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

9th October 2009

Dear Mr Hodge

Review of the Effectiveness of the Combined Code: Progress Report and Second Consultation – July 2009

The GC100 is the association for general counsels and company secretaries in the FTSE100. There are currently more than 120 members of the group, representing 85 issuer companies.

The GC100 welcomes the opportunity to respond to the second consultation which reviews the effectiveness of the Combined Code. We submitted a response to the initial consultation in June this year and would reiterate one of the key conclusions from that response, namely that we do not believe there is a case for "bright line" regulation or substantial change to the Code.

The GC100 supports the adoption of the three guiding principles by the FRC when assessing the case for changes to the Code and its accompanying guidance.

Specifically, we do not wish to see any increase in the overall level of prescription in the Code and believe that any changes made should be done with the clear aim of enhancing disclosure for shareholders.

We enclose a copy of our response to the Walker Review of corporate governance in UK banks and other financial industry entities (BOFIs). The GC100 believes that care should be taken that Walker's recommendations are not automatically applied to non-BOFIs.

Code preamble

The GC100 proposes that the FRC set out its expectations for the high level tasks of the board and the behaviours which are found in high performing boards in a new preamble and /or introduction to the Code.

Precedent for the use of a preamble to define the overarching expectations of companies in this way is set by the Listing Rules, which uses five overriding principles in its preamble to outline the context for the more detailed rules which follow.

The preamble should set out some simple but overarching principles, such as:

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1. The role of the board is to govern, not manage;
2. The board should determine and then annually review the tasks with which it should be engaged with, the matters reserved to it and the level of authority delegated to the executive;
3. The board should review behaviours annually.

By annually determining the tasks, matters reserved, delegations and behaviours, boards will be able to determine the most appropriate model for them within the context of the company's requirements at that time. It will also encourage a culture of ongoing debate around the board table and confirm that "governance" encompasses all the tasks of the board and not solely the oversight or compliance functions.

Suggestions for the tasks which boards should be engaged with could include:

- Reviewing (and where appropriate determining) strategy
- Determining the risk appetite and profile of the company
- Performance monitoring
- Succession
- Setting the "tone from the top"

Both Sir David Walker and the FRC (and indeed Sir Derek Higgs earlier) have recognised that board behaviours are as important to good board governance as the structures and processes adopted by the board

Equally, attempts to prescribe, by what ever means, the behaviours required for a high performing board, are unlikely to be successful other than at a very high level.

We believe that it is a crucial task of the chairman in his leadership of the board to ensure that there is a clear understanding amongst board members of how the board is expected to carry out its tasks and the behaviours that are required of board members in so doing. This expectation should be contained in the preamble.

Companies could set out how they have met the principles of the Code's preamble as part of their reporting activities (either through an existing reporting mechanism or a separate stewardship report). It should be clear that the preamble contains the overriding criteria to be used in determining compliance with the Code.

Responsibilities of the chairman and the non-executive directors

As we outlined in our first response, the GC100 believes that each board should be encouraged to determine and clearly communicate the role played by its chairman and non-executive directors in approaching the tasks of the board.

Any further guidance on the role, responsibilities and expected behaviours of the chairman, SID and non-executive directors should therefore be kept high level and could be included in non-binding guidance. This would enable companies to determine the most appropriate governance model, including the nature of each board member's role. We also believe that this could be powerful in managing external expectations (including shareholders and the media) as to what non-executive directors can and should do.

Our preference would be for the Code preamble to ask that companies determine the key aspects of the chairman and NED roles and set these out in their reporting activities or on their website. The chairman's role should also include determining whether sufficient information has been given to non-executive directors to fully and rigorously debate the issues and assess the risks involved.

We have concerns about introducing prescription over the time commitment expected from the chairman and non-executive directors. Setting a fixed time commitment for board members may often be artificial as the schedule of the board and its committees can be subject to change according to the demands of business. We would also have concerns that setting a fixed time commitment could discourage potential NED candidates – particularly those who are executive directors elsewhere.

Individuals are directors for all of the year, not just for so many days. Shareholders do have to know that directors are spending the appropriate time in governing the company on their behalf, but also need to recognise that board activities and interaction is not solely limited to and should not be judged by attendance on the days upon which board and committee meetings take place

We believe there are other alternatives to setting a fixed time commitment for NEDs. Ultimately the chairman will have responsibility for ensuring that sufficient time is spent by NEDs on board activities; this could be monitored either through the annual board evaluation or the nomination committee keeping the issue under review and making a recommendation to the board if it concluded that a director's other commitments were inconsistent with those required by the company.

