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COVID-19

CORPORATE GOVERNANCE FOR BROKER FIRMS & CORPORATE FINANCE ADVISORS

The 2019 novel coronavirus (**COVID-19**) pandemic is forcing both management and boards of directors in broker firms and corporate finance advisors to navigate uncharted and stormy seas. Whilst management will be in the front line of deciding and actioning the firm's response to the pandemic, boards' oversight responsibility makes it vital that they closely monitor management's actions and offers appropriate guidance and direction. Given that environmental, social and governance matters are already high on boards' agendas, they are likely to find their feet are held to the fire on governance during the COVID-19 crisis. Indeed, some have already suggested COVID-19 represents an opportunity for "*companies [to] demonstrate that they have effective leadership. In times of crisis that becomes more apparent, not less apparent.*"[1]

Some key issues that boards and senior management in broker firms and corporate finance advisors should be considering are:

- **Appointment of a crisis management team:** The FCA will expect firms to have contingency plans in place to ensure that they can continue to operate effectively and deliver key services. To the extent that firms have a crisis management policy, they should be reviewing and amending it as necessary in light of the particular challenges that COVID-19 poses. Firms should consider the appointment of a cross-functional crisis management team to identify specific risks and formulate a plan to mitigate them. The FCA has reminded firms of their operational resilience obligations, noting that they "*expect all firms to have contingency plans to deal with major events and that the plans have been tested*".[2] The firm's board should be kept informed of significant issues in a timely fashion and be provided with sufficient information to allow them to exercise oversight and make key decisions where necessary.

- **Board continuity:** The board should review the meetings scheduled for the next three months plus with a view to determining which can be cancelled or postponed to create time for regular and emergency meeting on COVID-19 related matters. In-person meetings should be replaced with conference calls to help prevent cross-contagion within the board. Boards should also consider whether (i) provisional arrangements are already in place to deal with scenarios where a quorum of the board is unachievable, (ii) alternative directors and/or senior managers have been identified who can step in should a director or senior manager become unavailable and (iii) for broking firms quoted on public markets, how the company and its board will hold its annual general meeting (in line with the statutorily mandated timeframe for holding such meeting) on the basis that it is very likely that the meeting will need to be chaired and held in a particular location as opposed to taking place online.

- **Business as usual compliance:** FCA regulated firms should be mindful that their conduct of business obligations remain unchanged. Mass remote working will raise a number of issues for regulated firms: phone lines will still need to be recorded, orders will need to be entered into the appropriate system promptly, the IT infrastructure will need to be robust and staff will need to continue to be supervised by, and have access to, compliance. Whilst firms may experience difficulties in submitting their regulatory data, the FCA will expect them to maintain appropriate records during this period and submit the data as soon as possible. Firms should review their policies and procedures and systems and controls around information management to ensure not only that client confidentiality and insider lists are maintained but that information barriers are effective and the risk of inside information being inappropriately disseminated (whether between certain functions within firms or outside of them) is not affected by remote working.

  The FCA have reminded companies quoted on public markets to continue to be mindful of their obligations to update the market under the Market Abuse Regulation and the need to meet regulatory deadlines as regards the publication of financial results.[3] ESMA has similarly noted that issuers should "*disclose as soon as possible any relevant significant information concerning the impacts of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under the Market Abuse Regulation*".[4] These obligations ought to be balanced against the FCA's request that publicly quoted companies should delay the publication of their preliminary results for at least two weeks to better

[1] "BlackRock to target companies on governance despite coronavirus", Financial Times, 18 March 2020, text available here.

[2] See FCA information for firms on Coronavirus (Covid-19) response, 19 March 2020, available here.

[3] Primary Market Bulletin Issue No. 27 – Coronavirus update, 17 March 2020, available here.

[4] See ESMA recommendations for actions by financial market participants for COVID-19 impact, 11 March 2020, available here.

assess the impact of COVID-19 on those results. Broking firms may well be busy helping to ensure their listed clients are able to, and do continue to, meet their regulatory disclosure obligations in this regard.

Whilst the FCA is likely to accept that firms faced with sudden and extreme events will need a short time in the initial phase to react to them, they will be unlikely to accept COVID-19 as a defence to a firm's failure to comply with their regulatory obligations or the criminal law. Firms' performance and alleged failings may be judged several years hence. Experience suggests that during times of extreme market volatility and dislocation there can also be enhanced regulatory scrutiny of issues such as CASS compliance, complaints handling, and trading practices such as the marking of books, market abuse and insider dealing. It is vitally important that firms' operational controls over key risk areas like these continue to operate robustly (and that can be evidenced if required).

- **Succession plan for significant influence functions:** Key governance and senior management roles within the firm should be identified. This should include members of the board, management, key risk takers, compliance and IT support. Deputies for each of these key individuals should be nominated and hand-over procedures and notes prepared to mitigate against the risk of illness making such individuals unavailable. The FCA rules permit the temporary appointment, for up to 12 weeks, of a substitute person for significant influence functions before FCA approved person status is sought.

- **Key HR issues:** Having large numbers of employees working from home over an extended period will be a new experience for many employers. It will be important to ensure that teams stay in regular contact, and that people continue to communicate. Normal employment law considerations will, however, continue to apply. If individuals feel disconnected, they are more likely to feel anxious or disgruntled about work, and that could lead to more disputes in the long run. It will take a greater effort to ensure that work is spread around fairly. Employers will need to accommodate more sickness absence and employees needing to balance childcare, children's home schooling requirements and work responsibilities than ever before. All of this needs to be balanced with protecting the business and complying with the requirements of clients and with regulatory obligations. The FCA has also asked firms to consider carefully which of its staff can be designated "key workers" now that schools have officially closed, since children of such workers can continue to be looked after by their schools (if no alternative arrangements can be put in place for those children). The FCA has indicated, however, it only expects a limited number of people to be identified as being key financial workers.[5]

- **Aftermath:** In the aftermath of COVID-19, the board should assess how the firm has navigated the crisis and what lessons can be learnt. Times of crisis are an opportunity for the board and management to demonstrate robust corporate governance.

If you have any questions, please do not hesitate to contact your usual AG contact or one of the lawyers listed below:

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[5] Guidance from the Bank of England, 20 March 2020, on who is a "key financial worker", available here.