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By e-mail only codereview@frc.org.uk

28th February 2018

Dear Ms Horton

Financial Reporting Council (FRC) Proposed Revisions to the UK Corporate Governance Code (the Code) and to the Guidance on Board Effectiveness (the Guidance)

Response of the City of London Law Society Company Law Committee

The views set out in this paper have been prepared the Company Law Committee of the City of London Law Society (CLLS). The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The membership of the committee can be seen here:-

http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=115&Itemid=469

Overview

This response has been prepared on behalf of the CLLS by a working party comprised of members of its Company Law Committee. We welcome the opportunity to comment on the FRC's consultation on the proposed Code and Guidance.

We welcome the FRC's proposal to shorten and sharpen the Code. We also welcome the renewed focus on the Principles. The Code is very influential and we think the FRC needs to be particularly careful when dealing with areas that are already dealt with by legislation, so as not to cause confusion over what is a legal requirement and what is considered to be best practice. We consider that the FRC and Code should encourage the development and adoption of corporate governance best practice in a manner which is consistent with the legal requirements in this area and should avoid principles and/or provisions that conflict with the law*.* To avoid confusion, the Code should include a general statement to make it clear that the Code sets out what is considered best practice, and that it is not intended to alter the legal requirements.

We have also made some proposed changes to the drafting, with explanations as to why these changes are important.

Q1. Do you have any concerns in relation to the proposed Code application date?

Yes. If the suggested changes around independence and board composition proceed, given the time it takes to appoint a new non-executive director and in particular a new chair and the possibly large numbers of companies which may need to be searching for a new director/chair at the same time, including companies below the FTSE 350 companies if they become subject to these provisions, we have concerns that it could be a challenge for companies to achieve this in the available time.

See also our answer to Q6 in relation to companies below the FTSE 350.

Q2. Do you have any comments on the revised Guidance?

Yes, please see the end of this document for our comments.

Q3. Do you agree that the proposed methods in Provision 3 are sufficient to achieve meaningful engagement?

We do not express a view on whether the proposed methods are sufficient to achieve meaningful engagement. However, we do wish to make a number of comments.

Some companies may feel a combination of engagement methods is appropriate, rather than just one method and so we suggest replacing "a method" with "one or more methods".

We welcome the fact that Paragraph 35 of the Guidance states that the three suggestions are not an exhaustive list, and that companies may choose other methods for gathering views. However, we also consider that the word "normally"

should be deleted from the Code as its use may have the unintended consequence of discouraging companies from considering what methods are best for them and from being innovative in this area. We would therefore favour the following drafting to address these points:

"The board should establish ~~a~~ one or more methods for gathering the views of the employees. ~~This might be one or more of the following or a~~. Examples of possible methods include a director appointed from the employees, a formal employee advisory panel or a designated non-executive director."

Work force. As a general point, we have concerns about use of the word "workforce", which is used in several places in the proposed Code (and guidance). In the proposed Code, the word is used in Section 1 – Leadership and Purpose (Principle D and Provisions 3 and 4); and in section 5 on Remuneration (Principle O and Provisions 33, 38 and 41).

We note that Section 172 of the Companies 2006 refers to "employees" and that the Government, after consultation, has decided not to change this. We also note that the Government response to its Green Paper on Corporate Governance Reform talks of "one of three "employee" engagement mechanisms". Neither talk about "workforce".

We consider that "employees" is a fairly settled legal term (i.e. employed under a contract of employment) and boards will then know from whom they should gather views, who they should involve in any formal advisory panel etc.…. The FRC will be aware that different court cases have decided that individuals in some cases will and in other cases will not be a "worker", illustrating that even the statutory definition of "worker" (which is not in the proposed Code) is unclear.

We consider that there needs to be more flexibility for boards to determine who, if anyone, they extend these arrangements to beyond employees. Also, notwithstanding the current explanation in paragraph 31 of the Guidance, there could be more assistance for companies as to what the FRC considers "workforce" does and does not mean (e.g. can it be stated that outsourced service suppliers are not considered to be part of the workforce and are there other categories of "worker" that the FRC can state that they do and do not mean this to extend to?).