Board balance and composition

There have been cases where investors or stakeholders have put pressure on boards to recruit NEDs with specific, narrow skill sets. We believe that boards should look at the wider skills and experience of their members when undertaking succession planning and further emphasis in the Code of the need for relevant experience amongst non-executive directors collectively (rather than individual expertise) would reinforce this. This will also require the "independence" test to be reviewed or applied in a way that in practice permits those with the relevant skills to be appointed to the board.

As we outlined in our earlier response, we also believe there should be greater flexibility in the Code around length of tenure, in particular the "nine year rule". Tenure of board members should be determined on the basis of contribution and continued evidence of the exercise of independent judgement, rather than an arbitrary term limit which can result in a loss of continuity amongst those NEDs with valuable experience.

Frequency of director re-election

Whilst opinion within the membership of the GC100 is divided as to whether annual re-election for all directors is preferable to a three year rotation, members do not support linking the outcome of certain resolutions (e.g. directors' remuneration report) to the re-election of certain directors as this would target individual directors and make chairmanship of certain committees fall under greater scrutiny. Neither do we support a different practice of re-election for the chairman of the board and committee chairmen to those of other directors as again we feel this targets individual directors rather than maintaining focus on the board as a whole.

We also believe the proposal to introduce a binding or advisory vote on specific issues or the corporate governance statement is unnecessary and will add further prescription to the AGM process for companies. Shareholders already have the opportunity to demonstrate their satisfaction with the governance and commercial performance of the company – with annual votes on the report and accounts, directors' remuneration report and reappointment of auditors. Adding a specific vote on the governance statement could lead to increased boiler plate disclosure rather than enhancing dialogue with investors, as companies may feel pressured to use a report that is subject to a vote as a "box ticking" mechanism.

Board information, development and support

The existing guidance in the Combined Code on training already stresses the importance of a full induction, learning and development programme and gives clear responsibility to the chairman to ensure this is done. We believe further prescription to this area is unnecessary. An alternative to adding to prescription in the Code on the content of such a programme would be for NEDs to use the board evaluation process to give their feedback on this area.

As we outlined in our June response, we believe it is crucial that non-executive directors are properly resourced in terms of information and support in order that they can effectively scrutinise the performance of management and the company. Such support should be more than solely the ability of NEDs to seek external advice on certain issues, which already exists. We believe that the board should consider the nature and source of that support. Sir David Walker emphasises in his report that it is important that boards carry out this task.

In a similar way to seeking feedback on induction and training, the quality of information and support given to non-executive directors could be tested on an annual basis through the board evaluation.

Board evaluation

As highlighted in our earlier response, the GC100 believes that a rigorous board/committee evaluation process is an important feature of good corporate governance practice. Whilst we agree that externally facilitated evaluations can add objectivity to a review of board effectiveness, we would caution that in itself external facilitation will not resolve investor concerns that disclosure on evaluation is uninformative.

External facilitation can have downsides in terms of the familiarity of the facilitator with the business model employed and the issues confronting the company. The timing, cost and potential disruption of an external evaluation may also be significant issues for some companies. We believe that the most effective methodology for a board evaluation will often depend on the circumstances of the company at that time and boards should be able to retain their ability to choose when to use external facilitation rather than this being determined by an evaluation timing cycle.

As an alternative to prescribing more externally facilitated reviews, the Code could instead place greater emphasis on enhanced disclosure of board evaluation. Such enhanced disclosure would not require an onerous level of prescription in the Code but simply state that disclosure of a company's board evaluation process should outline:

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.

The '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.

Risk management and internal control

The Walker Review emphasises that a number of its recommendations relating to risk (including the establishment of a separate risk committee) are specifically aimed at banks and life assurance companies and does not evaluate their application to other businesses. As outlined in our earlier response, we believe that different businesses face different risk profiles which change over time and circumstance. We have concerns that applying the Walker risk management mechanisms recommended for banks and other financial institutions would not be appropriate for companies in the non-financial sector who operate according to different (and often less complex) business models. We also believe that the Walker recommendations on risk, for example a separate risk committee or the creation of a Chief Risk Officer, could limit the ability of companies to structure their risk management model according to the business model and the environment in which they operate. Ultimately it is for the board as a whole to be responsible for determining the risk appetite and articulating the risk profile of a company, with management being responsible for the management of risk and internal controls.

