SLAUGHTER AND MAY

KEEPING SHAREHOLDERS INFORMED DURING THE COVID-19 CRISIS: AN UPDATE

C-19

31 March 2020

Companies are currently dealing with unprecedented challenges, with some facing an existential threat. With new developments occurring daily, we highlight below key points that have emerged in the last week or so that companies should consider in the context of their communications with investors.

Financial results and reporting	In a joint statement by the FCA, FRC and PRA on 26 March, the FCA announced the effective extension of the deadline in DTR 4.1.3 for publishing annual results from four months to six months from the year end: provided the audited annual results are published within six months, the FCA will not suspend a company's securities, or bring enforcement action, simply because a company is unable to meet the four month deadline. The temporary relief applies to companies whose home state for Transparency Directive purposes is the UK. No equivalent temporary relief has yet been granted in relation to half-yearly results (interims). However, on 27 March ESMA announced that it expects national regulators "not to prioritise" supervisory action against companies that do not publish by the three month deadline their half-yearly results relating to a reporting period ending on or after 31 December 2019 but before 1 April 2020, provided those results are published within four months of the period end. We therefore expect the FCA to make an announcement shortly on its approach to interims. On the same day, the AIM Regulation team announced that AIM companies with a financial year end between 30 September 2019 and 30 June 2020 can apply for a three month extension to the six month deadline for publishing annual results. On 21 March the FCA recommended that any company intending to publish a preliminary statement of its annual results in the next few days should delay publication for at least two weeks. This recommended moratorium will end on 5 April. The FCA encourages companies to maximise the time available to them by waiting until shortly before the (extended) deadline to publish their prelims or annual results, even if they have previously indicated that they intend to publish earlier, and urges investors not to draw adverse inferences if a company takes advantage of the ability to delay publication. However, before deciding to do so, companies should check

	whether their financing documents require publication within a specified timeframe. Except where finance documents or other circumstances necessitate earlier publication, most companies will want to aim to publish their annual results at the same time as they send their "full" statutory annual reports and accounts to shareholders. This must be done at least 21 clear days before the AGM, which must be held within six months of the FY end. If a company is unable to meet this timetable, it is possible to gain more time, but this will require the company to apply to extend the deadline for filing its annual reports and accounts at Companies House and to hold a separate general meeting later in the year to approve the annual reports and accounts, directors' remuneration report and certain related matters. Companies may also consider delaying a planned audit tender, even when mandatory rotation is due, by applying to the FRC for an extension. Elements of annual financial results that are likely to be most impacted by the pandemic are disclosures around liquidity; principal risks and uncertainties; the going concern basis; and the longer term viability statement. Companies will be discussing these with their auditors.
Inside information	Companies should continue to assess on a daily basis the impact of the pandemic and government measures against it. If management concludes that results for the period are likely to miss previous guidance by a significant margin, a profit warning announcement will be required unless a delay is permitted (which in most circumstances is unlikely) or the information is not price-sensitive. An already depressed share price and the large volume of information about the pandemic in the public domain might mean that certain information has already been "priced in", but this will depend on the circumstances. In any event, consider whether any existing guidance should be withdrawn or any previous announcement should be updated. Consider also whether the company has any other information that could be inside information – such as a covenant breach, or details of how significant items on its balance sheet, or its strategy or business model, are likely to be affected by the pandemic or by steps the company is taking in response. While events are moving so rapidly and share prices are unstable, it is particularly important for companies to review regularly whether information has become inside information or whether any delay in announcing inside information continues to be justified. As always, companies should be careful about disclosing selectively – e.g. to a major shareholder - information that is or could be inside information.
Dividends	Many companies have announced they will not seek shareholder approval for a final dividend at their forthcoming AGM. Even companies with a strong balance sheet should consider whether paying a dividend could

