COVID-19 AND ITS EFFECT ON LISTED COMPANIES

12 MAY 2020 • ARTICLE

Companies across the world, including those whose shares are admitted to trading or listed on markets in the UK, have been significantly affected by the COVID-19 pandemic. Governments have taken many significant steps to reduce the spread of the virus, including restrictions on personal movement and compulsory shut-downs of non-essential activities. The markets have also seen large movements in share prices, exacerbating the effects of COVID-19 on listed companies.

Although it is still too early to tell what all the long-term consequences of the pandemic might be, UK regulatory bodies have taken some steps to recognise the current disruption by providing guidance and relaxing certain regulatory requirements.

> "AIM companies with a year-end between 30 September 2019 and 30 June 2020 can apply for a three-month extension to the usual six-month deadline for publishing their annual audited accounts."

This note summarises the main temporary changes to the regulatory framework announced to date and provides suggestions on how listed companies in the UK might mitigate the disruption caused by the COVID-19 pandemic.

RELAXATION IN REGULATIONS FOR AIM COMPANIES

AIM Regulation, the email enquiry and telephone service for Nominated Advisers ("Nomads"), has announced some temporary measures to assist AIM companies during the COVID-19 period:

- AIM companies (through their Nomad) can ask for a suspension in trading, at AIM Regulation's discretion, to give themselves time to prepare a regulatory announcement;
- Under normal circumstances, an AIM company's securities will be cancelled from AIM trading where they have been suspended for more than six months. AIM Regulation may now, at its discretion, extend this period to 12 months for any AIM company that has been suspended between 30 September 2019 and 1 July 2020;
- AIM companies with a year-end between 30 September 2019 and 30 June 2020 can apply through their Nomad for a three-month extension to the usual six-month deadline for publishing their annual audited accounts; and
- AIM Regulation recognises that Nomads might currently be unable to make site visits and meet directors physically before taking on a new client. These requirements have been suspended temporarily, with the expectation that they will be carried out as soon as practicable.

CHANGES TO FILING AND DISCLOSURE OBLIGATIONS

Extension of Companies House filing deadline

As from 25 March 2020, companies can apply for a three-month extension for filing their accounts, to help businesses prioritise managing the impact of COVID-19. Companies must make an application to Companies House's fast track system for the extension to apply; however, those companies that cite issues around COVID-19 in their application will automatically and immediately be granted an extension.

FCA guidance on accounts for listed companies

On 26 March 2020, the Financial Conduct Authority ("FCA") announced that in the light of the ongoing COVID-19 pandemic, there would be a temporary relaxation in the financial reporting rules for main market listed companies.

In particular, the FCA announced that such companies must complete their audited financial statements within six months from their year-end (rather than the normal four-month deadline). Notably, the FCA emphasised that the market should not draw undue adverse inferences towards companies that make use of these additional two months.

FRC guidance on accounting standards for audited accounts

Despite the temporary timing relaxations announced by the FCA, it is worth noting that there is no change to accounting standards. The Financial Reporting Council ("FRC") COVID-19 update, issued on 14 April 2020, reiterates that accounting and auditing standards on going concern have not changed, nor has FRC's increased pressure on auditors to be tough. It emphasises that auditors should appropriately challenge management on its judgments and ensure that these are supported by sufficient evidence. It goes on to explain that the deadline extensions for the publication of audited annual financial reports are partly to give companies and auditors more time to make these difficult judgements, including taking fully into account the UK Government support measures that have been announced.

Disclosure to the market

Public companies must also consider their market disclosure obligations more generally.

All companies that fall within the Market Abuse Regulations ("MAR") must consider their disclosure obligations under MAR Article 17, and, notwithstanding the FCA's announcement regarding audited financial statements, companies must continue as normal to carry out all their obligations concerning inside information as soon as possible unless a valid reason to delay disclosure exists under MAR. In addition, AIM companies must provide prompt and fair disclosure of price sensitive information to the market under AIM Rule 11.

Preparing such disclosures is a difficult task, as the impact of COVID-19 on a company is potentially very significant, but the situation is changing rapidly and there is considerable uncertainty as to the long-term effects on the economy and wider society. Companies can acknowledge this uncertainty in their disclosures and, if done in a well-reasoned and transparent manner, that could help promote shareholder confidence. Also, companies should ensure they provide balance in their disclosures by fulfilling their disclosure obligations fully, but without over-emphasising the impact of COVID-19 or setting a precedent for the level of disclosure that investors might expect in the future.

ACCESS TO CAPITAL IS LIKELY TO BE A KEY ISSUE FOR LISTED COMPANIES AS THEY NAVIGATE THROUGH THIS UNPRECEDENTED ECONOMIC SITUATION AND TRY TO MAINTAIN THEIR SOLVENCY.

