

Mr David Styles
Director, Corporate Governance and Stewardship
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Sent via codereview@frc.org.uk

13th September 2023

Dear David,

Response to FRC Consultation on proposed UK Code Changes

Thank you for inviting IBE to respond to your consultation exercise on the new UK Corporate Governance Code. Our comments on the paper are as follows.

IBE

Independent Board Evaluation is the trading name of a specialist, sole-focus board assessment practice, founded in 2008. Independent Board Evaluation's unique approach tackles issues of governance and identifies any obstacles to optimum performance so that they can be addressed and resolved. The IBE team, led by Ffion Hague and Lisa Thomas, has been conducting board evaluations for listed and private companies across all sectors for over 15 years. Further details of our board evaluation methodology and client lists are at www.ibe.uk.com We are wholly independent and provide no other consultancy services.

The Consultation Document

Q3 – to enable evaluators and investors to form judgment on board performance, we need definitions of 'Culture' and 'Outcomes'. While NEDs can ensure that there is a plan for embedding a particular culture in the organisation, its execution and success is an executive responsibility.

Q4 – we need a definition of a 'significant appointment' to make this an objective assessment.

Q5 – while we support the notion that NEDs and companies must be encouraged to be realistic about their time commitments, making an assessment of whether a director has the appropriate time will need to remain a matter of judgement. Private and public board work can be very variable, and each person’s capacity for work differs. Boards already disclose attendance rates in their annual reports. We suggest that the disclosure specifically notes if attendance has been by telephone or video (for non-remote meetings) since over-boarding is usually signified at least in part by poor in-person attendance.

Q7 – We need a definition of ‘cognitive diversity’ if board evaluators are to challenge this and develop board composition through their recommendations. We believe that it will not be easy for companies to disclose nor report on this type of diversity without a definition. Cognitive diversity needs to be something that an independent board reviewer can objectively assess, and not something that would ordinarily form part of a longer term, and non-independent engagement, such as coaching of individual board members.

Q9 - We attach our response to the then ICSA, now CGI consultation in 2020. Some of these points have been addressed in the revised CGI guidance issued in July 2023.

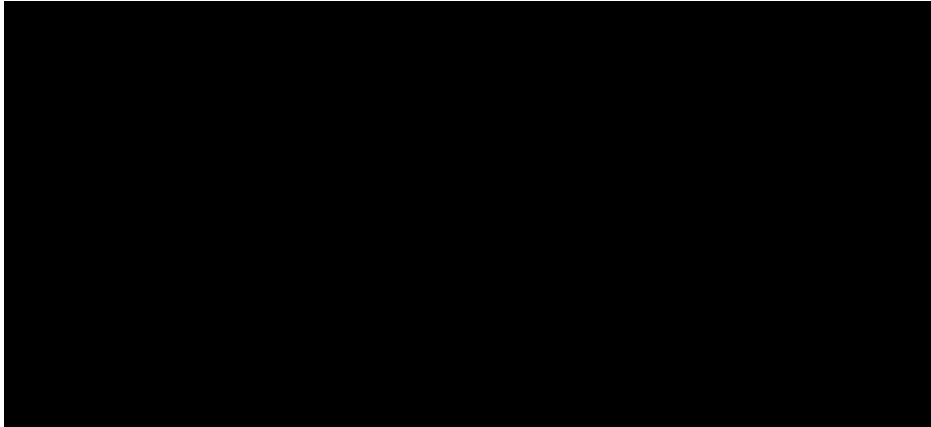
We welcome the application of the ‘comply or explain’ principle to the mandatory rotation of board evaluators after 6 years, which seems to us in some specific cases to be too short a period, and not in the best interests of good board governance. We strongly support the concept of rotating evaluators at intervals to avoid loss of objectivity and overfamiliarity, but we question why board evaluation practitioners are being treated differently and are subject to more frequent rotation than other professional advisers? We would ask why NEDs are deemed independent after 8 years, but board evaluators are not? And why audit partners are deemed sufficiently independent to review the accounts 5 years consecutively, but board evaluators are not after two reviews at 3-year intervals. Any perception of ‘cosiness’ between boards and their evaluators fails to take account of the change in board composition over a typical 6-9 year period. Enforced rotation in itself will not stop some evaluators giving boards an easy time but we fear that some of the profound value of the exercise may be lost if the rule is applied too rigidly. Examples include a board who has used an evaluator for 6 years whose new Chair wants to use the same provider again to provide continuity or to support their own induction process, and a board where specific circumstances such as a recent lapse in governance or a reputational crisis call for an evaluation to be undertaken by someone who is trusted by the board and knows the full background.

