



FCA CP21/18: Enhancing climate-related disclosures by standard listed companies
9 September 2021



City of London Law Society Company Law Committee

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A. Introduction

The views set out in this response have been prepared by a Joint Working Party of the Company Law and the Planning and Environmental Law Committees of the City of London Law Society (CLLS) and the Law Society of England and Wales (the **Law Society**).

The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

The Joint Working Party is made up of senior and specialist lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to corporate law and environmental and planning law.

The Joint Working Party thought it would be helpful to set out its overarching comments, before then providing responses in relation to your specific questions. These are set out below.

B. Overarching comments

- **Consistency with existing legislation and standards:**

Consistency with other UK requirements

We welcome the statement in CP21/18 that the FCA has been working closely with BEIS in order to deliver a coherent disclosure regime for those companies within the scope of both TCFD disclosure regimes. We also welcome the statement that the FCA is working closely with the FRC to develop a coordinated monitoring and supervision regime.

In our recent response to the BEIS *Consultation on requiring mandatory climate-related financial disclosures by publicly quoted companies, large private companies and Limited Liability Partnerships (LLPs)* (the **BEIS CP**) we highlighted some overlap and consistency issues between the proposals in that consultation paper and the recently introduced LR requirements for premium listed issuers. The LRs require a comply or explain statement about disclosures that are consistent with the four overarching TCFD pillars and 11 recommendations. In contrast, the proposals in the BEIS CP require companies and LLPs to disclose climate-related financial information in line with the four overarching pillars of the TCFD, but do not require the additional level of disclosure with the 11 recommendations. However, the proposals in the BEIS CP stated that if the required climate-related financial disclosures are not made, the non-financial information statement must provide a clear and reasoned explanation for the omission. We asked BEIS in our response to clarify how this is intended to interact with the LRs comply or explain statement.

In addition, the LRs focus on requiring disclosures on governance and risk management (and strategy in relation to these two pillars), but are less focused on the metrics and targets pillars. However, the BEIS CP focuses on all four pillars.

It would be helpful if the FCA's rules and guidance align with the version of TCFD adopted by BEIS in its regime. Otherwise there is a risk of ending up with a patchwork of overlapping but different disclosure obligations (with the further complexity that these would be overseen by different regulators). We note in particular that standard listed issuers may not have the resources to understand and comply with various different requirements, which could lead to a risk of poor compliance.

International alignment

Any developments in the UK also need to take into account the rapidly evolving international framework. In particular, some companies will have made shareholder commitments to comply with the TCFD framework and so it is desirable that UK requirements allow them to do that. In addition, the EU has established its own detailed reporting requirements, which are being expanded, and the US is likely to introduce climate change reporting obligations in the near future.

Therefore, it is important that, until global standards emerge, companies are subject to disclosure requirements that are as clear and consistent as possible, and which have built-in flexibility that acknowledges that companies may be having to navigate several regimes at once.

○ **Adequate director protections:**

In our response to the BEIS CP we encouraged BEIS to address ways that directors can be appropriately protected from liability, including where forward-looking climate-related disclosures are made in good faith. Scenario analysis, in particular, is an area where companies and individual directors have the greatest liability concerns. We note the inclusion in the HM Treasury consultation paper on the UK prospectus regime of a section on a different liability regime for forward-looking statements in prospectuses, noting that this will not extend to annual reports.

While we acknowledge that the FCA cannot change this position through its rules, we believe this to be an important consideration to highlight as it will impact companies' approach to their disclosures.

C. Responses to questions in the CP

- **Q 1: Do you agree with our proposal to extend the application of our existing TCFD-aligned disclosure requirement (set out in LR 9.8.6R(8)) to issuers of standard listed equity shares, excluding standard listed investment entities and shell companies? If not, what alternative scope would you consider to be appropriate, and why?**
 - We agree with the above proposal i.e., extension to commercial companies listing under Chapter 14 of the Listing Rules.
 - We support excluding standard listed investment entities and shell companies and dealing with them under CP21/17.

