

Reporting against the new Diversity Listing Rule

Potential pitfalls to watch out for when reporting becomes mandatory

Setting targets on a 'comply or explain' basis for the representation of women and people from a minority ethnic background is designed to be a positive reporting benchmark to encourage progress. However, it serves as a starting point to encourage scrutiny and consideration of diversity and inclusion more broadly, both at senior levels of listed companies and throughout their businesses.

[Diversity and inclusion on company boards and executive management Policy Statement PS22/3 April 2022](#)

1. Background

After consultation¹ in 2021, in April 2022, the Financial Conduct Authority (FCA) issued Policy Statement PS22/3 introducing new Listing Rules (LRs) on the diversity of company boards and their executive management. This was done with the aim of improving transparency for investors and other market participants; increasing engagement on this area; and informing investment decisions. The LR requires disclosure on a 'comply or explain' basis on three diversity targets:

1. At least 40% of the individuals on the board of directors are women.
2. At least one senior position on the board of directors (chair, chief executive (CEO); senior independent director; or chief financial officer (CFO)) is held by a woman.
3. At least one individual on the board of directors is from a minority ethnic background, defined to include those from an ethnic group other than a white ethnic group, as specified in categories recommended by the Office for National Statistics.

The LRs also requires the provision of numerical data on the ethnic background and the gender identity or sex of the individuals on the board and in executive management in a prescribed tabular format.

¹ FCA, CP 21/24 'Diversity and inclusion on company boards and executive committees'

On 20 March 2022, the FCA published [Primary Market Bulletin 44](#) to remind companies of its rules, guidance and expectations, including by providing some steps to help companies get ready for making the relevant disclosures. It also sets out its supervisory strategy for monitoring and enforcing compliance with the new rules.

The FCA intends to conduct periodic reviews of annual financial reports to determine whether listed companies are meeting their disclosure requirements under the new LRs and the amended Disclosure Guidance and Transparency Rules (DTR). If a listed company's disclosures do not appear to meet the requirements, the FCA may ask the company to take corrective action, for instance enhancing their disclosures in subsequent annual financial reports.

1.1. Scope

The companies in scope of the new Listing Rules are UK and overseas issuers with equity shares, or certificates representing equity shares, admitted to the premium or standard segment of the FCA's Official List, including closed-ended investment funds and sovereign controlled companies, but excluding open-ended investment companies and 'shell companies' as defined in LR 5.6.5AR.

1.2. Amendments to DTR

The FCA also amended DTR 7.2.8AR on board diversity policies to expand the reporting requirements (for in-scope companies²) to cover the diversity policies of key board committees (audit, remuneration and nomination). Board and board committee diversity policies also need to consider wider diversity characteristics including sexual orientation, socio-economic background and disability (in addition to the aspects of age, gender, or educational and professional backgrounds).

1.3. Commencement date

The commencement date for the new reporting requirements is financial years starting on or after 1 April 2022, however, some companies have chosen to voluntarily report against all or some of these requirements in their 31 December 2022 annual reports and accounts (ARAs)³.

2. EY analysis based on December 2022 reporting including pitfalls to watch for

Whilst acknowledging that the requirements did not apply to December 2022 reporters, we analysed the reporting of companies which had early adopted them on a voluntary basis to identify any pitfalls that in-scope companies should be aware of when the reporting becomes mandatory (i.e., years ending on or after 31 March 2022). Throughout this analysis, we refer to LR9.8.6 R which pertains to premium listed companies; the equivalent rule for standard listed companies is LR14.3.33R.

LR ref	Requirement
(9) a, c	A statement setting out whether the listed company has met board diversity targets as at a chosen reference date within its accounting period. In future periods, where the reference date changes, an explanation as to why will need to be provided.

² DTR 7.2.8R applies to certain UK issuers with securities admitted to UK regulated markets and to certain overseas listed companies, subject to existing exemptions for small and medium companies. See DTR 1B.1.7 R for full guidance on which companies are exempt.