We consider that, due to the lack of clarity generally on what is meant by "workforce" (being complex and diverse as stated by the FRC in the consultation paper), an alternative proposal the FRC might consider is that any extension beyond employees should feature as a suggestion in the Guidance, rather than in the Code. This would better reflect the fact that a "one size fits all" approach is not necessarily the best approach and allow companies, looking at their own workforce and circumstances and deciding the key constituents to which they choose to extend their arrangements. The Guidance could also suggest that companies choosing to extend beyond employees, may want to explain who they have included as part of the "workforce" and why.

Another relevant consideration is that, for groups with employees and workers outside the UK, who is regarded as an employee or worker will vary from one country to another.

On a more specific point, as regards "The board should establish a method for gathering the views of the workforce", we consider there is an implication from this provision and also from the Guidance (for example, "regular two-way dialogue" – paragraph 35) that boards must share information about their proposals. If this is the intention, the Guidance should make it clear that companies need not, as part of communications between the company and the workforce, have to divulge confidential or commercially sensitive information. This could be along the lines of paragraph 2(5) of schedule 8 of the Large and Medium-sized companies and groups (accounts & reports) regulations 2008 or along the lines of section 414C(14).

Provision 38 also uses the word "workforce" in relation to pension arrangements and we consider that this should be changed to "employees".

Q4. Do you consider that we should include more specific reference to the UN SDGs or other NGO principles, either in the Code or in the Guidance?

No, we consider no more specific reference need be included.

Q5. Do you agree that 20 per cent is 'significant' and that an update should be published no later than six months after the vote?

We do not express a view on whether 20 per cent is significant, but consider that a clear and objective threshold such as this has advantages in terms of certainty and consistency.

As regards the need to provide an update no later than six months after the vote, we have concerns that there might not be anything meaningful to say or that an announcement may prejudice the outcome of discussions on the points. Ideally, we would like to see flexibility built into the Code to allow companies to address these possibilities should they exist.

Q6. Do you agree with the removal of the exemption for companies below the FTSE 350 to have an independent board evaluation every three years? If not, please provide information relating to the potential costs and other burdens involved.

If the provision to externally facilitate the evaluation of boards at least every three years will apply to companies below the FTSE 350 immediately from 1 January 2019, please confirm they have up until the end of 2021 to comply.

Although we are not commenting on the potential costs associated with removing the current exemptions for companies below the FTSE 350, we suggest that if the FRC proceeds with this change, it considers making a transitional period available for the more onerous of the provisions that such companies will be subject to for the first time, namely board and committee composition.

We also have a query that arises in a number of places – please confirm (for example, in a footnote to the Code), in relation to a company that is newly listed and therefore newly subject to the Code, when the three year period starts to run. We assume it is from the point of listing and would not take account of time as a private, non-listed company.

Q7. Do you agree that nine years, as applied to non-executive directors and chairs, is an appropriate time period to be considered independent?

We see no reason to change from the well-established nine-year threshold, but we have a number of points to raise on Provision 15 (independence).

Removal of board discretion. We consider that the removal of the discretion for the board to determine who it considers to be independent will lead some companies into non-compliance even if the company itself considers the directors in question to be independent.

This is particularly a concern given that some of the factors of non-independence have no materiality or significance threshold. For example, a non-executive director: with any cross-directorships; with any additional remuneration, however small; and/or who is a member of the appointing company's pension scheme (e.g. because the business he worked for was acquired by the appointing company), will, under the proposed Code, automatically not be independent as there is no ability for the board to take other matters into consideration (e.g. the person's net wealth and whether the pension/additional remuneration he draws is *de minimis*). A related point is that automatically rendering a non-executive director as not independent due to a cross directorship could also have the unintended effect of slowing the progress of diversity.

We consider that the removal of board discretion, together with the fact that that this is now an exhaustive list, could lead to a "tick-box" mentality. Coupled with this, a lack of need for boards to give reasons and information for why they consider independence is not impaired, removes disclosure for investors that it would be useful for them to have to enable them to form their own view.

We also consider that if a concern of the FRC is that some companies have failed to give satisfactory explanations of why they have used the discretion and have disregarded one or more of the listed factors, the right approach is not to remove this useful and flexible discretion for all companies, but instead to strengthen the provision for such companies to be required to give an explanation perhaps by means of a specific provision specifying what the FRC expect such explanation should to cover, together with encouragement to investors to hold any companies to account where they consider the explanation is not adequate.

We consider that companies should be able to retain their discretion to consider a director independent even if one or more of the listed criteria is present. Our strong preference is that boards should have the discretion both ways, to exclude some of the listed criteria where they feel that relationship/circumstance does not impair independence but equally to include other factors where they feel these are relevant.

