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Fieldfisher LLP:  
Response to FCA  
Consultation on Diversity

October 2021

**In July 2021, the UK's Financial Conduct Authority launched a consultation on proposals to boost disclosure of diversity on listed company boards and executive committees. As a leading legal adviser to AIM-listed companies, Fieldfisher sought feedback from clients, contacts and colleagues and prepared and submitted the following response.**

**Q1: Do you agree with the proposed comply or explain disclosure requirement on board diversity targets relating to gender and ethnicity?**

We are pleased the FCA is taking the lead on diverse boards and we certainly encourage greater transparency in this area.

We agree in principle with targets for gender and consider that, in particular, the target for executive board members is of real importance.

However, we believe the focus on executive board members would be better confined to the CEO, Chair (only if the Chair is an Executive Chair), CFO and COO positions. Since the SID role is necessarily independent and non-executive, we do not consider that this should be included, although we appreciate that others may feel differently around the role of Chair and SID.

Greater thought should be given to the definition and categories of ethnicity. The most valuable data would come from taking a more granular approach, as opposed to using the ONS definitions.

The use of a comply or explain disclosure requirement should, in our opinion, be an effective method and should pave the path of least resistance from issuers. We do however have some concerns around the quality of reporting from some issuers and whether there would be any meaningful consequences for poor quality reporting.

See the Company Matters (part of the LINK Group) Report "Board diversity in AIM and FTSE Small Cap companies", for an example of poor reporting by AIM issuers. How does the FCA propose to monitor and deal with poor narrative reporting by issuers?

**Q2: Do you agree with the proposed disclosure obligation to set out numerical data on the gender and ethnic diversity on a company's board and its most senior level of executive management?**

Yes, but, as per our response to question 1, we consider that reporting should be more granular in terms of ethnicity

We do not consider that the proposed gender reporting really creates any additional burden on issuers. Profiles of directors and the composition of governance committees are generally disclosed already in the 'investor' sections of issuers' websites and within issuers' annual reports.

There may be some additional administrative burden for ethnicity reporting, but we are of the opinion that this would be minimal.

However, we consider that reporting on the composition of senior management would be very beneficial given that stakeholders do not have as much transparency here.

**Q3: Do you agree with the proposed scope of who would be required to report under the new Listing Rules proposals, and those we have excluded (e.g. issuers of listed debt)? If you disagree, please explain why.**

Yes, we agree with the proposed scope.

**Q4: Do you agree with our proposal to include overseas and smaller issuers in the new Listing Rules proposals? If not, please explain whether you would propose further flexibility within the rules, or would exclude such companies from scope?**

Yes, but our view is that different measures appropriate to overseas categories of race and ethnicity (or similar regimes) should be considered, given that the makeup of all countries is different. If possible, ethnicity should be



measured against the demography of the issuer.

The FCA should also consider that some companies are dual-listed and may be attempting to comply with multiple regimes simultaneously (even though this proposal is on a 'comply or explain' basis and as such should alleviate concerns here).

Notwithstanding this, we note that overseas issuers will need to give some thought to the basis on which they collect data on race and ethnicity in particular. Such data collection will need to be compliant with local privacy and labour laws and, in certain jurisdictions, it may be considered unusual to gather this category of data for cultural or historical reasons. This will also be a consideration for UK issuers with non-UK-resident board members.

### **Q5: Do you agree with proposed targets on gender and ethnic diversity representation at board level of companies? Should we consider any additional or different targets?**

We agree in sentiment with the aim of having diverse boards. However, we consider that there should be

particular focus on putting in place effective policies and procedures to enhance and encourage inclusivity and diversity. If this is done well, diverse boards and management will necessarily follow.

Shadow boards can be particularly effective in mentoring internal candidates and providing board experience for non-traditional candidates. However, we also recognise that progress over recent years has not been sufficiently quick or effective in creating diverse boards, and therefore support the proposed targets.

We consider that a 40% target for female board positions could be seen as arbitrary. An alternative approach to consider would be to set a target for a 50/50 gender split on a 'comply or explain' basis, given that this is actually reflective of the general population.

The FCA might also wish consider some alternative targets around ethnicity, such as a 20% ethnically diverse board or 50% diverse candidates overall (to include a minimum of one woman).

Finally, we suggest the composition of an organisation may be quite different at the various levels of management. A target in place at board level might necessarily be different at senior management level.