	damage their reputation or handicap them in any future negotiations with funders, DB scheme trustees, trade unions or the Government. As the *Financial Times* has commented, "If ever there was a time to cut dividends, it is probably now." On 27 March the ECB recommended that at least until 1 October 2020 significant credit institutions should not pay or commit to pay any dividends in respect of their 2019 and 2020 financial years. Directors of all companies should also consider whether paying a dividend is consistent with their duties and the company's corporate purpose. Boards should keep under review whether planned future interim dividends should be paid and their amount and timing. Provided that a company's articles of association include the typical provision that no dividend can exceed the amount recommended by the directors, in principle the board can decide to withdraw a proposed final dividend at any time before the AGM. With an interim dividend, the board is entitled as a matter of company law to withdraw or change the dividend at any time before payment is made. Whether it is a final or an interim dividend, however, it is likely to be better to make such a decision sooner rather than later. A decision not to pay an expected dividend is likely to be inside information that must be announced immediately unless it would not move the share price – for example, because the market has already priced in an expected suspension of dividends. On 25 March the LSE announced that, instead of a cash dividend having to paid within 30 business days of the record date, it will permit payment to be deferred by up to 30 business days. Any deferral must be announced as soon as possible. When the deferral period expires, the dividend must be paid or cancelled and, if it is cancelled, a further announcement must be made.
Buybacks	Similarly, a number of companies have already announced the suspension of their buyback programme. The ECB has recommended that at least until 1 October 2020 significant credit institutions should not seek to buy back their own shares. For other companies, relevant factors in such a decision will include (1) when the company expects to complete the programme; (2) the terms of the purchasing bank's mandate; (3) the company's current and future liquidity position in various projected scenarios; and (4) any existing restrictions in the company's debt facilities and any restrictions that are imposed by lenders as a condition to waiving any covenant breach. The points made in the first paragraph of "Dividends" above will also be relevant. As with dividends, a decision to suspend a buyback programme is likely to be inside information that must be announced immediately unless it would not move the share price – for example, because the market has already priced in an expected suspension. If a company has other inside information, it will probably need to announce it before suspending or terminating the buyback programme.

Share dealing	Companies should consider prohibiting all or certain categories of dealings by PDMRs even if the company does not currently have any inside information. The speed with which events are developing increases the risk that, with the benefit of hindsight, the FCA may take the view that the company did in fact have inside information (for example, that it should have published a profit warning) and that persons who dealt on the basis of that information committed market abuse. As well as reducing the legal and reputational risks to the company and individuals involved, in terms of optics it may be preferable for PDMRs not to deal at this time. While purchases of shares may raise fewer concerns, and therefore might be excluded from any blanket prohibition, a company should still consider carefully whether it has any inside information (either positive or negative) before permitting any dealing.
Communication generally	Even if a company is not required to make an announcement, there may be benefits to disclosing voluntarily details of the impact of the pandemic and what the company is doing in response. This could be an opportunity to demonstrate leadership and commercial initiative and to stand out from competitors. But beware of making statements that could quickly become out of date or look incomplete: they may need to be updated or corrected and the company could end up feeling compelled to give a "running commentary" on developments. And whichever channel of communication the company chooses to use, ensure that messages are kept consistent.

AGMs and other general meetings

On 28 March the Government announced that it intends to introduce legislation to enable companies to hold AGMs in a way that is consistent with the restrictions on movement and gatherings introduced recently to combat the spread of Covid-19. Until such legislation is in force, companies should follow the guidance published by Slaughter and May and the Chartered Governance Institute on 18 March and supplemented on 27 March. In broad terms, companies should continue to prepare to hold a physical meeting and arrange for it to be attended in person by the minimum number of individuals needed to form a quorum; other shareholders should be told not to attend in person but instead encouraged to appoint the Chair as their proxy and instruct him or her how to vote; and companies should consider providing an electronic facility to enable shareholders to participate remotely.

If you would like further information about the impact of Covid-19 on your business, please speak to your usual Slaughter and May contact