We consider that the need to give an explanation when the discretion is used and what that explanation should cover should be bolstered by a new provision in which the FRC states the minimum that it expects an explanation here should cover. Failure to cover all aspects of the explanation would amount to non-compliance with the provision. Such a provision could be -

"Where the board exercises the discretion to exclude one or more of the listed criteria and consequently determines a director to be independent, it must explain its rationale by stating [*specify minimum requirements*].

Independence of the chair. Please can you explain the rationale behind the reversal in the treatment of the chair as regards his/her independence. The current test is that the chairman needs to be independent on appointment only and thereafter the test is irrelevant whereas the new test is that the chairman "is now considered independent at all times" (paragraph 46 of the consultation paper). Given the hybrid nature of the role of the chairman, spanning the executive and non-executive teams, which has been tacitly accepted in the Code for many years (as is made clear by the current provision A.3.1 requiring that the chairman need only meet the test of independence on appointment), please explain what has changed to justify this reversal.

We consider that the proposed changes here will also have the (perhaps unintended) effect of making it more difficult for there to be internal chair appointments, as those individuals who have been a non-executive director for a few or some years will not be able to hold the chair for long enough to make it worthwhile for either the company or the individual. If the FRC decides to proceed with this, we suggest the provision should allow for nine years in the role as chair, i.e. to re-start the clock at the point when he/she becomes chair.

Smaller companies. For smaller companies (assuming the current exemption in B.1.2 is removed), the effect of changes to Provision 11 (a majority of the board to be independent including the chair) when compared with the current provision in B.1.2 (at least half of the board (excluding the chairman) to be independent) and Provision 15 (no discretion on independence) could be quite onerous. Please also see our answer to Q6.

We also have some drafting points on Provision 15:

- "Individual NEDs, including the chair, should not be considered independent for the purposes of board and committee composition if ~~any of them~~"…substitute with "he or she" [falls within bulleted list of circumstances]".

- **"from the date of their first election"**. Please clarify if this is meant to be the point of a director's "election" by shareholders, as the wording suggests taking it literally, or (as we think is the intention) the point of "appointment" by the board (that is when he/she first joined the board). If it is meant to be the latter, to make this clear, please re-draft as "from the date he or she first became a member of the board".

  Further, please also clarify in relation to the above words (either in the Code or in a footnote) what this means for a newly listed company. The current drafting could be construed as meaning when first elected/appointed as a director, which could be to a private company if this is when he was first elected/appointed as a director. We assume it is not meant to mean that but is instead meant to mean– "from the date when he or she first became a member of the board or from when the company became a premium-listed

company subject to the Code with him or her as a board member, whichever is the later".

- Similarly for the other independence tests in Provision 15 that look backwards, can it please be clarified which, if any, of these take account of time before the company became subject to the Code.

- In the light of the removal of the discretion for companies to say a director is independent notwithstanding one of the listed circumstances, we consider it becomes more key for the FRC to clarify the percentage holding which constitutes "significant" for the purposes of (i) significant links with other directors and (ii) where a director represents a significant shareholder.

- Similarly, please clarify what is meant by "close" family ties.

Q8. Do you agree that it is not necessary to provide for a maximum period of tenure?

Yes, we agree it is not necessary to provide for a maximum tenure, as even though a director may not be considered independent after nine years, he or she may remain on the board and serve a useful role.

Q9. Do you agree that the overall changes proposed in Section 3 of revised Code will lead to more action to build diversity in the boardroom, in the executive pipeline and in the company as a whole?

We express no views on the likelihood of success of section 3.

Q10. Do you agree with extending the Hampton-Alexander recommendation beyond the FTSE 350? If not, please provide information relating to the potential costs and other burdens involved.

We express no views on extension of the Hampton-Alexander recommendation beyond the FTSE 350.

Q11. What are your views on encouraging companies to report on levels of ethnicity in executive pipelines? Please provide information relating to the practical implications, potential costs and other burdens involved, and to which companies it should apply.