We believe that the application of the 'comply or explain' principle to any mandatory rotation of board evaluators should be included in the Code so that it cannot be changed without due consideration in future revisions of the guidance.

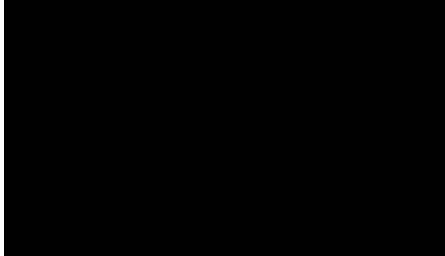
For the same reasons we would strongly support including in the Code or guidance a definition of when a board has changed so significantly that the clock is re-set, e.g., following a merger or a change of Chair plus SID, or indeed after a change of more than half the board in total.

We are of course happy to discuss these points in greater detail at any time,

Yours sincerely



Independent Board Evaluation
13th September 2023



4th July 2019



ICSA Review of the Effectiveness of Independent Board Evaluation in the UK Listed Sector

Thank you for inviting IBE to respond to your consultation exercise on the ICSA review of board effectiveness. Our comments on the paper are as follows.

IBE

Independent Board Evaluation is a wholly independent board assessment practice, founded in 2008. Independent Board Evaluation's unique approach tackles issues of governance and identifies any obstacles to optimum performance so that they can be addressed and resolved. The IBE team, led by Ffion Hague and Lisa Thomas, has been conducting board evaluations for listed and private companies across all sectors since 2003. Further details of our board evaluation methodology and client lists are at www.ibe.uk.com. We are wholly independent and provide no other consultancy services.

The Consultation Document

As practitioners with a sole focus on board evaluation we support the idea of creating a Code of Conduct for board evaluators in the interests of raising standards in the provision of this service providing the Code encourages more people to enter the profession, and does not restrict boards' choice of who to use to provide the service or inhibit innovation in this sector by being overly-prescriptive. We believe that the Code should be voluntary at this stage, in line with the codes of conduct applied to head-hunters.

We strongly support ICSA's proposals on the definition of the purpose of board evaluation. We do not have the powers (eg around disclosure of documents) to adopt a definition of board evaluation that is more akin to an audit. Furthermore, board evaluation cannot predict effectiveness, although a good one does make it more likely: boards are dynamic entities and a change of line-up – for instance a

change of Chairman or CEO – can significantly affect its effectiveness positively or negatively. However, a good evaluation process, transparently reported, shows seriousness of intent and a willingness to accept challenge which are good indicators of future effectiveness.

In terms of the independence of evaluators, it is a point of discussion whether the same pressures would fall on a company with several consultants as on a sole trader and judgments about market dominance should perhaps distinguish between the two. Indeed, as a general point, we think it would be helpful to clarify whether the proposed Code should be adopted by firms or individuals and whether it should apply to firms or individuals (e.g. the provision that no evaluator should do more than 3 consecutive reviews, where we would argue that it should apply to individual evaluators within a practice, and conflicts of interest). We strongly support more providers coming into the market, but do not think the intention here is to fragment established practices so that the market is populated only by sole traders.

We support the concept that evaluators should be chosen by more than one member of the board, and ideally by members of the Nomination Committee. However, we believe that internal references, where evaluators are recommended by an existing member of the board who has worked with them elsewhere, can play a positive part in the process. Indeed, it can be difficult to select on any basis other than references when the content and output of our work is confidential and cannot be shared with a new client. A director who has been through our evaluation process is well-placed to judge if an approach used elsewhere will work. To make the process fair, directors should of course declare any interest – e.g. membership of an advisory board of a provider etc – and involve at least one other board member in the decision.

With regards to the provision to limit the number of consecutive evaluations to three, we think this should be subject to the principle of comply or explain. We strongly support the concept of rotating evaluators at intervals to avoid loss of objectivity and other complications and, since we are coming up to the fourth cycle after the introduction of mandatory board evaluation in 2010, we will be able to see over the next few years whether boards are in fact doing so naturally. However, we think a hard and fast rule would in some cases not be in the interest of investors. Examples include a board who has used an evaluator for three full external evaluations whose new Chairman wants to use the same provider again to provide continuity or to help their own induction process, and a board where a specific event calls for an evaluation to be undertaken by someone who is trusted by the board and knows the full background. Being overly-prescriptive would also count against boards who want to use the same evaluator for light-touch reviews in-between full external reviews, which is good practice in our view. Finally, while there is a shortage of qualified provision of service in the market, we think it would be problematic to impose this as a rule too rigidly whereas a ‘comply or explain’ approach would discourage boards from using an evaluator repeatedly without good reason but allow those who want to make an exception to make their case to investors. In addition, we need a definition in the Code of what an external board evaluation actually is and how it differs from a light-touch, assisted internal, or follow-up review. It would also be useful for the Code to define when a board has changed so significantly that the clock starts again, e.g. following a merger or a change of Chairman/CEO/SID etc.