The GC100 sees no compelling argument for a review of the Turnbull guidance and would be concerned that further changes and provisions to Turnbull could result in more boiler plate disclosure on risk as companies attempt to report against increasingly complex and lengthy requirements.

Remuneration

As we noted in our previous response we agree that remuneration policies, including those operating below board level, should be consistent with effective risk management and support the view that remuneration committees should have regard to the risks associated with the achievement of specific targets linked to the annual incentive schemes and the potential cumulative effect of such targets over a longer period.

Whilst we note that much of the European Commission's 'Recommendations on Executive Pay' is covered by existing UK practice (including the use of measurable performance criteria for variable remuneration and guidance on termination payments), we would question whether bringing the Commission's recommendations in to the Code would strengthen remuneration practices and make disclosure on remuneration more accessible to investors and other stakeholders. Instead it may make reporting on remuneration more complex and result in lengthier, boiler-plate accounts as companies attempt to meet the increased quantity of regulation and guidance in this area.

One of the Commission's recommendations which we do not feel is appropriate is the inclusion on the remuneration committee of at least one member who has knowledge of and experience in the field of remuneration policy. It should be up to the nomination

committee of each board to determine which non-executive directors are the best candidates for committee membership based on their skills and experience; investors have the opportunity to support (or reject) this selection when voting on the re-election of directors.

Finally we question how more direct shareholder involvement in setting remuneration would work in practice. The suggestion of holding votes on each individual director's remuneration package rather than the single vote on the directors' remuneration report takes back the delegation given by shareholders to the board to determine the remuneration of executive directors collectively. It would also make the resolutions and voting process at the AGM more complex and we would query the practical implications of what would happen if an individual director's remuneration package was voted down whilst other directors were passed?

Quality of disclosure by companies

The GC100 believes that companies spend significant time and effort in complying with disclosure requirements and there is often disconnect between these requirements and narrative reporting that is accessible to users. We believe the FRC should examine what disclosure is being made, the different requirements for disclosure and how much of this is actually useful to shareholders. It should also be recognised that any disclosure made by companies has to undergo an assurance process which will involve both external auditor and legal review, which is costly. Clearly any further increase in the quantity and scope of disclosure will have an impact on the cost of assurance.

We do not see merit in the FRC or FSA undertaking greater monitoring of "comply or explain" statements. "Comply or explain" enables companies to provide an explanation as to why they have not complied, and investors can then judge whether this is acceptable. By taking an enforcement role, the FRC or FSA will be reducing this flexibility for companies – and there is a risk that by the FRC/FSA providing a judgement as to whether a company has provided sufficient explanation, investors will defer to that opinion rather than reading and engaging with companies themselves before reaching a conclusion. This is why "apply or explain" is a better mantra in this context (and one which Derek Higgs himself had wished he had adopted).

Engagement between boards and shareholders

The GC100 is supportive of the framework proposed by Sir David Walker. We see the 'Principles of Stewardship' as representing best practice for investors and fund managers, and in the spirit of the Combined Code we believe that institutions should adopt a "comply or explain" approach to disclosure. We would be happy to be involved in further dialogue on investor engagement

We also believe that the FRC and ISC should actively consider the development of best practice guidelines for proxy voting services, although it is not clear where such best practice guidance should sit (i.e. within the Combined Code or elsewhere). Proxy voting agencies have grown hugely in influence, yet are not regulated, are not shareholders and do not have the responsibilities associated with share ownership. Some proxy voting agencies do not engage with companies before publishing their recommendations, yet the voting recommendations made by these agencies are publicly available and often reported on by the media, even where governance issues may have been misinterpreted or misunderstood.

We are concerned that some investors may choose to simply apply the voting recommendations of a proxy agent to their holdings without examining the issues themselves (and indeed we recognise that some investors feel they are not resourced to undertake comprehensive analysis of each company in which they invest during the AGM season, particularly smaller firms). Again, these issues demonstrate why the Code should encourage "apply or explain" (rather than comply or explain) as it compels greater engagement and dialogue between companies and their owners on the governance performance of boards.

Best practice guidance for proxy voting advisers should cover key issues such as engagement between companies and their shareholders, the need to articulate why "explain" is not sufficient before recommending a vote against and the declaration and management of conflicts of interest (e.g. around any consultancy work or fees received). We note that there is currently a parallel debate on the role and nature of the proxy advisory industry in the US which is examining similar issues.