We consider that companies may face difficulties in collecting ethnicity data even though this question is limited to "executive pipeline" rather than the whole workforce. Whilst gender balance is relatively easy to identify and report on without the need for surveys etc., what is meant by "ethnicity" is less clear cut: for example, is it relative to place of birth or to race for example and how should second and third generations and mixed ethnicity be classified? As to collection of the data, ethnicity data would most likely have to be identified by way of a survey. Any such survey/email would need to be tactfully handled, for example, making clear to people that they will not be penalised for not replying and offering an "other" category on top of the pick list of ethnicity categories. In terms of resulting information, companies may also need to disclose what the percentage reply rate was to give readers a full picture.

Finally, both these issues raise a further issue of how comparable published results may be as between companies, particularly if different companies use different definitions of "ethnicity". If ethnicity data is to be collected and reported on, comparability would be assisted by the FRC setting some standard position for all companies to adopt on these issues and requiring reporting companies to state the extent to which they adhere to this standard or where they have chosen to depart from it.

Q12. Do you agree with retaining the requirements included in the current Code, even though there is some duplication with the Listing Rules, the Disclosure and Transparency Rules or Companies Act?

Where the FCA Listing Rules or Disclosure and Transparency Rules say that compliance with the Code satisfies particular rules, for example, DTR 7.1.7, 7.2.4 and 7.2.8 we are happy with retaining such requirements in the Code.

However, where the Code is duplicative of, for example, the Companies Act 2006 or other legislation, we would favour deletion of such provisions from the Code for a number of reasons.

Reducing duplication will ease the burden on UK companies of trying to ascertain if requirements which are in the Code, but slightly differently worded from the legislation, are meant to be the same as the legislation or are actually say something slightly different and so require a slightly different disclosure.

In particular, we question why new Provision 4 has been inserted into the proposed Code given this will be covered by secondary legislation. Is this intended to apply the same requirement to non-UK companies (in which case please see below)?

We suggest that for premium listed companies required to comply with the Code but not governed by the Companies Act 2006, for example, overseas companies, this duplication could be avoided by a simple statement in the Code aimed specifically at such companies which would be similar to LR 9.8.7A(1), such as "An overseas company subject to the Code that is not required to comply with the Companies Act 2006 must comply with [the sections of the Act listed in Schedule []] as if it were a company incorporated under the Act to which those sections apply".

This removal of duplication would be a significant simplification for UK incorporated companies who form the vast majority of companies subject to the Code.

Q13. Do you support the removal to the Guidance of the requirement currently retained in C.3.3 of the current Code? If not, please give reasons.

Yes.

Q14. Do you agree with the wider remit for the remuneration committee and what are your views on the most effective way to discharge this new responsibility, and how might this operate in practice?

As regards "workforce", we make the same comments as for question 3.

Also, we have a concern that the expanded remit of the remuneration committee, namely "oversight" of company remuneration and wider workforce policies, means that its non-executive director members will have to become involved in what has been executive territory and so blurs the distinction between executive and non-executive directors. We would suggest that the last sentence of provision 33 be changed to read -

"It should take into account employee remuneration and policies and practices when setting policy for director remuneration."

Q15. Can you suggest other ways in which the Code could support executive remuneration that drives long-term sustainable performance?

We express no views on this question.

Q16. Do you think the changes proposed will give meaningful impetus to boards in exercising discretion?

We express no views on this question.

Q17. Should the Stewardship Code be more explicit about the expectations of those investing directly or indirectly and those advising them?

Whilst we have not covered the Stewardship Code questions, we would ask the FRC to consider the role played by proxy advisory bodies/firms and how to ensure they too are subject to relevant best practice recommendations of the Stewardship Code. We acknowledge that the Code currently states that it applies by extension to proxy advisers, but some companies' experiences suggest that this should be strengthened. For example, to suggest that proxy advisory firms engage early enough with companies on which they are about to issue voting recommendations, so that their concerns can be made know to the company as soon as possible and can be discussed with the company which can offer explanation or justification and/or address the concerns before (as opposed to after) final voting recommendations are settled and issued.

Additional issues not specifically covered by consultation questions

- **"Comply or explain" section (now omitted in part from the Code):** Due to the removal of a large part of this section, the following sentence is omitted "Smaller listed companies, in particular those new to listing, may judge that some of the provisions are disproportionate or less relevant in their case." This wording was helpful to smaller companies, and added to the feeling that the FRC did not have a one size fits all approach, which is now less evident.

Section 1 – Leadership and purpose

- As a general point, there are several places in the Code and in the Guidance (please see our comments below on the Guidance) which we feel could be interpreted as going further than the law upon which it is clearly based and with which we have concerns.

