in a way which caused them loss. The claimants in this case were tracker funds and, as passive investors who had not read or heard the information, they failed to meet the reliance test. Read more here.

FCA imposes £40m fine for breaches of the Listing Rules

The FCA has fined Barclays plc £30m and Barclays Bank plc £10m for breaches of the (old) Listing Rules, following the banking group's failure to disclose arrangements with Qatari investors in connection with capital fundraisings in 2008. The FCA said in its final decision notices that Barclays had failed to include all necessary information in its shareholder circular for shareholders to make properly informed decisions (in breach of LR 13.3.1R(3)), failed to take reasonable care to ensure the accuracy of the information in the announcements and prospectuses (in breach of LR 1.3.3R), and failed to act with integrity towards its actual and potential shareholders (in breach of Listing Principle 3).

High Court considers Material Adverse Effect interpretation in SPA

In a recent case, the High Court considered whether a geotechnical event at a Brazilian mine occurring between exchange and completion constituted a "material adverse effect" (MAE, being very similar to a material adverse change or MAC clause) under a share purchase agreement, giving the buyer a right to terminate the agreement. In finding against the buyer, the judgement set out guidance on the interpretation of MAE clauses, including in its commentary that "material" means "significant or substantial" and that in this case, a reduction in equity value of 20% or more would be material, 15% or more might be material, and 10% would be too low to count as material.

If you would like further information on any of the topics covered, please get in touch with your usual Pinsent Masons contact or Kirsty Divers.

This note reports on topical legal developments which, while current at the time of writing, may evolve over time. This note does not constitute legal advice; specific legal advice should be taken before acting on any of the topics covered.

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