



Chris Hodge
Corporate Governance Unit
Financial Reporting Council
Fifth Floor
Aldwych House
71-91 Aldwych
London WC2B 4HN

5th March 2010

Consultation on the revised UK Corporate Governance Code: December 2009

The GC100 is the association for general counsel and company secretaries in the FTSE100. There are currently more than 120 members of the group, representing some 90 issuer companies.

The GC100 welcomes the opportunity to respond to the FRC's consultation on proposed changes to the Code. We submitted responses to the June and October consultations on the Code last year and would reiterate our conclusions from those responses, namely that we do not wish to see any increase in the overall level of prescription in the Code, nor do we feel there is a case for substantial change.

The GC100 has the following comments on the draft revised Code (page numbers refer to the FRC's 'Consultation on the revised UK Corporate Governance Code', December 2009):

Name change of the Code

Whilst welcoming the clarity of meaning in the proposed naming of the Code as "The UK Corporate Governance Code", we understand that the rules of the Irish Stock Exchange (ISE) require Irish-listed companies to comply or explain against the Code, and suggest that you consider this point further with the ISE, including giving consideration to the suggestion that the Code be named "*The UK and Ireland Corporate Governance Code.*"

Governance and the Code (p.11)

We note that the FRC intends to review the Code again in 2012: given the extensive review process from this consultation and the application of the Code to accounting periods beginning on or after 29 June 2010, we question whether scheduling the next review in 2012 is premature and suggest it may be beneficial to allow a longer period for the new Code to 'bed down' before consulting on further revisions.

Chairman's Preface (p.13)

The GC100 supports the inclusion of the Chairman's preface within the Code and believes this encapsulates the FRC's expectations for the tasks and behaviours of high performing boards. We suggest that the recommendation in paragraph 7 be strengthened to read "*It is expected that chairman will choose to report personally in their annual statements how the principles (in Sections A and B) relating to the role and effectiveness of the board have*

been applied."

Comply or explain (p.14)

We are disappointed that the FRC has not taken the opportunity to modify the description of the existing "comply or explain" approach to the more accurate and less pejorative "apply or explain" approach. For the reasons set out in our previous submissions, the GC100 believes that this would be a much welcomed and beneficial change, and we urge the FRC to reconsider its position on this. It is notable that the King Committee on Governance in South Africa (in its "King III" report of 2009) has explicitly adopted "apply or explain", on the basis that this more appropriately conveys the intent of the King code on corporate governance. The Netherlands corporate governance code is similarly worded.

Whilst the second paragraph of this section clarifies that the FRC expects companies to report to shareholders and intermediaries/ agents employed to assist shareholders in scrutinising governance arrangements, we note that paragraph 4 refers to only institutional shareholders as needing to pay regard to companies' individual circumstances when evaluating explanations for departures from the Code. The GC100 recommends that paragraph 4 is amended to make clear that this responsibility also applies to intermediaries and agents, in addition to shareholders.

Section B: Effectiveness (p.16)

We would suggest greater distinction between the task of the board as a whole and that of management. This could be achieved by creating an introductory paragraph to Section B to read: "*The board's role is to govern. Governance is neither a process of compliance nor an additional level of management. The board's activity is focused on this task as the representative of the company's owners and it discharges this through actions that promote long-term shareholder value.*"

We also ask that further clarity is given on the revised statement - "*All directors must be able to allocate sufficient time to the company to perform their duties effectively*"- as to what the FRC considers "sufficient time" to mean. Recognising that prescription in this area will be difficult as time commitment will vary from company to company and upon circumstance, it is suggested that the wording is amended to read "*All directors must be able to allocate sufficient time to the company to perform their duties effectively and ensure the effective running of the board.*"

Section C: Accountability (p.17)