³ We analysed over 80 FTSE 350 ARAs for December 2022 year ends that had been published as at 24 March 2023. Around 37% included early reporting in respect of the new LRs and a further 13% acknowledged the new requirements but did not provide the tabular disclosures

2.1. Comments on statement of compliance and reference date

The LR requires an explicit statement as to whether targets have been met, even though the numerical disclosures in the required tables should make this clear. Some companies have included the tables but failed to make this explicit statement.

Similarly, in some cases the reference date was not clearly set out. In all cases where this was provided, it was the year-end date.

LR ref	Requirement	LR Guidance
(9) b	Where any of these targets have not been met, a reason for this needs to be provided.	9.8.6J G If they so wish, companies may want to disclose: <ul style="list-style-type: none">a. A brief summary of any key policies, procedures and processes, and any wider context, that it considers contribute to improving the diversity of its board and executive managementb. Any mitigating factors or circumstances which make achieving diversity on its board more challenging (for example, the size of the board or the country where its main operations are located)c. Any risks it foresees in being able to meet or continue to meet the board diversity targets in LR 9.8.6R(9)(a) in the next accounting period, or any plans to improve the diversity of its board

2.2. Comments on reasons for not meeting targets

Generally, companies that had not met targets did not provide reasons explaining why this was the case. Instead of providing the explanation, some companies linked the fact that targets were met post year-end or commented that addressing the non-compliance is a priority. Some companies referenced a recent retirement/resignation, but without directly quoting this as a reason.

In the case where a listed company has not met the targets under LR 9.8.6 R (9)(a) and LR 14.3.33 R (1)(a), there are requirements under LR 9.8.6 R (9)(b) and LR 14.3.33 R (1)(b) to set out the targets not met and provide the 'reasons' for not doing so. Companies should provide clear and meaningful explanations as to why they have not met targets.

[FCA Primary Market Bulletin 44](#)

LR ref	Requirement
(9) d	Disclose any changes to the board that have occurred between the reference date and the date on which the annual financial report is approved that have affected the listed company's ability to meet any of the targets.

2.3. Comments on changes subsequent to reference date

Some companies referenced changes expected to happen subsequent to the date of ARA approval, noting these will result in LR targets being met. However, few were clear whether changes occurred between the reference date and the date of ARA approval. We would encourage companies to be explicit about this, even if confirming that such changes had not taken place. This could further be linked to a tenure disclosure that shows maximum possible tenure for each of the board members.

LR ref	Requirement	LR Guidance
(10), (11)	Numerical data on the ethnic background and the gender identity or sex, including an explanation of the approach to collecting the data used for the purposes of making the disclosures.	<p>9.8.6I G</p> <p>The FCA expects the approach to data collection to be consistent across:</p> <ol style="list-style-type: none"> All the disclosures required under the LR All individuals in relation to whom data is being reported. <p>The explanation of the approach to data collection should include</p> <ul style="list-style-type: none"> ▶ The method of collection ▶ Source of the data ▶ Where data collection is done on the basis of self-reporting by the individuals concerned, a description of the questions asked

2.4. Comments on data disclosure

2.4.1. Sex or gender identity

More than three-quarters of the 540 responses to the FCA's consultation, focussed on its proposal for reporting against targets for those self-identifying as women, as opposed to women defined by sex. Many of these respondents argued that the proposal was inconsistent with equalities legislation and in relation to UK-incorporated companies, highlighted that it differed from reporting required under the Companies Act 2006⁴.

As a result, when announcing the final proposals, the FCA made it clear that companies can decide how to approach data collection and report **either** on the basis of sex **or** gender identity – choosing one approach and being clear on that choice. This is highlighted in the title of the reporting table which refers to 'sex/gender representation.'