- Please see our comments above regarding the interaction of the requirements in the existing LRs with the BEIS CP proposals.
- We note that in CP21/21 the possibility of a single merged listing regime without a premium or standard distinction is one of the proposals; by having the same regime for standard listed issuers as premium listed issuers, that would simplify any change of listing segments for standard listed issuers.
- **Q2: Do you consider that issuers of standard listed GDRs and standard listed issuers of shares other than equity shares should also be subject to our TCFD-aligned disclosure requirements? If not, what alternative approach would you consider to be appropriate, and why?**
 - We do not support the extension of LR 9.8.6R(8) to the above categories of issuers for the following reasons:
 - As noted in CP21/18, GDR issuers are typically listed on an overseas market.
 - Those overseas markets will be developing their own climate-related disclosure regimes thus creating potential for overlap and inconsistency should the UK regime apply to them as well.
 - We also believe that many of those companies, in particular GDR issuers, would have listed in London with an expectation of a light-touch listing regime to facilitate overseas trading in their shares and that it is more appropriate for them to be regulated on matters of climate change in their country of incorporation.
 - As an alternative, GDR issuers could be asked to include disclosures explaining any relevant local rules that they are subject to and the extent of their compliance with those rules – as they currently do for corporate governance disclosures under DTR 7.2. A further alternative could be for GDR issuers to be required to comply with the UK requirements only if there is no local regime. This would help achieve the overarching goal of ensuring that climate-related disclosures become standard market practice.
- **Q3: We welcome views from market participants on whether to apply TCFD-aligned disclosure rules to issuers of standard listed debt (and debt-like) securities, and how best to do this. In particular, we seek input on the following:**
 - **a. What climate-related information from issuers of these securities would market participants find decision useful and how far would these information needs be met by TCFD-aligned disclosures?**
 - **b. Do market participants' information needs differ according to the different types of issuer in LR 17?**
 - **c. If you consider that we should apply TCFD-aligned disclosures rules to issuers of standard listed debt (and debt-like) securities, should some issuer types be excluded from the rule to deliver an effective and proportionate approach? If so, which types of issuers should be included/excluded and how can the scope best be defined?**
 - **d. Are there any other matters we should take into consideration – eg, competitiveness, complexity of the application of the rule,**

burden on issuers in LR 17, or the feasibility to comply with any potential rules?

- We support the response of ICMA to this question.
- **Q4: Do you agree with our proposal to mirror the structure and wording of LR 9.8.6R(8) and LR 9.8.6BG to LR 9.8.6EG for companies with a UK premium listing? If not, what alternative approach would you consider to be appropriate, and why?**
 - We agree with this proposal; it makes sense to not complicate the LRs with different requirements; this would also smooth any changes to the listing regime as a result of CP21/21 were the premium and standard listing segments to be merged.
- **Q5: Do you agree that, subject to the TCFD's final guidance materials being broadly consistent with those proposed, we should incorporate them into our existing and proposed handbook guidance provisions as described (including both the existing guidance relating to LR 9.8.6R(8) and our proposed new guidance relating to LR 14.3.27R):**
 - a. the TCFD's proposed updates to the TCFD Final Report and TCFD Annex
 - b. the TCFD's proposed standalone guidance document on metrics, targets and transition planning
 - c. the TCFD's technical supplement on measuring portfolio alignment.

If not, what alternative approach would you prefer?

- We agree with this proposal and agree that it would be preferable to incorporate them by reference, in order to assist with global alignment. Many companies will be committing to report against TCFD standards in any event and so it will aid consistency if the FCA's requirements track any changes to these standards in real time.
- However, we also note that for consistency the FCA's rules and guidance should align with the version of TCFD adopted by BEIS.
- **Q6: Do you agree that we should update the Technical Note 801.1 to reflect the proposed new rule and associated guidance in this CP?**
 - We agree with this proposal.
- **Q7: Do you agree with our encouraging listed companies to consider the SASB metrics for their sector when making their disclosures against the TCFD's recommended disclosures, as appropriate? If not, please explain.**
 - We are supportive of this approach and agree that "encourage" is the right level of expectation for now, in light of ongoing convergence of international standards and, in particular, the work of the International Financial Reporting Standards (IFRS) Foundation, which plans to unveil its International Sustainability Standards Board (ISSB) initiative ahead of the COP26 meeting taking place this November. We also note that this point was not made previously in relation to premium listed issuers and so the FCA should clarify that this approach applies to both premium and standard listed issuers.
- **Q8: Do you agree with our approach to maintain a 'comply or explain' compliance basis until such time as a common international reporting standard has been**

published and adopted in the UK? If not, what alternative approach would you prefer, and why?