Principle A – We have serious concerns with Principle A. We consider that, in many aspects, it is not consistent with the existing law and may seriously muddy the waters as regards directors' duties. For example, it states that the function of the board is to "promote the long-term sustainable success of the company". Under section 172 a director's overriding duty is to promote the success of the company for the benefit of members, which may involve a director in considering the long-term impact of a decision (along with any other factors relevant to success) but may also, in different circumstances, lead a director to legitimately take action based on short-term considerations.

Similarly as regards "and contribute to wider society", we consider that this also is not a current "function" or duty of boards.

The board's function is determined by the company's constitution and the directors' legal duties. We suggest you replace "whose function is" with "who should aim to".

We are also concerned with the statement that the board should establish the company's purpose, as we are not clear (i) what this means and (ii) whether this is not actually the responsibility of shareholders.

Principle C – We consider that "meet its responsibilities to stakeholders" goes further than section 172 which only requires directors to "have regard to" the listed factors. Indeed even as between the listed factors, section 172 makes distinctions. For example, whilst section 172 talks of "having regard to the interests of employees", as regards suppliers, customers and others, it talks of "having regard to the need to foster the company's business relationships with them". Principle C seems to suggest equivalence between shareholders and stakeholders which does not reflect section 172.

This could be re-drafted to read – "In order for the company to meet its responsibilities to shareholders and have regard to its stakeholders …."

- **Principle D** – "All directors must act with integrity and lead by example in the best interests of the company".

It is not clear whether the above is only limited to situations where a director is acting in his or her capacity as a director of the particular company or is intended to go further than that. If it is intended to go beyond the case where the director is acting as a director of a particular company, it does not seem to acknowledge that a director may also be a director of another company as well. Although the law deals with conflicts of interest, this Principle does not do so.

We also consider that it is not clear what the second half of this Principle -"in the best interests of the company", which is similar to but not the same as the duty in section 172 of the 2006 Act, adds to section 172.

A suggestion for an alternative formulation for this Principle that retains some elements and that links in with section 172(e) and addresses the above issues might be -

"In acting as a director of the company, each director should act with integrity having regard to maintaining the highest standards of business conduct".

- **Provision 1**. It is not clear to us what the FRC is seeking to address here that is not already covered by section 414C (strategic report) of the Companies Act 2006 and the 66 pages of FRC draft Guidance on the Strategic Report.

  Please also explain what more is envisaged by the requirement for disclosure on "….the sustainability of the company's business model" beyond the viability statement in Provision 31? If nothing more is envisaged, we suggest that this could be deleted.

- **Provision 2.** Due to the lack of clarity as to, and subjectivity of, what is meant by "embody", and due to our concerns on whether it is appropriate to ask a director to "embody" his/her company's culture, we suggest removing this and leaving it at "promote the desired culture of the company". Where a director is a director of more than one company, we do not see how they could necessarily "embody" the culture of both companies, which may be different.

- **Provision 4**. This duplicates legislation to be proposed by the Government and we suggest deleting this to reduce the length/burden on companies. We also note that the Government response to its Green Paper states regarding its proposed secondary legislation that it will only be for companies of "significant" size. Accordingly, if the requirement is duplicated in the Code, any threshold would also need to be replicated.

- **Provision 5.** The first mention here is of "major shareholders" and thereafter just "shareholders" We suggest this should be "major shareholders" throughout.

- **Provision 7**. Please explain what this is intended to elicit over and above what is already covered by sections 175, 176 and 177 of the Companies Act 2006 and also the Listing Rules such as LR 6.1.4 (demonstration of independent business) and LR 11 (related party provisions) and, for companies with controlling shareholders, LRs 6.1.4A and B.

  If nothing more is sought over and above compliance with the Act and the Listing Rules, we suggest that this could be deleted. If it is intended to apply the Companies Act standards to overseas companies, this should be made clear or dealt with as we suggest in our answer to Question 12.

  If this is to remain, we would suggest that since these are areas over which the board does not have sole control, and bearing in mind that sections 175 and 177 both permit conflicts of interest in certain circumstances, "eliminate" should be replaced with "address" and " ensure that the influence of third parties does not compromise or override independent judgement" should be replaced with "with the aim that the influence of third parties does not compromise or override independent judgement."