SHARE ISSUANCES

Access to capital is likely to be a key issue for listed companies as they navigate through this unprecedented economic situation and try to maintain their solvency.

As part of their usual annual general meeting ("AGM") business, companies listed in the UK will typically seek authority from shareholders to issue new shares, including authority to do so free of pre-emption rights. On 1 April 2020, the Pre-Emption Group published a statement recommending that investors consider supporting issuances by companies of up to 20% of their issued share capital for general purposes, rather than the previous 5%, with an additional 5% for specified acquisitions or investments. These recommendations, which are temporary until 30 September 2020, have been endorsed by the FCA's statement of policy dated 8 April 2020. The Institutional Shareholder Services group ("ISS") has also clarified in its guidance of 8 April 2020 that its policies already allow, in exceptional circumstances, for a case-by-case analysis of proposed share issuances that exceed any normal market-specific limits on size and potential dilution, and that the COVID-19 pandemic would constitute such exceptional circumstances.

Where companies do not have the requisite shareholder approvals to issue new shares to raise capital, one option may be to utilise a cash box structure; this involves an issue of new shares for non-cash consideration (the purchase of shares of a cash box company) as shares issued for non-cash consideration are not subject to the same pre-emption rights. However, any decision on whether or not to use a cash box structure will need to balance the need for cash liquidity with potential criticism that it is being used to avoid the need for shareholder approval or dilute other shareholders.

"Any decision on whether or not to use a cash box structure will need to balance the need for cash liquidity with potential criticism that it is being used to avoid the need for shareholder approval."

WRONGFUL TRADING

Where companies are unable to raise the required capital, wrongful trading questions also require consideration. The UK Government has recently announced that it will temporarily suspend the wrongful trading provisions of the Insolvency Act 1986. These provisions are a key consideration for directors in deciding whether to commence an insolvency proceeding (liquidation or administration) due to the personal liability that directors can incur to contribute to the assets of the company if they fall foul of them. This suspension will be retroactive to 1 March 2020 and will last (at least initially) for three months. The details of how this suspension will be implemented have yet to be published and so how the suspension will work in practice is not currently clear. We have discussed this change in more detail here.

GENERAL MEETING REQUIREMENTS UNDER LISTING RULES

The FCA has also announced in its Statement of Policy of 8 April 2020 that it is temporarily relaxing the Listing Rules ("LR") relating to Class 1 transactions (LR 10.5.1R) and related party transactions (LR 11.1.7R) for which premium listed companies must usually seek approval of such transactions at a general meeting. As a result of the current pandemic, such premium listed companies can apply to the FCA for a dispensation (decided on a case-by-case basis) from the requirement to hold a general meeting. Instead, a premium listed company can take the steps set out in detail in the FCA's Technical Supplement in order to carry out such a transaction, which involves the company obtaining a sufficient number of undertakings from shareholders (who are eligible to vote under the LRs) that they approve the transaction and would vote in favour of any resolution to that effect at a general meeting were it to be held.

DEADLINES FOR HOLDING AGMS AND RULES ON HOLDING VIRTUAL AGMS

English law requires public companies to hold their AGM within six months following their accounting reference date. Given the social distancing measures that have been implemented across the UK, such companies will need to consider: (i) whether they will be able to hold their AGM within the six-month deadline, (ii) the possibility of using a virtual AGM as an alternative to a traditional AGM which takes place at a physical location, and (iii) restrictions to be put in place for any physical AGM.

The UK Government has announced that it will introduce legislation to extend the current six-month AGM deadline, though the details of such legislation have not yet been provided. The Government also intends to introduce legislation to make it easier for AGMs to take place whilst complying with the social distancing measures that have been implemented in recent months. The FRC's Q&A publication on 17 April 2020 stated that the legislation to be introduced will not *mandate* the use of "virtual-only" AGMs on the basis that virtual meetings are uncommon and largely untested in the UK ("virtual-only" AGMs are currently thought to be permitted under English law, subject to any restrictions in the company's articles, but this has not been tested in the courts). Instead, the new legislation will introduce more limited changes to how AGMs can be run. For example, companies will be permitted to hold "closed meetings" that would fulfil quorum requirements with a minimum number of people by telephone or other electronic means, in some cases temporarily giving companies the ability to override their articles of association. The FRC also states that, given the difficulty in staffing company offices due to the social distancing restrictions, the legislation is going to relax the obligation for companies to provide paper copies of certain documentation to shareholders, and allow companies to restrict the communication of notices and other meeting documentation to emails, websites and other electronic media.

> ""Virtual-only" AGMs are currently thought to be permitted under English law, but this has not been tested in the courts."

