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Corporate Governance Unit  
Financial Reporting Council  
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29 May 2009

Dear Mr Hodge

### **Review of the Effectiveness of the Combined Code**

I am writing to you on behalf of the Commerce & Industry Group's (C&I Group's) Corporate Governance Committee in response to the Financial Reporting Council's request for views from listed companies, directors, investors and other interested parties on their experience of implementing the Combined Code.

The C&I Group is an organisation recognised by the Law Society of England and Wales which represents lawyers working as in-house counsel in commerce, industry and charities. The C&I Group has established a dedicated Corporate Governance Committee with members drawn from a broad cross section of organisations, including some listed companies, and some external advisers.

The Corporate Governance Committee has published three documents which elaborate on some of the ideas discussed in this letter:

- "A fine line - Further guidance to In-House Lawyers in England and Wales on ensuring good corporate governance in your organisations" dated 24<sup>th</sup> July 2006;
- "Blowing the Whistle - Guidance to In-house Lawyers in England and Wales on Whistleblowing and Corporate Governance" dated 20<sup>th</sup> April 2007; and
- "Suitably Sheltered? Indemnities and insurance for directors and officers", dated 16<sup>th</sup> April 2009.

These publications are available on [www.cigroup.org.uk/Regions\\_corp\\_gov.asp](http://www.cigroup.org.uk/Regions_corp_gov.asp).

Please note that the views expressed in this letter and in the above-mentioned guidance notes are not to be attributed to the employers of the members of the Corporate Governance Committee/C&I Group.

The Corporate Governance Committee has previously expressed some of the same views in its letter dated 25<sup>th</sup> June 2007 in response to the FRC's 2007 review of the implementation of the Combined Code. We believe that events since then support the need for a further review of the effectiveness of the Code.

#### Paragraph A.5.3 – The role of the Company Secretary

This paragraph provides a useful summary of the important role of the company secretary in ensuring that a company has good corporate governance. It is based on paragraphs 11.29 to 11.34 of the Higgs Report. However, it omits an important recommendation contained in paragraph 11.30 of the Higgs Report, namely:

*“To ensure good communication within the board and its committees, it is good practice for the company secretary, or their designee, to be secretary to all board committees.”*

The omission of this important recommendation from the Code raises the possibility that some companies will conclude that the company secretary could be excluded from one or more of the board committees, and that an unqualified person could instead act as their secretary. The risk is perhaps greatest with the Nominations and Remunerations Committees, where there may be pressure to exclude the company secretary because of the highly sensitive discussions that these committees may have about current or proposed directors and senior managers. However, the Nominations and Remunerations Committees are arguably the committees which are in greatest need of the company secretary's independent and expert advice on corporate governance, and excluding the company secretary from these committees may deprive him/her of an overview of all the corporate governance issues facing the company.

We therefore suggest that the following should be added to paragraph A.5.3:

*“To ensure good communication within the board and its committees, and between the board and the company's control functions, the company secretary, or their designee, should be secretary to all board committees.”*

#### The In-house Legal function

The Code is completely silent about the need for listed companies to have an in-house legal function, as it apparently assumes that the company secretary is able to provide all the advice on corporate governance issues which a listed company

requires. In many FTSE 250/Small Cap companies, the Company Secretary is a neither a chartered secretary nor a lawyer – often an accountant who may not be supported by an in- house legal function. However, depending on their size, the nature of their business, and similar factors, listed companies may face corporate governance issues that go beyond the internal workings of the board and its committees which are the normal province of the company secretary.

We therefore suggest that the Code be amended to include a requirement for the board to consider whether the company needs an internal legal function to enable it to identify and manage the legal and regulatory risks faced by the company (with the assistance of external counsel where the head of the legal function deems it necessary or appropriate).

#### Paragraph C.3.4 – Whistleblowing/Serious Concerns

A key part of any organisation’s corporate governance arrangements should be to encourage its staff to report any serious malpractices that they observe, first to their superiors within the organisation and, if that avenue fails or is for some reason not available, to external authorities. Without such reporting, the organisation’s board and senior management may not be aware of malpractices committed at lower levels of the organisation, the board may not be aware of malpractices committed by the senior management itself, and (if there is a complete breakdown of corporate governance in an organisation) the organisation’s owners, creditors, regulators, or other stakeholders may not be aware of the board’s own complicity in the malpractice.

Paragraph C.3.4 of the Code contains the only reference to Whistleblowing in the Code and relates more to the audit committee’s role in overseeing this i.e. it is more aimed at financial issues. We suggest that the Code should contain a more positive and prominent statement that companies should:

- a) adopt and implement an effective Whistleblowing/Serious Concerns policy,
- b) encourage whistleblowing which is done in good faith, and
- c) give assurances to their staff that they will not be victimised if (acting in good faith) they raise concerns with the board about possible malpractices within the company (including defects in its corporate governance arrangements) or they report possible malpractices externally in accordance with their normal roles in the company.

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For further information about the C&I Group and the Corporate Governance Committee, please visit [www.cigroup.org.uk](http://www.cigroup.org.uk); or if you would like to discuss any of our comments, please feel free to call me on tel.07770 754594.

Yours sincerely

A handwritten signature in cursive script that reads "Nina Barakzai".

**Nina Barakzai**

On behalf of the C&I Group's Corporate Governance Committee