Whilst there are divergence of views within the GC100 as to whether there should be more definition of what "risk appetite" means, we believe that it is important this principle is included in the revised Code as it will ensure there is a dialogue between boards and executive on the issue of risk. The GC100 proposes that the FRC's revised wording on this principle is amended to give greater guidance on what it expects boards to undertake in this area. The revised wording would read "*The board should consider, assess and keep under review the company's risk appetite and tolerance.*"

B.1.1. Composition of the board: Nine year rule (p.23)

We believe it would be worth considering some de-emphasis of the so-called "nine year rule" in the context of director independence, especially in light of the focus elsewhere in the revised Code on the importance of directors having a detailed knowledge of the company and its operations. The nine year cut off in this context is an artificial and

arbitrary rule which does not place sufficient weight on experience gained by a director whilst on the board. In our view, this rule reduces the effectiveness of boards, especially in instances where proxy voting services pay minimal attention to a company's explanation as to the determination of independence of directors who have served this long and automatically recommend a vote against the re-election of any NED who has served more than nine years.

B.3: Commitment (p.26)

We note the new wording of the main principle in this section which reflects former Supporting Principle A.4, and suggest that minor rewording could give a stronger message:

"All directors must be able to allocate sufficient time to the company to discharge their responsibilities effectively", or

"All directors must be able to allocate sufficient time to the company to perform their duties effectively."

B.6: Board evaluation (p.29)

The GC100 recognises that there are occasions when an externally facilitated board evaluation may be of value to a company and its directors, but does not believe this should be prescribed within the Code.

We have concerns that by introducing such prescription, the FRC is creating the need for an "industry" of external facilitators, where the existing pool of external facilitators is small. In our previous response, the GC100 pointed to the downsides of external facilitation, including the familiarity of the facilitator with the business model employed, cost and timing. We reiterate that the most effective methodology for a board evaluation will often depend on the circumstances of the company at that time and that boards should be able to retain their ability to choose when to use external facilitation.

The GC100 also questions how this prescription for a mandated external evaluation every three years sits with the main principle of the Code section which states that the board should undertake a "rigorous" evaluation of its own performance and that of its directors. If the board does undertake a "rigorous" evaluation every year then we would question why its evaluation needs to be externally facilitated every three years. We believe that either the main principle or the new provision should be amended as its current drafting does not enable companies to make a convincing explanation of why it has not been applied.

In the GC100's previous response to the consultation, we suggested that an alternative to prescribing more externally facilitated reviews could instead be a greater emphasis on enhanced disclosure of board evaluation. We believe that this does not require an onerous level of prescription in the Code, but suggest the following areas could be outlined in a company's disclosure on its board evaluation:

1. The methodology used for the evaluation
2. That feedback on the effectiveness of 'key' governance processes was solicited in the evaluation, and
3. That the main outcomes of the evaluation have been acted upon.

Suggested 'key' governance processes covered by the evaluation could include the tasks of the board, board composition, induction and education, quality and timeliness of information and support given to the board.

B.7: Re-election of directors (p.30)

As outlined in our previous response, opinion within the GC100 membership is divided as to whether annual re-election for all directors is preferable to a three year rotation.

Members who are against the introduction of annual re-election for directors have concerns that such a practice could have an effect on board succession and recruitment, especially in situations where the company was faced with a turnaround situation that might require more than a year to resolve. There are also concerns that for some companies, particularly smaller ones, the logistics of annual director re-election could prove onerous at the AGM. Concern has also been raised that there could be potential for the re-election of the whole board being used by a significant (but nevertheless minority) shareholder to take effective control by replacing the board. Finally, some members are concerned that annual re-election could further strengthen the influence of voting agencies, who would advise (and in some cases vote) on the increased number of resolutions at the AGM.

In contrast, those members who support annual re-election feel it offers shareholders the opportunity to hold the board to account, as without specific re-election, it may be difficult for directors to be removed from boards outside their three year terms.

