

## Diversity and inclusion on boards: advice to companies on new FCA reporting requirements



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**Sex Matters** is a human rights organisation campaigning  
for clarity about sex in law, policy and language

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## Background

In April 2022 the Financial Conduct Authority published a policy statement PS22/3, *Diversity and inclusion on company boards and executive management*,<sup>1</sup> and on 20th April 2022 the new rules based on that policy came into force: *Listing rules and disclosure guidance and transparency rules (diversity and inclusion) instrument 2022*.<sup>2</sup> The most significant of these require listed companies<sup>3</sup> to include diversity statements on the number of men and women on their boards in their annual reports for financial years starting on or after 1st April 2022.

Companies' figures are to be measured against three diversity targets:

- at least 40% of the individuals on the board of directors should be women
- at least one of the "big four" senior positions (chair, chief executive, senior independent director, chief financial officer) should be held by a woman
- at least one individual on the board of directors should be from a minority ethnic background.

The aim of the regulations is to provide transparency on boardroom diversity, to enable companies and investors to assess progress and to inform shareholder engagement and investment decisions.

The FCA has left it up to companies to determine how they define "men" and "women" but requires them to do so consistently. This briefing aims to assist boards in complying with the new regulations. We recommend the simplest, clearest, most neutral and most coherent approach: reporting based on sex.

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<sup>1</sup> <https://www.fca.org.uk/publication/policy/ps22-3.pdf>

<sup>2</sup> [https://www.handbook.fca.org.uk/instrument/2022/FCA\\_2022\\_6.pdf](https://www.handbook.fca.org.uk/instrument/2022/FCA_2022_6.pdf)

<sup>3</sup> The listing requirements apply to 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'.

## The two approaches

The measure on reporting on women on boards aims at continuing and expanding the progress made through the FTSE Women Leaders Review<sup>4</sup> (previously the Hampton-Alexander Review and the Davies Review) in improving female representation at the highest levels of business. Companies have worked hard to create inclusive cultures and to remove barriers to attracting and retaining female talent.<sup>5</sup>

The FCA's original plan for mandatory reporting proposed replacing clear metrics based on sex with a requirement to categorise people by their self-identified gender (including a new "non-binary" category). After a consultation in which responses almost universally called for the targets and metrics to remain focused on sex, the FCA decided to leave the choice between the two with boards themselves:

"We have made changes to allow companies the flexibility to determine how they collect and report data in this area. In particular, we have given companies the option to report on either sex or gender identity for the numerical disclosures, provided they explain their approach to data collection and ensure consistency in their approach."

The new regulations direct companies to select from two approaches to reporting:

- **sex** – choices are man, woman or prefer not to say
- **gender identity** – choices are man, woman, [other categories] or prefer not to say.

Companies must publish a clear explanation of the approach used, and how the data is collected. The choice of categorisation must be consistent between:

- all individuals whose data is being reported
- the numeric data and targets.

That is, if you choose to report on sex (or conversely, gender identity), this must apply to everyone, to the targets set and to the performance of the company against them.

Good practice suggests the approach to reporting should also be consistent with a company's own diversity policy, which in turn should be consistent with the Equality Act 2010 for UK operations and should be backed by clear policy, management and controls. Companies covered by the existing disclosure and transparency rules<sup>6</sup> are already required to report on:

- the objectives of the diversity policy

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<sup>4</sup> <https://ftsewomenleaders.com/>

<sup>5</sup> FRC (2021). *Board Diversity and Effectiveness in FTSE 350 Companies*

<sup>6</sup> FCA (2022). *Disclosure Guidance and Transparency Rules Sourcebook*

- how the diversity policy has been implemented
- the results.

Overall, the FCA listing principles require a company to “take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations”.

## Sex

In UK law, and in everyday usage, “sex” is understood to be binary and based on biology. The Equality Act 2010 (Section 11(a)) provides that:

“In relation to the protected characteristic of sex – a reference to a person who has a particular protected characteristic is a reference to a man or to a woman.”

s.212(1) provides:

“In this Act ... ‘man’ means a male of any age; ... ‘woman’ means a female of any age.”

The word “gender” is sometimes used in policies to mean sex, as in “gender pay gap”, but as the Equality and Human Rights Commission has previously emphasised, this usage is not a reference to an alternative spectrum or system of self-declared identity.

Although a person’s biological sex is fixed, their sex as recognised in UK law may be changed with a “Gender Recognition Certificate”, which can be acquired by people who have been diagnosed by a psychiatrist or other medical specialist with “gender dysphoria”. Around 6,000 people (less than 0.01% of the population of the UK) have received such a certificate.

## Gender identity

Gender identity is a subjective feeling or idea. It is not a concept that is recognised in UK law or defined by the FCA. A definition from international non-governmental organisations is:

“Each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”<sup>7</sup>

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<sup>7</sup> <https://yogyakartaprinciples.org/preamble/>

Facebook, for example, offers over 50 custom gender options, including agender, androgyne, bigender, genderqueer, trans woman, transfeminine, neutrois, non-binary, pangender, trans man, trans\*, transmasculine and two-spirit.