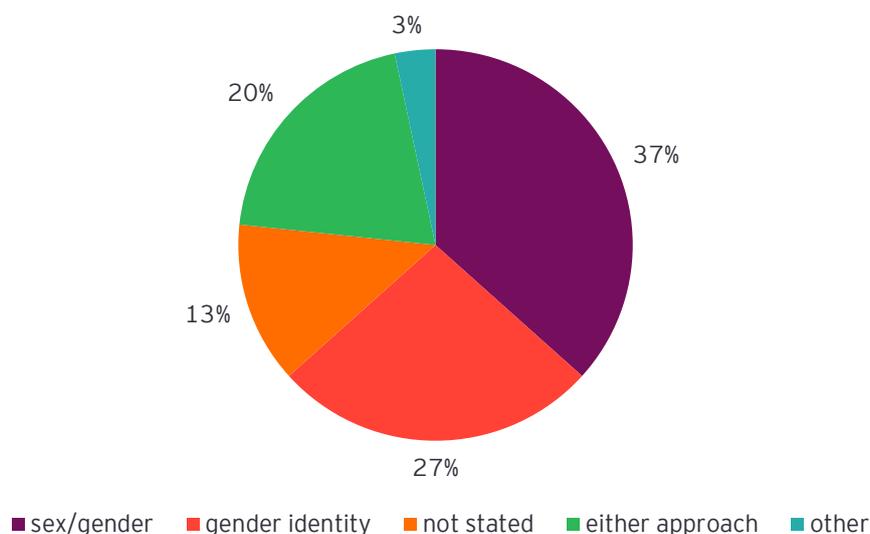
Table 1: Reporting table on sex/gender representation

	Number of board members	Percentage of the board	Number of senior positions on the board (CEO, CFO, SID and Chair)	Number in executive management	Percentage of executive management
Men					
Women					
[Other categories]					
Not specified/ prefer not to say					

In our sample, where companies referenced 'gender identity' as the basis for the disclosure, the choice of approach appears clear. This is however less so, when companies refer simply to 'gender.' The lack of clarity can be exacerbated by references to the data being collected on a self-identifying basis without explicitly referencing gender identity or where the title of the table is inconsistent with the explained approach. Whilst not explicit, in some cases, the reporting suggests that the data is based on a combination of both approaches.

⁴ Companies Act s414C requires a breakdown showing at the end of the financial year the number of persons of each sex who were directors of the company

Inferred approach to data collection



Anonymised examples which illustrate lack of clarity in approach

'We collect gender data on a self-identifying basis in a questionnaire which asks to identify gender based on the categories set out in the required table.'

'Numerical data on gender identity or sex of the Board members and executive managements has been provided as of 31 December 2022.'

'We voluntarily report information on the gender of the Board and Executive Committee.' Table title: Gender identity or sex of Board Members

We recommend that companies refer to only one of either sex or gender identity in the title of the table to make the chosen approach clear and make an explicit statement about the approach to data collection, ensuring consistency between these two disclosures.

2.4.2. Consistency in method of data collection

The FCA emphasises that the approach to data collection needs to be consistent. A number of companies explained that they used questionnaires to collect data related to Board members but were silent on the approach to collect data for executive management. This raises questions on the approach to and consistency of data collection for executive management (e.g., whether it was taken directly from HR systems).

We recommend that companies are explicit about the consistency of the approach to data collection, especially when information about the Board is collected through a separate process.



Systematic data analysis is critical to development of an effective inclusion and diversity strategy and to the measurement of its success. The terms sex and gender are sometimes used interchangeably, but as organisations work to build a genuinely diverse board and senior executive pipeline, accurate data collection should be based on sex in line with the Equality Act. Organisations that wish to collect data on gender identity or gender reassignment should do so separately rather than aggregate with sex.

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2.4.3. Closed-ended investment funds

Closed-ended investment funds do not need to set out whether they have met the board diversity target regarding senior board positions and executive management if they do not apply, provided a reason(s) is set out on why those matters are not applicable.