Similarly, a board may be able to show that they currently have an effective (albeit not necessarily diverse)

board but have worked to put in place significant measures to diversify and develop their talent pipeline with succession planning for future board composition in mind.

We have previously conducted interviews with a number of our listed clients who have highlighted difficulties with the recruitment of diverse boards, so we appreciate that these proposals will necessarily develop longer-term planning by issuers.

**Q6: Do you agree with the format and extent of numerical data reporting proposed in the tables in Annex 2? If not, please explain any changes you would suggest or where further clarity is needed.**

We recommend including an additional column for the senior management level to distinguish financial controllers or positions that probably lead to executive board positions, for example, COO, CTO, FD, and MD. This also goes to the succession planning of the issuer and covers the management composition of the issuer, which is less visible to investors.

An alternative to looking at the senior management level is to look at all employees above a certain salary threshold or the top 20% of earners at a particular organisation.

**Q7: Should we consider requiring similar numerical data reporting for the level below the executive management team of in-scope listed companies and/or seek data on representation by sexual orientation? If so, we welcome any drafting suggestions and views on any impact this may have for the CBA and scope of our proposals.**

Yes, we agree that reporting on senior management composition in terms of gender and ethnicity would be beneficial (see answers above). However, data on sexual orientation and disability should not be gathered and disclosed on a compulsory basis for privacy reasons.

This may be particularly pertinent in respect of sexual orientation reporting for overseas issuers, whose home countries may not have sufficient legal protections for LGBTQ+ persons. Sexual orientation is also a special category of data that individuals may not want to disclose.

We would however encourage reporting on a voluntary and anonymous basis for disability and sexual orientation data, recognising that some individuals may still feel a level of stigma in disclosing such data.

**Q8: Do you agree with proposed amendment to DTR 7.2.8AR to add to the examples of diversity aspects included in DTR 7.2.8AR which issuers could disclose in their reporting on their diversity policy, and to extend consideration to key board committees? If not, please explain why.**

See our response to question 7. We do not agree that all individuals would feel comfortable disclosing data on certain aspects of diversity, including disability, sexual orientation and possibly even socio-economic background on a compulsory basis. However, we would encourage reporting on a voluntary and anonymous basis.

We consider that it is helpful to examine the composition of governance committees, particularly as these are predominantly formed of non-executive board members.

**Q9: Do you agree with our proposed new guidance provision DTR7.2.8CG encouraging in-scope issuers to consider providing numerical data to further inform reporting on the results of their diversity policies? If not, please explain why.**

Yes, although we would argue that some of this data is already available to investors on the investor sections of issuers' websites and their annual reports. Nevertheless, numerical data is helpful when looking at issuers on a comparative basis.

**Q10: Do you agree with the proposed implementation timing? If not, please explain why and indicate what alternative timeframe you consider appropriate.**

Yes, we consider that this is an appropriate timescale. Although it would be desirable to see results sooner, the implementation period gives sufficient time for issuers to carry out an effective recruitment campaign (should they need to do so).

**Q11: Do you agree with our phased approach to improve our use of data over time? Should we consider other approaches? If so, please suggest these.**

The data that the FCA proposes to gather represents a good starting point to encourage more diverse boards but we hope that this is only the beginning of such data capture.

We hope that, if implemented, the FCA will be prepared to analyse and understand the responses gathered and use this data to inform (and revise, where necessary) targets accordingly. We hope that, once three-to-five years' worth of data has been received, some useful findings will be made to help inform more detailed data capture in later iterations of this policy.

The FCA may find, for example, that there is an improvement in the number of women being appointed, but little progress is being made with ethnicity.

There is much additional data that could be gathered that may make future policies much more effective. This includes:

- A more granular look at ethnicity;
- Data around internal promotion versus lateral hires;
- Recruitment mandates; and
- Flexible working policies.

We predominantly work for and with AIM-listed issuers and would be pleased to see the proposals recommended to AIM issuers in the future.

In putting together the above responses, we have canvassed the views of our own internal Inclusiveness

and Diversity Groups, as well as lawyers interacting with listed clients. We have further sought the view of a number of our listed clients.

We would be very happy to discuss this consultation further with the FCA if that would be of assistance.

*For a copy of FCA Consultation, see: [Diversity and inclusion on company boards and executive committees](#).*



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