While we consider accountability and responsiveness to investor views to be a key tenet of board effectiveness, we see major practical difficulties in involving investors in evaluations. It is not clear how many investors would need to be involved to fulfil this provision or what criteria would be used to select them and, as external evaluators, we would not want to intervene in the dialogue between companies and their investors. The risk of an evaluator creating expectations of change following an interview or giving some investors access to information that is not available to all seems to us to be another major hurdle. We would also approach any measure that increases the pressure from investors to share with them the findings of a review with caution, in the interests of making evaluations effective and getting frank, honest feedback from directors: we would not expect boards to discuss any shortcomings with us as freely if the findings of the review were to be open to investor scrutiny. We do however often recommend that boards commission external reviews of investor opinion on a regular basis and we take account of their governance concerns in evaluations and including these and other measures to incorporate investor views into evaluations may be a more practical way forward.

We do consider that investors have every right to know that the board evaluation process is undertaken regularly and thoroughly with a reputable practitioner but would not support the involvement of investors in choosing those practitioners on the grounds that boards need to be free to choose to work with any practitioner they think would add value. Choosing from an approved list, for instance, would not necessarily encourage innovative approaches from new entrants to this market.

We would welcome the extension of a voluntary Code to cover other sectors and indeed, our experience is that many private and not-for-profit organisations conduct board evaluations regularly as if they were bound by the same regulatory imperative as listed boards.

With regards to proving our credentials for the job, we agree that evaluators need to demonstrate that they have the capacity and capability to do the job, but this should be based on facts (track record, qualifications etc) not qualities (belief in diversity, appreciation of dynamics) which are best established through references.

On the issue of an oversight body or a complaints system, as practitioners we believe that we should not comment but we would of course co-operate fully with any such body that is established.

On the subject of disclosure, even an agreement between the evaluator and boards is not effective in every circumstance. We agree that certifying when agreement has been reached is a step forward but would suggest that this should be backed up by a mechanism for evaluators to communicate to shareholders whether or not the disclosure is a fair representation of the evaluation to afford some leverage to the evaluator.

Our more detailed observations on the draft Code Appendices follows and we hope that these comments are helpful to you in reaching a final recommendation on the Code.

Appendix C - Draft code of practice for service providers

We are supportive of a voluntary Code of Practice for Service Providers. We comment below on the areas that we believe need further consideration:

Provider Competence and Capacity

Most assignments are won through a competitive pitch where the evaluator's competence and capacity are fully tested, and increasingly this process may be carried out by several members of the board or Nomination Committee and would include a discussion at the full board where the evaluator is not present. Whilst including useful material on a website is important, we think that the pitch process is the one which truly tests whether an evaluator is well suited to an assignment.

Regarding the range of topics and skills evaluators need, we broadly agree with the list proposed but would welcome guidance on how evaluators are to demonstrate that they have *an appreciation of the critical importance of diversity of the board*, in practice. We also wonder whether evaluators would *be assessing the effectiveness of specific decisions made over time, critical to the success of the business*. Instead, we believe that this part should refer to an analysis of the process which led to the decision. Evaluators are not usually qualified to be making such an assessment and are not there to second guess business decisions. Evaluators bring best practice from working across many different sectors, but not company specific knowledge, and this is an important component in maintaining independence. Evaluators' focus is on the adequacy of governance, not business performance.

We do not support the inclusion of shareholders in the list of external perspectives to be collected during an evaluation for the reasons stated above. We do however believe that other stakeholders are important voices in the process and support the inclusion of, for example, senior management, employees, advisors, regulators, industry bodies, key customers and suppliers where appropriate.

Qualifications. We suggest that the drafting should be amended to read "Areas of capability might include *some or all of the following*". We would however query whether financial expertise needs to be included in the list, since a board evaluation is not an audit. It would be helpful also to understand what professional qualifications might be in contemplation here. Further, any reference to *up to date professional knowledge* should specifically refer to knowledge of UK Corporate Governance and not any other jurisdiction.

