

Primary Market Technical Note

Disclosures in relation to ESG matters, including climate change

The information in this note is designed to help issuers and practitioners interpret our UK Listing Rules, Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules, and related legislation. The guidance notes provide answers to the most common queries we receive and represent FCA guidance as defined in section 139A FSMA

Rules

Listed issuers, other issuers with securities admitted to trading on regulated markets and other entities in scope of requirements under the Market Abuse Regulation (MAR) and the Prospectus Regulation (PR) are subject to a range of disclosure requirements. The purpose of these requirements is to ensure that shareholders, investors and markets more generally are enabled to make informed decisions.

For example, pursuant to the PR, issuers must consider what disclosures they should make to enable investors to assess (amongst other things) the assets and prospects of the issuer.

A wide range of factors may impact a company's prospects. Climate-related risks and opportunities are widely understood to be financially material to many issuers' assets and therefore may need to be disclosed. Other environmental, social and governance (ESG)-related risks and opportunities are also likely to be financially material to

many issuers. Accordingly, issuers should consider ESG matters carefully when determining what should be disclosed under the PR, as well as under the other disclosure regimes.

More broadly, disclosure obligations arise under the UK Listing Rules and Prospectus Regulation when an issuer's securities are offered to the public, first listed or admitted to trading on a regulated market.

On an ongoing basis, disclosure obligations arise pursuant to the UK Listing Rules, Disclosure Guidance and Transparency Rules and Market Abuse Regulation:

- in relation to announcements and financial reporting
- on an event-driven basis given that issuers must inform the public as soon as possible of inside information which directly concerns them.

We also note that issuers should assess climate-related risks and opportunities and other ESG considerations carefully in informing their disclosures, both in respect of equity and non-equity securities.

We discuss specific FCA Handbook requirements and obligations set out in retained EU law and how they apply in respect of ESG issues below. The examples of relevant provisions that we provide are not intended to be exhaustive.

UK Listing Rules

Listed issuers need to have appropriate arrangements in place to support their disclosure obligations under various regimes. The Listing Principles are particularly relevant in this respect.

Listing Principle 1 requires that: "A listed company must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations."

Related guidance in UKLR 2.2.2G further explains that this principle is intended to ensure that listed companies: *"have adequate procedures, systems and controls to enable them to comply with their obligations under the listing rules, disclosure requirements, transparency rules and corporate governance rules. In particular, the FCA considers that listed companies should place particular emphasis on ensuring that they have adequate procedures, systems and controls in relation to, where applicable [...] (2) the timely and accurate disclosure of information to the market..."*

In considering whether their procedures, systems and controls are adequate to enable them to comply with their obligations under these various regimes, including the timely and accurate disclosure of information to the market, an issuer should consider whether there is a need to access and draw on specific data sources when disclosing climate-related and other ESG-related risks and opportunities.

An issuer should also consider whether there is a need to develop specific systems, analytical instruments or organisational arrangements to collate and assess the information required to enable it to comply with its obligations.

This recognises that the appropriate consideration of climate-related and other ESG-related matters may require that an issuer accesses data sources that, unlike other indicators of organisational performance, may not typically be used for other business purposes. Furthermore, such data may need to be assessed and analysed using bespoke techniques.

In this respect, UKLR 2.2.4G further elaborates: *"Timely and accurate disclosure of information to the market is a key obligation of listed companies. For the purposes of Listing Principle 1, a listed company should have adequate procedures, systems and controls to be able to:*

- 1.** *ensure that it can properly identify information which requires disclosure under the listing rules, disclosure requirements, transparency rules or corporate governance rules in a timely manner; and*
- 2.** *ensure that any information identified under (1) is properly considered by the directors and that such a consideration encompasses whether the information should be disclosed."*

Additionally, listed issuers should consider Listing Principle 6. This requires that: "A listed company must communicate information to holders and potential holders of its listed securities in such a way as to avoid the creation or continuation of a false market in those listed securities."

UKLR 6.6.6R (5) requires that a listed issuer in the equity shares (commercial companies) category includes within its annual financial report a statement of how the company has applied the Principles set out in the UK Corporate Governance Code, in a manner that would enable shareholders to evaluate how the principles have been applied.

Relatedly, UKLR 6.6.6R (6) requires the inclusion in its annual financial report of a statement as to whether *"the listed company has (a) complied throughout the accounting period with all relevant provisions set out in the UK Corporate Governance Code; or (b) not complied throughout the accounting period with all relevant provisions set out in the UK Corporate Governance Code and if so, setting out: (i) those provisions it has not complied with; (ii) in the case of provisions whose requirements are of a continuing nature, the period within which, if any, it did not comply with some or all of those provisions; and (iii) the company's reasons for non-compliance."*

The UK Corporate Governance Code and its supporting guidance explicitly recognise companies' responsibilities to wider society and provides authoritative guidance on how Boards can ensure strategic importance is given to ESG considerations that are critical to many investors.

