COVID-19 NEWS OF INTEREST

Temporary Relief Announced for UK Companies Facing the Challenges of Corporate Reporting During the Coronavirus Crisis

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EXECUTIVE SUMMARY

This memo focuses on the reporting reliefs announced for UK-listed companies, but also on the reporting extensions impacting private UK companies, including private equity-owned UK portfolio companies, and considers the implications of such reporting reliefs on companies' financing documentation, and other implications where there are in-scope Market Abuse Regulation (MAR) securities.

HIGHLIGHTS:

- LSE-listed companies will automatically be allowed an extra two months to publish their audited annual financial reports;
- AIM-listed companies can apply for a three-month extension of the deadline for the publication of their annual audited accounts;
- All UK-incorporated companies (private and public) will automatically have an additional three months to file their annual accounts with UK Companies House;

- Companies will need to consider the implications of the reliefs on their contractual reporting obligations, and any amendments that may be required to financing or investor documents to postpone or waive the financial reporting requirements;

- The regulators have urged lenders to make a distinction for 'normal' covenant breaches and some of the breaches that might occur because of the Coronavirus pandemic and to take into account these circumstances in responding to potential breaches of covenants; and

- Issuers must assess carefully what information constitutes inside information at this time, and under MAR must disclose any inside information to the market as soon as possible unless there is a valid reason to delay. To the extent an issuer takes advantage of the longer reporting periods, any restrictions on persons with access to inside information will be relevant throughout such period.

I. UK-LISTED COMPANIES

On 26 March 2020, the Financial Conduct Authority (FCA), the Financial Reporting Council (FRC) and the Prudential Regulation Authority (PRA) released a joint statement permitting delays to the timetable for publication of annual financial results by listed companies in light of the Coronavirus crisis[1]. The statement included a series of actions aimed at reducing the operational burden facing listed companies, balanced with ensuring a continuous flow of information to investors in support of the continued functioning of the UK's capital markets.

The proposed package of measures included: (i) a statement by the FCA, allowing listed companies an extra two months to publish their audited annual financial reports[2], (ii) best practice guidance from the FRC to Boards (most relevant to premium LSE-listings), for maintaining strong corporate governance practices in the current disruptive environment, including: (x) continuing to operate an effective control environment, (y) considering how to secure reliable and relevant sharing of information and (z) paying attention to capital maintenance factors and ensuring sufficient reserves[3], (iii) guidance from the PRA regarding the approach that should be taken by banks, building societies and PRA-designated investment firms in assessing expected loss provisions under IFRS 9 (i.e., the provisions for estimating losses based on credit risk of the borrower)[4], and (iv) guidance from the FRC for audit firms seeking to overcome challenges in obtaining audit evidence[5].

1 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/publication/2020/joint-statement-on-covid-19.pdf?la=en&hash=28F9AC9E45681F3DC65B90B36B5C92075048955F

2 https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus

3 https://www.frc.org.uk/about-the-frc/covid-19/company-guidance-update-march-2020-(covid-19)

4 https://www.bankofengland.co.uk/prudential-regulation/publication/2020/joint-statement-by-the-fca-frc-and-pra-on-covid-19

5 https://www.frc.org.uk/about-the-frc/covid-19/covid-19-bulletin-march-2020

What Does This Mean for Listed Companies?

DTRs: Under DTR 4, companies listed on a regulated market such as the main market of the LSE (whose home state is in the United Kingdom) have four months from their financial year-end to publish audited financial statements. If this deadline is not met, the FCA has the power to impose sanctions, including a suspension of the listed securities. Under the temporary relief announced in the FCA's statement, the FCA will refrain from imposing sanctions, provided audited financial statements are instead published within six months of companies' financial year-end.

Market Practice and Publication of Preliminary Results: The FCA went on to note that while adverse inferences can often be drawn when listed companies move results announcements, it is important that market practice also adjust for the current new environment, and given the market practice of publishing preliminary results in advance of the deadline imposed by DTR 4, the FCA has urged that this time be used by listed companies to review their financial information timetables generally and to ensure accurate and carefully prepared disclosures are made to the market. This follows a statement made by the FCA on 21 March 2020 requesting that listed companies observe a moratorium of at least two weeks on the publication of their preliminary results. The FCA has confirmed that the moratorium will end on 5 April 2020.

Will the Relief Be Widely Used? The FCA recognises that some listed companies, given the nature of their operations, may consider it appropriate to publish their financial statements within the four month deadline, but strongly urges that the temporary relief be used where it will lead to more accurate and informed disclosure.

Who Is Eligible for the Relief? The FCA also published a helpful Q&A document dealing with certain aspects of the temporary relief, including eligibility[6]. The FCA's relief applies to issuers whose home state is in the United Kingdom (broadly UK-incorporated issuers). For issuers incorporated in the EEA, ESMA has also published a statement regarding delayed publication of financial reports[7]. Companies with only debt securities listed will be eligible for the temporary relief if the debt securities are admitted to trading on a regulated market such as the main market of the LSE (as opposed to The International Securities Market or The Professional Securities Market, which already oblige an issuer to publish its annual report and accounts within six months of the end of the relevant financial period). It is also important to note that the temporary relief does not currently extend to half-yearly financial reports which must still be published within three months of the half-year-end in accordance with DTR 4.2.