- We agree that it is sensible to follow a comply or explain approach for the time being, whilst different standards are emerging. This approach will ensure that companies are able to reconcile potentially differing standards and expectations until a common standard has been adopted.
- However, the FCA's accompanying guidance makes it clear that it would ordinarily *expect* issuers to comply, except where they face "transitional challenges in obtaining relevant data or embedding relevant modelling or analytical capabilities". That approach may call into question whether it is correct to refer to this as a "comply or explain" regime. In the interests of clarity and transparency, we would hope that if a requirement here (or elsewhere) is meant to operate as a rule (albeit with one or two exceptions) it is framed as a rule; alternatively, if there is a choice of not complying but, instead, of explaining, then that latter option should be fully available. As previously accepted by the FRC in the context of the UK Corporate Governance Code, a well-crafted explanation can be more useful than a tick-box approach to compliance.
- **Q9: Do you agree with our approach not to require third party audit and assurance for issuers' climate-related disclosures at this time? If not, what additional requirements would you consider to be appropriate?**
 - We agree with this approach. We note that the outcome of the BEIS consultation on restoring trust in audit and corporate governance is awaited and so it is preferable for any audit-related proposals to be brought in via this route rather than through FCA rules.
- **Q10: Do you agree that our new rule should take effect for accounting periods beginning on or after 1 January 2022? If you consider that we should set a different timeframe, please explain why.**
 - We support the proposed timing for the introduction of these changes to the LRs.
- **Q11: Do you agree with the conclusions and analysis set out in our cost benefit analysis (Annex 2)?**
 - We have no comments on the cost benefit analysis.
- **Q12: If future changes were considered in relation to the UK prospectus regime, we would welcome views on also taking the opportunity to introduce specific requirements in relation to UoP bond frameworks and their sustainability characteristics?**
 - We support the response of ICMA to this question.
- **Q13: Should the FCA explore supporting the UoP bond market by recognising existing standards (eg, ICMA Principles), potentially through our recognition of industry codes criteria and process?**
- **Q14: We would also welcome views on more ambitious measures the FCA could consider, for example to require that the central elements of UoP bonds be reflected in contractual agreements and set out in the prospectus.**
- **Q15: We would welcome views on the potential harm set out above and what, if any, actions the FCA or the Treasury should consider.**

- **Q16: Should the FCA, alongside the Treasury, consider the development and creation of a UK bond standard, starting with green bonds?**
- **Q17: Do you agree with how we have characterised the challenges and potential harms arising from the role played by ESG data and rating providers? If not, please explain what other challenges or harms might arise?**
- **Q18: Would further guidance for firms on their use of ESG ratings – and potentially other third-party ESG data – be useful, potentially clarifying expectations on outsourcing arrangements, due diligence, disclosure and the use of ratings in benchmarks and indices? Are there other aspects such guidance should include?**
- **Q19: We would welcome views on whether there is a case either to encourage ESG data and rating providers to adopt a voluntary Best Practice Code, or for the FCA to engage with the Treasury to encourage bringing ESG data and rating providers' activities inside the FCA's regulatory perimeter.**
 - We agree that since ESG rating providers operate and cover companies globally, there would be a strong benefit in an internationally acceptable regulatory approach, rather than a local regime. We note that, since this consultation was published, the Board of the International Organization of Securities Commissions (IOSCO) released its own consultation on a set of recommendations to mitigate risks flowing from activities of ESG ratings and data products providers which closed on 6 September 2021. We are supportive of the IOSCO's recommendations and note that this initiative is part of its broader work with the IFRS Foundation to establish global sustainability disclosure standards (see above). Therefore, it is important to monitor how the convergence of standards continues to progress.
- **Q20: If there is a case for closer regulatory oversight of ESG data and rating providers, we welcome views on:**
 - a. **Whether transparency, governance and management of conflicts of interest are the right aspects of ESG data and rating providers' operations and activities to prioritise in regulatory oversight, and if not, what other aspects should be considered**
 - b. **Whether and how regulatory priorities should differ between ESG rating providers and other ESG data providers**
 - c. **The similarities and differences between the policy issues that arise for ESG rating providers and those that arise for CRAs, and how far these similarities and differences might inform the appropriate policy response**
- **Q21: What other ESG topics do you consider that we should be prioritising to support our strategic objective? Please explain.**
 - We consider that it is sensible for the FCA to take a gradual approach, beginning with climate change reporting and then starting to look beyond this in due course. As mentioned above, one of our key concerns is that the measures that market participants have to comply with are consistent and coordinated, and so we consider that taking a phased and steady approach will help to ensure that this is the case.

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