UKLR 6.6.6R(8) and UKLR 6.6.17R require UK incorporated and overseas companies with an equity shares (commercial companies) listing to include certain statements in their annual financial report in relation to climate related financial disclosures. These requirements also apply to issuers in the equity shares (international commercial companies secondary listing) category, certificates representing certain securities category, non-equity shares and non-voting equity shares category and equity shares (transition) category via UKLR 14.3.24R, UKLR 15.3.1R(3), UKLR 16.3.23R and UKLR 22.2.24R. The statement should set out:

- 1.** whether the listed company has included in its annual financial report climate-related financial disclosures consistent with the TCFD Recommendations and Recommended Disclosures;
- 2.** in cases where the listed company has:
 - a.** made climate-related financial disclosures consistent with the TCFD Recommendations and Recommended Disclosures, but has included some or all of these disclosures in a document other than the annual financial report:
 - i.** the recommendations and/or recommended disclosures for which it has included disclosures in that other document;
 - ii.** a description of that document and where it can be found; and
 - iii.** the reasons for including the relevant disclosures in that document and not in the annual financial report;

- b.** not included climate-related financial disclosures consistent with all of the TCFD Recommendations and Recommended Disclosures in either its annual financial report or other document as referred to in (a):
 - i.** the recommendations and/or recommended disclosures for which it has not included such disclosures;
 - ii.** the reasons for not including such disclosures; and
 - iii.** any steps it is taking or plans to take in order to be able to make those disclosures in the future, and the timeframe within which it expects to be able to make those disclosures; and
- 3.** where in its annual financial report or (where appropriate) other document the climate-related financial disclosures referred to in (a) can be found.”

UKLR 6.6.8G, UKLR 6.6.9G, and UKLR 6.6.10G in the equity shares (commercial companies) category provide guidance in relation to determining whether climate related financial disclosures are consistent with the TCFD Recommendations and Recommended Disclosures. Corresponding guidance provisions are also included in the other listing category chapters that require climate-related financial disclosure as set out above.

UKLR 6.6.11G and corresponding guidance for other listing categories explains that the FCA would ordinarily expect a listed company to be able to “make climate-related financial disclosures consistent with the TCFD Recommendations and Recommended Disclosures, except where it faces transitional challenges in obtaining relevant data or embedding relevant modelling or analytical capabilities.”

UKLR 6.6.12G and corresponding guidance for other listing categories provides guidance for a listed company where making disclosures on transition plans as part of their strategy disclosures.

UKLR 10.3.1R (1) requires every circular sent by an issuer with securities in the equity shares (commercial companies) or closed-ended investment funds category to holders of its listed securities to “provide a clear and adequate explanation of its subject matter giving due prominence to its essential characteristics, benefits and risks”. In addition, UKLR 10.3.1R (3) requires every such circular to “contain all information necessary to allow the security holders to make a properly informed decision” if voting or other action is required.

In both cases, this may include in relation to ESG matters.

UKLR 1.3.3R requires that “An issuer must take reasonable care to ensure that any information it notifies to a RIS or makes available through the FCA is not misleading, false or deceptive and does not omit anything likely to affect the import of the information.” Again, ESG matters may be relevant here too.

Listing Particulars are discussed in the next section.

Prospectus Regulation

Article 6 of the Prospectus Regulation

When a prospectus is required, it must contain the necessary information which is material to an investor for making an informed assessment of (amongst other things) the assets and prospects of the issuer and of the reasons for the issuance and its impact on the issuer. That information may vary depending on the nature and circumstances of the issuer and the type of securities.

In order to provide adequate information to the market for this purpose, information on climate change and other ESG-related matters may need to be provided where relevant to the issuer. For instance, in the context of the UK Government’s target to achieve net-zero carbon emissions by 2050 and to achieve the goals of the Paris Agreement more generally, many companies are likely to need to consider significant changes to their business. Such changes may be material to an investor’s assessment of the prospects of the company and the risks and opportunities shaping it.

Article 14 of the Prospectus Regulation

As a derogation from Article 6, the relevant reduced information to be presented in the simplified prospectus for secondary issuances is that necessary to enable investors to understand the prospects of the issuer and any significant changes in the business and financial position of the issuer since the end of the last financial year. This information should be written and presented in such a way as to allow investors to make an informed investment decision.

Risk factors

Recital 54 of the Prospectus Regulation addresses risk factors that are required by the PR and makes specific reference to environmental, social and governance factors. The recital states:

"The primary purpose of including risk factors in a prospectus is to ensure that investors make an informed assessment of such risks and thus take investment decisions in full knowledge of the facts. Risk factors should therefore be limited to those risks which are material and specific to the issuer and its securities and which are corroborated by the content of the prospectus. A prospectus should not contain risk factors which are generic and only serve as disclaimers, as those could obscure more specific risk factors that investors should be aware of, thereby preventing the prospectus from presenting information in an easily analysable, concise and comprehensible form. Among others, environmental, social and governance circumstances can also constitute specific and material risks for the issuer and its securities and, in that case, should be disclosed. To help investors identify the most material risks, the issuer should adequately describe and present each risk factor in the prospectus. A limited number of risk factors selected by the issuer should be included in the summary."