  It would also be helpful if "significant shareholder" could be defined in the Code by reference to the shareholding percentage. For example, is it the same as the definition of "controlling shareholder" as set out in LR 6.1.2A or is it the same as the definition of associate in LR App. 1.1.1 or is it intended to mean something different?

Section 2 – Division of Responsibilities

- **Principle G.** As not all non-executive directors will have specialist areas of experience on which to advise all of the time, as this will depend on the topic/issue being discussed at board meetings being in their field of expertise, we suggest adding "if they have any" after "offer specialist advice".

- **Provision 13 –** The current Code talks of non-executive directors having a prime role in appointing and where necessary removing executive directors. We suggest reverting to the existing wording as this reflects the law where non-executive directors propose and the unitary board as a whole is responsible, as opposed to Provision 13 which as drafted states that non-executive directors (not the whole board) are (alone) responsible for appointing and removing executive directors.

  We consider the second sentence in Provision 13 should read "..hold to account the performance of management and individual **executive** directors….

- **Provision 14 –** this states that all external appointments should not be undertaken without prior approval of the board. This could be very burdensome and stop directors taking on, for example, small charity appointments. We suggest this is limited to material or significant appointments (similar to B.3.1).

Section 3 – Composition, succession and evaluation

Principle J – A minor drafting point is that diversity may encompass many aspects and a full list is not feasible, so we suggest that Principle J should read "…and promote diversity, **including** (cf "of") gender, social and ethnic backgrounds, cognitive and personal strengths".

Section 4 – audit, risk and internal control

- **Principle L.** The board cannot "ensure" the independence and effectiveness of external audit, as it is not under its control. We suggest "ensure" be replaced with "promote".

Section 5 – remuneration

- **Provision 33 and Principle Q.** There appears to be a clash between these two as currently drafted. Principle Q states that no director should be involved in deciding his or her remuneration outcome. Provision 33 says "The remuneration committee shall have delegated responsibility for…**setting remuneration for the board** and…" In talking of "the board" (compare to current D.2.2 which refers to"…setting remuneration for all "executive directors and the chairman"…"), Provision 33 is saying that the remuneration committee (comprised solely of independent non-executive directors) will set the remuneration of the non-executive directors as well as the executives. We suggest that changes should be made to (i) re-insert references to setting remuneration for **executive directors** and (ii) also to deal with who will set non-executive director pay (see for example current D.2.3).

- **Provision 38**. See our comments above on question 3 as regards "workforce".

We also suggest that the following drafting changes be made – (i) "be aligned to" be replaced with "take account of" and "workforce as a whole" should be replaced with UK workforce.

Items proposed to be removed from the Code

As regards those Provisions that the Summary of Changes shows have been deleted, we make the following comments (unless addressed in questions already).

A.1.3 (insurance cover to be arranged for directors). We suggest this be moved into the Guidance.

SP B.1 (sufficient size of board). We suggest this be moved into the Guidance.

D.1.2 (rem arrangements when an exec is released to be a NED). We are not sure why this has been deleted.

D.2.3 (board or shareholders to set NED pay). We have suggested re-instating this (see our extra comments on the remuneration section).

E.2.1 (separate resolutions on separate matters; resolution on AR; proxy form requirements). We are not sure why this has been deleted?

E.2.4 (20 and 14 business days). We suggest the 20 business days be re-instated as accepted market practice but that the 14 days be removed as it was never consulted on.

Comments on the revised Guidance on Board Effectiveness.

- **Structure of the Guidance**. Although in places the Guidance states that it is not mandatory and is not intended to be prescriptive, in other places it does come across as prescriptive. This, together with the moving of certain elements from the Code into the Guidance, suggests that companies may be penalised for not adhering to the Guidance, as well as the Code.

  We would like the FRC to consider whether other ways of structuring the Guidance might be appropriate: for example, a series of thought-provoking questions for boards to consider which might encourage companies to think about what is best for them and avoid box-ticking, yet which still supports the principles and provisions in the Code.

- **Paragraph 12.** There is a reference here to "the terms of reference" and it is not clear to what this refers as there has been no previous mention**.**

- **Paragraph 13.** We suggest replacing "is an" with "can often be".

- **Questions for the board.** It is not clear what the "its" in the 4th bullet refers to. In the 6th bullet we suggest replacing "how do we make sure" with "How do we have regard to " and making consequential changes.

- **Paragraph 18.** We suggest the "an" needs to be removed before "integrated".