Despite the divergence of views amongst the GC100's members, there is consensus amongst members that singling out only the chairman for annual re-election is unfair as its targets an individual director rather than maintaining focus on the board as a whole. The GC100 suggests that rather than introducing prescription in this area, the FRC instead retain the flexibility within the Code for companies to determine for themselves the frequency of the re-election of directors and chairmen, with the requirement that issuers explain in their governance report their approach to board re-election. It was also suggested that the Code be amended to place an obligation on shareholders to liaise with the company to discuss concerns they have rather than express their concerns via voting.

C.1.2: Accountability (p.31)

The GC100 questions whether the new provision C.1.2 is needed in the Code as we believe that a company's business review (if correctly drafted) should cover a full explanation of the basis on which the company generates revenues and makes a profit from its operations. We have concern that by including this new provision there will be multiple sources for companies to refer to when drafting the content of their business reviews – i.e. the Companies Act 2006, the ASB's Reporting Statement on Operating and Financial Reviews, the ABI's Guidelines on Responsible Investment Disclosure, Defra's Environmental Key Performance Indicators: Reporting Guidelines for UK Businesses and the UK Corporate Governance Code – and as a matter of principle there seems no need for the Code to duplicate requirements which are already prescribed in some detail in other mandatory rules.

E.1: Dialogue with Shareholders (p.39)

Whilst we support the emphasis given by the new drafting for all directors to be familiar with the views and concerns of major shareholders, we would propose amending the wording to a more objective term than "understanding". The proposed wording would instead read "*Whilst recognising that most shareholder contact is with the chief executive and finance director, the chairman should ensure that all directors are made aware of their major shareholders' issues and concerns.*"

E.2.2: Constructive use of the AGM (p.40)

The GC100 asks that the wording in this section be amended to read "*For each resolution, where a vote has been taken on a show of hands, the company should ensure that the following information is given at the meeting...*" Amending the wording would ensure that companies who conduct their AGM voting on a poll (for example, those with a large or geographically diverse shareholder base) can continue to do so without risking inadvertent non-application of the Code.

Schedule A: Remuneration (p.41)

The GC100 remains concerned that greater clarity is needed with regard to the new wording of the paragraph in Schedule A around performance criteria, particularly as companies may choose for very legitimate reasons to use non-financial metrics for short term incentives, but not for long term incentives. We also have concerns about how straightforward it is for companies (particularly those in the non-financial services sector) to link payout with risk policies and believe it should not be brought into the Code.

We propose revising the wording in Schedule A to read:

"Payouts or grants under all incentive schemes, including new grants under existing share option schemes, should be subject to challenging performance criteria including financial and (where the board considers them to be appropriate) non-financial performance metrics."

We have a further concern that it is not clear what the FRC's proposal that the "*criteria for paying bonuses should be risk adjusted*" means in practice. We also believe that Schedule A should reflect the ability of Remuneration Committees to exercise judgement both upwards and downwards in making awards.

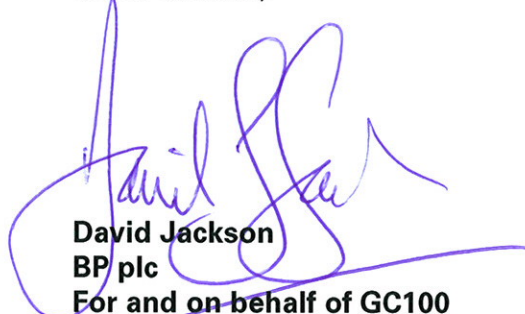
Other actions arising from the review of the Code: Turnbull guidance

The GC100 notes that the FRC intends to carry out a limited review of the Turnbull Guidance on internal control during 2010. We believe that the Turnbull Guidance is working well in practice, and ask that any review undertaken remains light touch.

We hope that the above response on behalf of our members has given constructive feedback on the FRC's consultation on the revised Code. The GC100 would be willing to be involved in any further drafting activity or clarification of the points raised in our response.

Please note as a matter of formality that the views expressed in this letter do not necessarily reflect the views of each of the individual members of the GC100 or their respective employing companies.

Yours sincerely



David Jackson
BP plc
For and on behalf of GC100