In respect of senior board positions, some investment trusts (IT) in our sample have chosen to include the chair of the audit committee as one of the senior board positions, in light of the fact that funds seldom have a CEO or CFO.

Unsurprisingly, none of the ITs provided information on executive management, but not all of them provided a statement explaining why this disclosure was not applicable. Even though this is quite evident (as there are no employees and therefore no executive management), an explicit statement is nonetheless required.

2.4.4. Diversity below the board - differing definitions

The devil is in the detail when it comes to the disclosure of data related to executive management – companies need to be aware that the definitions of executive management, senior managers and senior management differ between the LRs, Companies Act (CA 2006) and the UK Corporate Governance Code (UK CG Code).

Furthermore, whereas the LR allows companies to choose a reference date and allows for reporting based on either sex or gender identity, CA 2006 requires reporting as at the end of the financial year based on sex and the UK CG Code is silent on the reporting date, but also requires this to be based on sex.

Source	Requirements and terms used (underlined, bold)	Definitions per source
LR	'Numerical data on the ethnic background and the gender identity or sex of executive management as at the reference date'	The executive committee or most senior executive or managerial body below the board (or where there is no such formal committee or body, the most senior level of managers reporting to the chief executive), including the company secretary but excluding administrative and support staff.
CA 2006 s414(8)	'A breakdown showing at the end of the financial year the number of persons of each sex who were senior managers'	An employee of the company who has responsibility for planning, directing or controlling the activities of the company, or a strategically significant part of the company [s414C(9)]. In a group strategic report, this includes directors of the undertakings included in the consolidation. [s414C(10)]
UK CG Code Provision 23 I(iv)	Senior Management 'The annual report should describe the work of the nomination committee, including the gender balance of those in the senior management and their direct reports.'	The executive committee or the first layer of management below board level, including the company secretary.

Companies need to be careful when making these three disclosures, that they thoroughly understand the different basis of preparation.



The Companies Act, Listing Rules and Corporate Governance Code impose similar, but non-identical disclosure requirements. Companies reporting on the basis of the undefined term 'gender' will, without more explanation, fail to comply with any of these requirements. Reporting on the basis of sex, however, would satisfy all of them.

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2.5. Other observations - DTR disclosures

As noted in the introduction, the FCA also amended DTR 7.2.8AR relating to board and board committee diversity.

Whilst a number of companies made reference in their 2022 ARAs to broadening the diversity characteristics they consider, very few were explicit as to whether the diversity policies cover the key board committees.

3. Conclusion

Whilst on the face of it the new LRs seem quite simple to report against, we have identified a number of pitfalls that companies should be aware of. The main ones are a lack of clarity on the approach for collection of data (i.e., whether based on sex or gender identity) and potential inconsistencies in data collection between the Board and Executive Management. Companies that will be making these disclosures on a mandatory basis for the first time (i.e., years ending on or after 31 March 2023) need to be cognisant of these matters to make sure that they report in accordance with the requirements.

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EYSCORE 002931-23-UK

UKC-028188 (UK) 03/23. Creative London.

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Appendix: Extract from the FCA's Primary Markets Bulletin 44 "Getting ready for the new D&I disclosures"

We set out below the steps we would expect listed companies to have considered in preparation for making the relevant D&I disclosures on a comply or explain basis:

1. Review your governance arrangements for oversight of diversity and inclusion targets and reporting, including the roles of the board, sub-committees, and senior management.
2. Know your compliance framework, including both new and existing rules and regulations.
3. Assess your existing public narrative reporting of diversity and inclusion.
4. Establish or enhance your procedures, systems and controls over data collection and reporting, including for choosing an appropriate reference date for data collected.
5. Where it appears, you may not meet the targets or have the relevant data:
 - a. Ensure you can provide clear and meaningful explanations (which could include possible action plans) as to why you have not met the targets or do not have the relevant data.
 - b. You may wish to review the effectiveness of your existing board succession and recruitment plans.
6. Identify any legal restrictions which may prevent collection or publication of the required data.

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