We hope that the above response on behalf of our members will contribute towards the development of the Code and the enhancement of good corporate governance practice. 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

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GC100 response to the Walker Review of corporate governance in UK banks and other financial industry entities

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1 October 2009

Strictly Private & Confidential

Sir David Walker
Walker Review
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Dear Sir David,

Walker Review

GC100 is the association for the general counsel and company secretaries in the FTSE 100 and welcomes the opportunity to contribute to the Walker Review. There are currently over 120 members of the group, representing some 85 issuers.

We believe that the Review is well thought out and incisive. The Review has addressed the perceived issues of concern and has made many sensible suggestions and recommendations for how they should be addressed. In particular we welcome the statement about the need for there to be judgment and flexibility.

Good corporate governance will not be assured by "box ticking" conformity with specific prescription. Rather this will always be dependent on behaviour.

Following extensive discussions amongst our members representing both BOFIs and non BOFIs we would like to make the following comments in relation to the five key themes laid out in the Review and the 39 recommendations:

5 Key Themes

1. We fully endorse the view that the Combined Code remains fit for purpose. No code or regulation can create a zero failure regime. Specific regulations will create further "box ticking" prescription. There is some concern amongst our non BOFI members that changes to the Combined Code brought in specifically for BOFIs, e.g. Recommendation 3, may inevitably end up applying to non BOFIs as well. It will be essential that the FRC amends the Code where it believes it to be necessary, in a way that does not impact adversely on non BOFIs. We suggest that this can be achieved through the use of sector-specific annexes similar to the practice adopted in the Listing Rules subject to our non BOFI members' concerns about ensuring non applicability to them being satisfied.

   In addition, members have raised the important issue of what types of entity will ultimately fall (and should fall) within a BOFI "class" for the purposes of this

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review. There will need to be as clear a definition as possible.

2. We fully endorse the view that it is behaviour rather than organisation that is the issue in hand. Given this, it is very difficult in practice for the Code to prescribe behaviour to any substantial degree or define good judgment.

   We remain concerned that there is a public misunderstanding over the role of the NED. The perception of what NEDs can and should be able to achieve is unrealistic. The role of the Board is one of strategy and oversight. NEDs cannot guarantee success or that failure does not occur.

   One of the key roles for a NED is to challenge constructively the Executive on the company's proposed strategy. The right environment needs to be created where NEDs can do this and "agree to disagree" on issues, within a Board that still has strong working relationships. This should result in a better level of challenge, leading to a fuller understanding of risk before reaching a consensus on strategy, which the Executive is then sufficiently empowered to deliver. In facilitating this, a good chairman will ensure that a Board is fully informed and its members behave in a way that allows robust debate and a clear understanding of issues, whether the Board is dealing with strategy or oversight.

   Finally, there is an issue with the current Code that perhaps the independence criteria and the way they have been applied has unnecessarily restricted the pool of potential NEDs. Further, the "nine year rule" may have resulted in a loss of continuity and valuable experience.

3. In addition to the general observations at paragraph 1 above, our non BOFI members are concerned that the recommendations on risk management are not appropriate to their sectors, where risks may be managed differently. They feel that "one size" does not fit all. The Board should establish the overall system by which risk is identified and monitored as part of its task of "setting the tone from the top". However, this should not derogate from the Executive's responsibilities for risk management. In particular, a fully independent risk function should not be seen as removing risk management from executive responsibility and accountability; neither should it remove the matter from the Board.

4. Increased engagement with shareholders needs to avoid creating a situation where management is increasingly driven to short-term solutions by activist shareholders (often with a very small holding) which are perhaps not in the best interest of longer term and more passive shareholders.

5. Our membership is concerned that any prescriptive changes to remuneration practices should not make UK companies uncompetitive in seeking the best talent, and should allow the flexibility to distinguish between varying management responsibilities in different structures.

<u>39 Recommendations</u>

In relation to the 39 recommendations set out in the Review, we have the following specific comments. We have only commented on those recommendations where we have a suggestion or issue:

Recommendations 2 and 9:

Support for the Board is an integral part of the Chairman's responsibility as set out in Recommendation 9. However where NEDs seek additional external advice this should be co-ordinated with the Executive to maintain the integrity of the unitary board model.

Recommendations 3 and 7:

Whilst we fully understand that a large multi-national BOFI should expect significant NED and Chairman time commitment, it is very important to retain flexibility. Quality of contribution rather than time spent is key. There is a concern that a minimum time commitment may become the expected norm for all. It is important to avoid a situation where serving Chairmen, CEOs or CFOs of other companies are excluded from sitting on BOFI Boards by time requirements, thereby reducing the pool of NEDs further.