Relatedly, in 2019, ESMA published a set of Guidelines on risk factors under the Prospectus Regulation. Guideline 7 on the presentation of risk factors across categories is accompanied by explanatory paragraph 35 which notes that ESG related risks could form a specific category. Climate change and other ESG factors might also be relevant to other suggested categories of risks, including 'Legal and regulatory'. The ESMA Guidelines provide an example of how ESG risk factors could be disclosed.

Annexes to the Delegated Prospectus Regulation

Various annexes to the Commission Delegated Prospectus Regulation (EU 2019/980) require relevant disclosures including an overview of the business and a description of the regulatory environment.

Item 5.7.4. Annex 1 requires a description of any environmental issues that may affect the issuer's utilisation of its tangible fixed assets. Item 9.1 requires, on the other hand, a description of the regulatory environment that the issuer operates in and that may materially affect its business, together with information regarding any governmental, economic, fiscal, monetary or political policies or factors that have

materially affected, or could materially affect, directly or indirectly, the issuer's operations. Therefore, if the regulatory environment includes environmental matters, they will have to be disclosed, if material.

Item 2.5.1 in Annex 24, requires smaller issuers adopting the UK Growth prospectus specifically to address environmental matters in covering, to the extent necessary for an understanding of the issuer's business as a whole, an analysis of the development and performance of the issuer's business and its position. The analysis shall include both financial and, where appropriate, non-financial Key Performance Indicators relevant to the particular business, including information relating to environmental and employee matters. This analysis shall, where appropriate, also include references to, and additional explanations of, amounts reported in the annual financial statements.

Similarly, FSMA requires Listing Particulars to contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of the prospects of the issuer of the securities.

The FCA Guidelines on disclosure requirements the Prospectus Regulation and Guidance on specialist issuers (Primary Market/TN/619.1) contains helpful guidance in a number of areas relevant to ESG considerations. This includes guidance on environmental and employee key performance indicators in the context of the operating and financial review (paragraph 28) and identifying factors to consider when preparing profit forecasts (paragraph 50). Specific requirements for mineral companies are set out in paragraphs 131-133 of the Guidance on specialist issuers and in Appendices I, II and III. Appendices II and III also contain specific requirements for the Mining and Oil and Gas Competent Persons' Report.

UKLR 23.2 contains further detail on the Listing Particulars and their content, including minimum information requirements.

Disclosure Guidance and Transparency Rules (DTR)

Issuers have a number of ongoing disclosures obligations. These disclosures are primarily intended to allow shareholders, investors and the market at large to form a view on the value of traded securities.

Implicit in this is that investors need to be put in a position to be able to assess the prospects of the company and the risks and opportunities shaping it.

In order to provide adequate information to the market for this purpose, information on climate change and other ESG-related matters may need to be provided where relevant to the issuer. For instance, in the context of the UK Government's target to achieve net-zero carbon emissions by 2050 and to achieve the goals of the Paris Agreement more generally, many companies are likely to need to consider significant changes to their business. Such changes may be material to an investor's assessment of the prospects of the company and the risks and opportunities shaping it.

The Disclosure Guidance and Transparency Rules (DTR) require that the Management Report in the Annual Financial Report and the Interim Management Report in the Half-Yearly Financial Report contain a description of the principal risks and uncertainties facing the issuer (DTR 4.1.8R and DTR 4.2.7R, respectively).

The Management Report in the Annual Financial Report must also contain a fair review of the issuer's business. DTR 4.1.9R requires the inclusion in that review, to the extent necessary for an understanding of the development, performance or position of the issuer's business, of analysis using, where appropriate key performance indicators. This should include information relating to environmental matters and employee matters where appropriate.

DTR 7.2 requires an issuer to include a corporate governance statement in its directors' report, or in a separate report published with its annual report or made available on its website. DTR 7.2 includes information requirements in relation to any relevant corporate governance code (DTR 7.2.2R and DTR 7.2.3R), the issuer's internal control and risk management systems in relation to the financial reporting process (DTR 7.2.5R), and the diversity policy applied to the issuer's administrative, management and supervisory bodies (DTR 7.2.8AR).

DTR 1A.3.2R requires an issuer to "take all reasonable care to ensure that any information it notifies to a RIS is not misleading, false or deceptive and does not omit anything likely to affect the import of the information." This may include in relation to ESG matters.

Market Abuse Regulation (MAR)

Pursuant to Article 17 of MAR, an issuer must publicly disclose inside information that directly concerns them as soon as possible, unless the conditions for delay are met. This includes any inside information that relates to climate change and other ESG-related matters.

Article 17(1) clarifies that “The issuer shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public...”

When disclosing climate-related and other ESG-related information, an issuer must not do so in a way (for example by omitting information) that breaches the prohibition of market manipulation under Article 15 of MAR, noting the relevant behaviours defined in Article 12 of MAR that amount to market manipulation. These include, but are not limited to, dissemination of information which is likely to give false or misleading signals as to the supply of, demand for, or price of a financial instrument.

In this regard, recital 47 adds: “The manipulation or attempted manipulation of financial instruments [...] may consist in the invention of manifestly false information, but also the wilful omission of material facts, as well as the knowingly inaccurate reporting of information.”