What about AIM-Listed Companies? On 26 March 2020, the LSE also published an 'Inside AIM' statement announcing that companies with their securities admitted to trading on AIM can apply for a three-month extension of the deadline for the publication of their annual audited accounts under Rule 19 AIM Rules[8]. The statement permits companies to apply for a three-month extension to file their annual accounts. The statement applies with immediate effect to AIM-listed

6 https://www.fca.org.uk/markets/delaying-annual-company-accounts-coronavirus-qa

7 https://www.esma.europa.eu/sites/default/files/library/esma31-67-742_public_statement_on_publication_deadlines_under_the_td.pdf

8 https://www.londonstockexchange.com/companies-and-advisors/aim/advisers/inside-aim-newsletter/inside-aim-coronavirus-audited-accounts.pdf

companies with financial years ending between 30 September 2019 and 30 June 2020. The extension request must be made to AIM Regulation (AIM's governing body) by the AIM-listed company's nominated adviser prior to its reporting deadline. Similarly to the FCA's temporary relief, the extension does not currently apply to the publication of half yearly reports under Rule 18 of the AIM Rules, but the LSE stressed that this is currently under review.

II. UK COMPANIES (PRIVATE AND PUBLIC)

On 25 March 2020, UK Companies House published a statement announcing that, in light of the ongoing Coronavirus crisis, all UK-incorporated companies (private and public) would have an additional three months to file their annual accounts with UK Companies House[9].

The statement clarifies that the relief will not apply automatically and companies wishing to take advantage of it should apply for the three month extension via a fast-track online system, although those citing Coronavirus issues or 'health-related' matters as reasons for the delay will automatically and immediately be granted such extension.

It is important to note that companies that have already extended their filing deadline, or shortened their accounting reference period, may be ineligible for an extension.

III. KEY IMPLICATIONS FOR ALL TO CONSIDER

Friction with Contractual Reporting Obligations

In considering whether to avail of the reporting extensions, companies must weigh up any contractual obligations in their underlying financing or shareholder documentation. Whether it's private equity-owned UK portfolio companies or stand-alone UK corporates (public or private), indentures, credit facilities and trust deeds typically contain reporting covenants which must be observed or the company risks triggering a default. This often includes delivery of annual audited financial statements (together with a clean audit opinion) within, typically, 90-120 days of the financial year-end. In bond documentation, 25-30% of the bondholders will be able to serve notice calling a default if the reporting deadline is missed. A typical cure or grace period for breach of covenant, after notice is given, is usually 60 days. Breaches of the reporting covenant, however, usually have a longer period of up to 120-180 days. If availing of the reporting reliefs, it will be important for companies to review their contractual reporting obligations ahead of time to consider any amendments that may be required to those documents to postpone or waive the financial reporting requirements. Most likely an amendment of the reporting requirements will be subject to consent by at least a majority of lenders/bondholders. It will also be important for companies to consult throughout the process with their auditors to ensure there are no liquidity or solvency issues that would prevent them from being able to deliver their opinion.

9 https://www.gov.uk/government/news/companies-to-receive-3-month-extension-period-to-file-accounts-during-covid-19

In their joint statement, the FCA, FRC and PRA strongly encouraged investors and lenders to take notice of the unique set of circumstances arising from the Coronavirus crisis which might result in uncertainty in companies' financial positions and potential delays in the provision of financial information, as well as the need for auditors to undertake additional work to support their audit opinions and the increased use of modified audit opinions, and to take into account these circumstances in responding to potential breaches of covenants arising directly from the COVID-19 pandemic and its consequences.

Similarly, in its 'Dear CEO' letter of 26 March 2020[10], the PRA called for a distinction to be recognised between 'normal' covenant breaches and some of the breaches that might occur because of the Coronavirus pandemic, including for example, breaches that might arise as a result of delays in providing lenders with unaudited or audited financial statements, and urged lenders to consider waiving such breaches in good faith and without imposing new charges or restrictions on borrowers following covenant breaches with a direct link to the Coronavirus pandemic.

Market Abuse Regulation

The FCA has emphasised the importance of issuers continuing to comply with disclosure obligations under MAR. Accordingly, issuers must disclose any inside information to the market as soon as possible unless there is a valid reason to delay disclosure under MAR. Issuers must assess carefully what information constitutes inside information at this time, recognising that the impact of the pandemic on any given issuer will need to be taken into account in determining what information is material to an issuer's business and what should therefore be disclosed.

In connection with issuers re-thinking their timetables for publication of financial information, issuers should also consider any announcements that need to be made to the market in respect of that. Clearly, to the extent an issuer takes advantage of the longer reporting periods, any restrictions on persons with access to inside information will be relevant throughout such period. As an issuer's closed period is linked to the timing of the publication of its interim or year-end financial reports[11], we would expect the closed period to continue to be aligned with any adjusted reporting periods. Provisions under MAR relating to prohibitions on dealing whilst in possession of insider information and PDMR restrictions continue to apply at all times.

The FCA's overriding aim is to continue to maintain open and orderly markets despite current volatility, but issuers may still make requests to suspend trading in accordance with existing rules and practice. In considering such requests, the FCA will take into account the risks to the smooth operation of the markets and the risk of harm to consumers.

10 https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/letter/2020/covid-19-ifrs-9-capital-requirements-and-loan-covenants.pdf?la=en&hash=77F4E1D06F713D2104067EC6642FE95EF2935EBD

11 https://www.esma.europa.eu/sites/default/files/library/2016-1129_mar_qa.pdf

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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