While some people feel that expressing themselves through gender identity is important to them, replacing the biological characteristic of sex is controversial and is not recommended by the regulator for official statistics.<sup>8</sup>

## Reporting on sex: simple, coherent, prudent, consistent

We recommend that companies report the composition of their boards based on sex: men and women. This is simple, coherent, prudent and consistent.

- **Simple:** sex is an objective characteristic, recognised in law and universally understood to be socially and legally significant. It is recorded in payroll records and thus will already be a part of administrative data systems. It is not considered sensitive data for data-protection purposes.
- **Coherent:** if your company already has a diversity policy, it will already be collecting sex data in order to develop initiatives to overcome sex discrimination and the barriers that women can face at work, and monitor their effects.
- **Prudent:** collection of data based on sex enables organisations to guard against indirect discrimination risk, for example where a practice puts women at a disadvantage compared with men. This would not be possible with aggregated data based on the non-legal category of self-identified gender.
- **Consistent:** UK incorporated companies are required to report on the composition by sex of their board under the Companies Act 2006, section 414C(8).

The strongest reason to report by sex is to keep impetus in the ongoing effort to ensure that the female half of humanity is better represented wherever decisions are made. Only reporting by sex supports this objective.

## Gender identity: a risky and problematic option

The new regulations leave it open for companies to decide to report based on “gender identity” (but not to mix and match between sex and gender identity).

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<sup>8</sup> <https://osr.statisticsauthority.gov.uk/publication/draft-guidance-collecting-and-reporting-data-about-sex-in-official-statistics>

Abandoning sex and choosing gender identity would involve several problems and risks:

1. **Does not serve the objective of improving female representation.** Reporting on gender identity instead of sex means abandoning reporting on the proportion of female leaders and no longer monitoring the protected characteristic of sex. A company that chooses to report based on gender identity will produce data that cannot be analysed by reference to or compared with official statistics, or historic information on board directors, and cannot be analysed through the lens of indirect discrimination.
2. **Requires a completely new and separate data collection process.** Companies may be tempted to simply reclassify everyone's sex as their "gender identity". This is inaccurate and risks breaching GDPR (see point 4).
3. **Increases complexity.** In order to collect data on "gender identity" the concept needs to be defined and explained to those whose data is being collected. This will result in extra cost and complexity. If board members do not agree with the concept, they may be forced to reply "prefer not to say". This will compromise the usefulness of the data for interrogation and comparison both within the company and with other companies and other sources.
4. **Creates risks related to data privacy.** While information on sex is not considered sensitive, conditions of sensitivity and confidentiality apply when collecting information on "special category" data for the purposes of UK GDPR. **This is likely to include gender identity.**
5. **Creates the potential for belief discrimination.** Asking directors to declare a gender identity requires them to comply with a belief system (that every person has an innate gender identity) they may not share. This could contribute to a hostile environment for employees and directors who hold the "gender-critical" view that immutable, binary sex matters.
6. **Opens companies to controversy and reputational damage.** By deciding to report data on gender identity rather than sex, a company is taking an extreme position in a controversial public debate. Further, it risks misrepresenting progress on female representation if a male board member identifies as trans and would therefore be counted as a woman for reporting purposes. Conversely, a female board member who identified as trans or non-binary would become "invisible".

## What about trans inclusion?

People who identify as transgender are covered by the protected characteristic of "gender reassignment" in the Equality Act 2010. They should not be discriminated against because of this.

Reporting board composition based on sex does not prevent a company from welcoming (or indeed celebrating) a board member who identifies as transgender. This is simply a different aspect of diversity. It does not mean their sex has changed.

This was confirmed in February 2022 when the organisation For Women Scotland won an appeal against the Scottish government in relation to the definition of “woman” used in legislation aimed at increasing the number of women on public boards. In delivering the opinion of the Court, the Lord Justice Clerk, Lady Dorrian, said:

“By incorporating those transsexuals living as women into the definition of woman, the 2018 Act conflates and confuses two separate and distinct protected characteristics...The fact that an appropriate percentage for a representation objective in relation to one protected characteristic may not be proportionate and appropriate to another characteristic highlights why it is important to apply an individual approach to the characteristics and to focus in each case on those who share a relevant protected characteristic.”<sup>9</sup>

Some transgender people may seek to “live in stealth”, disassociating themselves entirely from their previous identity and seeking to keep their sex secret. For most, however, this is unrealistic. Sex characteristics are usually perceptible, and personal histories known. Trying to keep your sex secret is unlikely to be compatible with a role in public life. Company directors act as agents of shareholders, and their identities and histories must be known and transparent. This is a fundamental component of good governance for businesses.

The inclusion of a “prefer not to say” option is a reasonable accommodation. It allows any transsexual or transgender person who wishes to avoid being counted as a member of their biological sex for the purposes of board diversity reporting to do so, without stopping data on sex being collected for everyone else for the purposes of meeting the objectives in the company’s equality policy.

A trans person with a gender recognition certificate may be recorded as being their “acquired sex” if the company chooses to report on legal rather than biological sex. But a trans person without a GRC should be recorded as their actual sex (or may “prefer not to say”).

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Sex Matters is a not-for-profit company registered by guarantee.

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Published 29th April 2022

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<sup>9</sup> [https://scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf?sfvrsn=7920df79\\_1](https://scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf?sfvrsn=7920df79_1)