Recommendations 4 and 5:

The FSA increasingly has its own requirements regarding the "approved person" process for the companies it regulates. The Review's suggestions for bringing external experience to this process is to be commended. Ultimately however it must be left to individual Boards to determine the level and range of experience they require for the Board to fulfil its duties. They should be the best people to judge what is required.

Recommendation 8:

There is always the risk that starting with a presumption that relevant industry experience is essential can lead to existing paradigms being reinforced rather than challenged. We agree that the leadership capabilities of the Chairman to draw effectively on the skills and knowledge of other directors are paramount (together with the ability to understand and address their own development needs). In the circumstance where a prospective chairman possesses very strong leadership capabilities but less relevant experience, a company should be able to take into account the availability of relevant industry experience amongst the NEDs.

Recommendation 14:

In practice, the number of intermediaries involved in holding shares in UK companies makes short-term movements on the register difficult to monitor.

Recommendation 15:

The FSA should always discuss movements on the share register with the company first. There is a risk that this recommendation could result in the FSA requiring adjustments to a BOFI's strategy, in response to short-term selling pressure or market conditions that are not in the longer-term interests of the company or its long term shareholders.

Recommendations 16-20:

The GC100 would be happy to participate in any further debate/working group on how the critical issue of creating a closer dialogue between investors and companies can be made to work in practice.

There is a growing concern that the business model of most fund managers, their remuneration practices and the way their performance is benchmarked do not foster an interest in the long- term value creation strategy of companies. An apply or explain obligation in relation to the principles of stewardship may help. However, the principles of stewardship should apply at all times and not only when the Investor has "concerns". Encouragement for fund managers to increase the attention they pay to governance and the quality of the Board will be important in ensuring the correct behaviour of the Board.

Recommendation 24:

Removal of a CRO of a BOFI should give rise to the automatic right for the Board to require an exit interview with the NEDs or at least the SID without executive management present. There is an argument that an exit interview with the FSA in the same manner as employed for the actuary of a with-profits fund should also be required.

Smaller or less complex non-BOFI companies should continue to have the flexibility to determine how they implement risk management. Non BOFIs are concerned that the CRO requirement may ultimately apply to them.

Recommendation 25:

It would be preferable if individual Risk Committees have discretion as to whether and when external advice should be sought rather than it being "expected" in the normal course.

Recommendation 27

The recommended specific content/disclosures for risk reports will need to take account of the existing disclosure provisions, both in the UK and other jurisdictions, to reduce the information overload. Companies are already required to give details of, for example, principal risks and uncertainties, systems of internal control and risk management processes.

Recommendation 30:

We are concerned that the approach here concentrates on identifying the relevant executives based purely on their quantum of remuneration. This ignores the varying nature of roles and responsibilities held. It would also mean that disclosure would be greatest where Executive Board remuneration was lowest. We would question whether this is the intended outcome.

Recommendation 31:

We are concerned that this could lead to arbitrary and unintended outcomes. For example, there will be unequal disclosures among companies depending on the levels of directors' remuneration or it may result in an upward ratchet in pay levels below board level. An alternative approach could be for the Remuneration Committee to disclose greater detail on the policy controls and structures that govern remuneration decisions for those in senior management positions. If disclosure is the approach to be taken, then a principles-based approach is preferred, based on management role and/or impact on the risk profile of the company.

Recommendation 32:

We believe that a consistent approach is needed to ensure a level playing field and to maintain the globally competitive position of UK BOFIs.

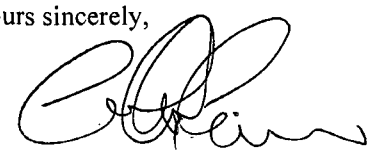
Recommendation 33:

If the relevant periods for both the initial grant of an award and the period during which shares must be held prior to release (both during and after employment) are long enough, there should be no need for the claw back concept. Claw back will either result in overly prescriptive rules or be subject to hindsight judgements. Management should suffer through the impact on the value of their share awards but the potential removal of an award on the basis of hindsight (absent male fides) will discount the value of the award. This is turn might lead to replacement with other forms of remuneration which may not be so closely linked to the interests of long term investors. Management should only be penalised for a bona-fide commercial judgement going wrong if it adversely impacts shareholders generally through the value of their shares.

The GC100 remains ready to discuss any of the above issues in more detail should you so wish.

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 GC100 or their respective employing companies.

Yours sincerely,



Geoffrey Timms
For and on behalf of GC100