In advance of this legislation being detailed in full, we have set out below some guidance for public companies who wish to hold any form of virtual AGM under English law in its current state. Perhaps now more than ever, companies should be encouraging effective meetings which promote transparency and the sharing of information. In this regard, well-run AGMs with a "virtual" aspect could be a step in the right direction.

Are virtual annual general meetings permitted under English law?

In short, yes. Section 360A of the Companies Act 2006 ("CA 2006") (implementing an EU directive) permits companies to offer their shareholders any form of participation in an AGM by electronic means. These include: real-time transmission such as a video-conference; real-time two-way communication such as a conference call dial-in; and a mechanism such as web or app voting buttons for casting votes without the need to appoint a proxy holder who is physically present at the meeting.

Does a virtual AGM need to also have a physical meeting?

Section 311(1)(b) CA 2006 requires a notice of an AGM to state the place of the meeting. However, s360A CA 2006 states that nothing contained in Part 1 CA 2006 (which includes s311) can preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it. This has been construed to mean that s360A overrides the requirement at s311(1)(b) for a notice to state the place of the general meeting, but that interpretation has not yet been tested in the courts.

Before using a virtual AGM, companies should also check their articles of association for any prohibitions on virtual AGMs. In ordinary times, best practice would be to amend any articles that are unclear on this point to specifically allow virtual shareholder meetings. The proposed legislation will, we understand from the FRC Q&A mentioned above, go some way to allowing virtual meetings, in the form of "closed meetings" with lower quorum requirements and a clearer legal position on telephone and other forms of electronic communications at AGMs.

In any case, it is often the case that only a few shareholders attend some AGMs in person. Companies that have already called, or are currently planning, their AGMs, should inform their shareholders not to attend in person but to vote online and/or by giving the chairman a proxy, and to provide any questions in advance. Measures should also be taken to ensure that any physical meetings themselves comply with UK Government measures restricting large congregations and requiring social distancing. This would include an AGM chairman preventing entry to the AGM of anyone other than persons required to form a quorum (which will usually be satisfied by the chairman and another director/employee assuming a quorum of two). The FRC Q&A mentioned above suggests that the new legislation will also address the issue of quorum during the current social distancing restrictions.

Does a virtual AGM work in practice?

A number of English public companies have made amendments to their articles of association to allow for virtual AGMs and there is no harm having the option to be able to do so. However, it is worth noting that the Investment Association (a trade body that represents UK investment managers) has issued a statement that its members are unlikely to be supportive of amendments to articles of association which allow for "virtual-only" AGMs, though this has not stopped such amendments being approved or, in some cases, implemented. Again, the new legislation is expected to provide further clarity on managing AGMs in the current climate, albeit not going so far as to *mandate* the use of "virtual-only" AGMs.

"Virtual meetings come with a range of benefits, including a reduction in costs as a meeting venue and associated services like security and catering are not required."

The Chartered Governance Institute has also set out guidance on good practice in holding company meetings. It highlights the importance of (i) an effective communication system (whether via video link or telephone), (ii) clear instructions for joining the call and on-call conduct and (iii) a host for the call (perhaps the company secretary) who is well trained in the communication system and can troubleshoot any issues before the scheduled start of the meeting. Similarly, ISS confirmed on 8 April 2020 that (a) in most of its policies globally, it already does not recommend objection to "virtual-only" meetings and (b) in markets where ISS discourages "virtual-only" meetings and where such meetings are already allowed by law without requiring any amendment of bylaws, ISS will be altering the application of its policies so as not to recommend adverse votes related to "virtual-only" meetings until it is safe to hold in-person meetings again. The ISS guidance adds that, where boards opt for "virtual-only" meetings, they should make clear the reason for their decision (most likely due to COVID-19) and ensure that shareholders are able to participate in the meetings as fully as possible.

WHAT NEXT?

If the COVID-19 pandemic means virtual AGMs become more commonplace, they could then become the "new normal". Virtual meetings come with a range of benefits, including a reduction in costs as a meeting venue and associated services like security and catering are not required. For companies with large numbers of shareholders, a virtual AGM might also make the logistics of attendance and voting more straightforward and be beneficial from a carbon footprint perspective. Most importantly, there is early evidence to suggest that virtual AGMs promote greater shareholder attendance and engagement. It therefore remains to be seen how commonplace virtual AGMs become, though COVID-19 could be the catalyst for listed companies to consider taking a new approach in how they communicate with their shareholders and the wider public.

KEY CONTACTS

JAN MELLMANN
PARTNER • LONDON

T: +44 20 7814 8060

jmellmann@wfw.com

CHRIS KILBURN
PARTNER • LONDON

T: +44 20 7814 8193

ckilburn@wfw.com

SARAH WILLIAMSON
SENIOR ASSOCIATE • LONDON

T: +44 20 7863 8960

swilliamson@wfw.com