Independence and integrity

As noted above, we believe that companies should be afforded the option of a comply or explain regime with regard to the number of evaluations carried out by a particular provider and this should be clarified as to whether it applies to an individual practitioner or a practice as a whole. In any event we would also welcome clarification that this refers to no more than *three full external evaluations* and would argue that it should not include a light touch follow-up review which might take place 12-24 months

after a full external review. We suggest also consideration of a cooling off period so that it is clear that the clock is re-set should the company wish to return to the same provider after using another provider in the interim, as well as the scenarios highlighted in our more general comments above about whether a merged organisation would be included in this provision. We agree with the view that companies and providers are mindful of independence issues, and that many already apply an informal rule not to carry out more than three external reviews for one client unless there are particular circumstances in play.

The requirement for professional indemnity insurance is important. We believe that this will need to be carried by individual evaluators, and not necessarily signatories which may be whole firms, depending on the legal structures of providers.

Terms of engagement

There is a reference to a follow up after twelve months *with the company*. In reality this is likely to take place with the Chairman and/or the Company Secretary rather than the wider board or nomination committee and clarification may be needed here.

Where particularly sensitive information is discovered, the evaluator must show discretion. However, it must be clear that a board evaluation is not a part of the formal whistleblowing process and participants in board evaluations should be encouraged by providers to follow formal whistleblowing procedures where needed.

With regard to client disclosure, this drafting raises the question of what the provider should do where the company disagrees with the provider and does not, in fact, correctly represent the providers views, despite having given the provider the chance to check the accuracy of their statements. Please see our earlier comments.

Appendix D - Draft principles of good practice for listed companies

The revision of the UK Code of Corporate Governance and accompanying guidance has already been very helpful during the pitch process for an evaluation, since it encourages an active debate about methodology and transparency. We have no objection in principle to the introduction of principles of good practice for listed companies but would support delaying this until there is more data available on how the revisions to the Code have filtered through into actions adopted by boards and subsequent reporting. We think it worth focusing companies' attention on the UK Code of Corporate Governance and guidance for now. We also believe that it is for companies to provide specific comments on Appendices D and E but would make the following observations of our own:

Selection

The drafting of Point 2 should be consistent with the drafting of the Code for Providers. The draft Code for Providers states that it *"is good practice for signatories not to undertake more than three*

consecutive evaluations” whereas this Code states “*Companies will not appoint reviewers ... that have carried out more than two previous consecutive full board evaluations..*” with the latter being more prohibitive than the former.

Clarification may also be needed for point 11, where there is a reference to the reviewer being engaged to *monitor* the implementation of the actions agreed following the review. An engagement to monitor might prejudice the provider’s ability to be independent. That said, we agree that there should be follow up by the provider of 6-12 months after an evaluation, which is different and focuses on tweaking the action list if necessary.

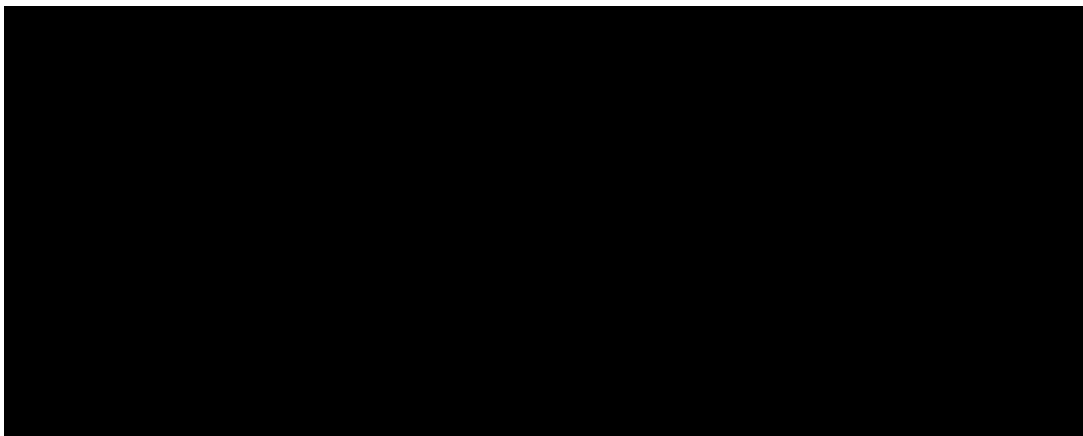
Appendix E - Draft disclosure guidance for listed companies

Please see above our general comments on disclosure by companies.

Board Composition

The wording in point 17 may need to be redrafted. Where a NED is not performing well for example, there may be any number of reasons for this including ill health or personal circumstances and it may not be appropriate to spell out what specific shortcomings are being addressed in a public forum. This is one example of where discretion may be needed.

Yours sincerely



Independent Board Evaluation
4th July 2019