- **Paragraph 20.** We suggest the following minor drafting point: the second bullet should read "and**/or** convening additional meetings" to clarify that there is no

suggestion that any company would have to put all of these additional safeguards in place.

- **Paragraph 21.** To reduce the prescriptiveness of this as worded, which could be taken literally to apply to all board decisions, we suggest adding the words ",where it considers it relevant to do so, "after "the board".

- **Paragraph 22.** We suggest the following minor drafting points – in the second sentence, to ensure this refers back to major shareholders, we suggest redrafting as "The chair should discuss governance and performance against strategy with major shareholders and ensure their views are… We suggest "major" be added before "shareholders" in the last line for consistency.

- **Paragraph 24.** Please change "they" to "it".

- **Paragraph 26.** We consider the phrases "need to respect" and "take account of", which are not the same as the section 172 wording, add an element of confusion for companies, as it is not clear whether they are intended to mean something different . We would prefer the statutory words "have regard to" to be used.

- **Paragraph 28**. We suggest "have taken account of" be replaced with "have had regard to". It is not clear whether "a wider range of stakeholders" is meant to be the same stakeholders which are referred to in section 172 or whether other stakeholders are envisaged. This paragraph will need to be re-considered when the Government's secondary legislation on section 172 reporting is published.

- **Paragraph 31.** We think the second sentence here is too prescriptive and should instead read "For example, **it may be appropriate for** remote workers, agency workers and contractors to be included…"

- **Paragraph 35.** Please add "to" before "innovative".

- **Paragraph 36 – questions for boards.** In this section, the words "employees", "colleagues" and "workforce" are all used. It is not clear whether they are all meant to be synonyms or all mean something different, and if so what the difference(s) is/are.

- **Paragraph 50.** The first bullet seems unduly prescriptive, yet also leaves some things out which one might think should be there given the inclusion of the other items, for example, risk management, internal control., reputational matters etc.. We think it is preferable that this should mirror Provision E and be less prescriptive.

  We suggest the last bullet should mirror section 172 and read – "ensuring the board **has regard to** the views of **major** shareholders and other **key** stakeholders".

- **Paragraph 52.** We are concerned that the statement that "undue reliance should not be placed on a small number of independent non-executive directors when deciding chairs and membership of committees" will place a very high burden and cost especially on smaller listed companies.

- **Paragraph 61.** Drafting point – it is not clear to whom "they" refers at the start of the second line of paragraph 61 and also the start of line 3. Is it to the Chief Executive and his/her executive team?

- **Paragraph 74**. We are not sure whether it is helpful to say what the company secretary might take responsibility for, which is for each company and each company secretary to decide.

- **Paragraph 80.** We think it would be preferable to add drafting into this paragraph that brings in Principle J, namely appointments to be on merit and objective criterion before mentioning "positive steps to increase levels of diversity".

- **Paragraph 82.** We think "intellectual capability" is not necessarily the quality, or the only quality that, is relevant here, but that it is more the case that someone has the "strength of character" to suggest change and alternatives. As the relevant qualities are quite subjective, we consider it preferable to leave the qualities more generic and concentrate on the result you want to achieve – perhaps something along the lines of – "A board requires directors who are **willing and able** to suggest change to a proposed strategy, and to promulgate alternatives **if they think it appropriate**."

- **Paragraph 84**. Drafting point – please add "major" before "shareholders".

- **Paragraph 95, bullet 5**. Drafting point – we think "directors" should be added after "executive/non-executive".

Yours faithfully

David Pudge
Chair
The City of London Law Society Company Law Committee

The Working Group was led by Nicholas Holmes at Ashurst and consisted of the following members:

David Pudge	Clifford Chance LLP
Lucy Fergusson	Linklaters LLP
Martin Webster	Pinsent Masons LLP
Victoria Younghusband	Charles Russell Speechlys Law
Stephanie Maguire	Freshfields Bruckhaus Deringer LLP
Caroline Chambers	Ashurst LLP
Jeffrey Sultoon	Ashurst LLP
Richard Ufland	Hogan Lovells International LLP
Murray Cox	Slaughter & May
Mark Austin	Freshfields Bruckhaus Deringer LLP
Richard Spedding	Travers Smith LLP
Vanessa Knapp	Independent
Vanessa Marrison	Ashurst LLP
Kath Roberts	Clifford Chance LLP