



# The City of London Law Society

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## **CITY OF LONDON LAW SOCIETY COMPANY LAW COMMITTEE**

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### **Response to the ICSA Review consultation on the Higgs Guidance**

The City of London Law Society (CLLS) represents approximately 13,000 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, multi jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees and in this case the response has been prepared by a working party of the CLLS Company Law Committee.

The first of ICSA's two consultations comprises three questions to which we respond below:

#### **1. DO YOU AGREE WITH THE PURPOSE OF THE GUIDANCE?**

1.1 The aim of the Review is stated to be to offer guidance which, without being prescriptive, assists boards in understanding and implementing the purpose of the Code and, in so doing, delivers practical advice to boards on how they can apply the Code to enhance their effectiveness.

1.2 We agree this approach. We particularly welcome the emphasis on non-prescriptive guidance, the giving of practical assistance, and the overriding focus on enhancing board effectiveness.

1.3 We believe the Higgs Guidance has, in its current form, been a useful resource for boards. Changes to that guidance should reflect amendments to the Code and, particularly, changes in emphasis made by the revised Code, in each case using jargon-free language. We do not think it would be useful for the guidance to include new topics not covered by the Code.

#### **2. DO YOU AGREE THAT THE ICSA PAPER HAS IDENTIFIED THE RIGHT AREAS WHERE THE EXISTING GUIDANCE COULD BE ENHANCED?**

2.1 Section 1.1 of the ICSA paper says that: "The guidance will refer to ethical sensitivity, and the need for the board to take account of ethical issues in setting business strategy and the manner in which business is undertaken."

2.2 We do not think it would be useful for the guidance to offer advice on ethical issues, for the following reasons:

2.2.1 Neither the revised Code nor the FRC's Final Report refer to ethical concerns in this context.

- 2.2.2 We think the scope of the board's obligation to take ethical issues into account is uncertain as a matter of law and we doubt that it will be feasible to establish a consensus as to good practice (falling short of legal obligation) in this area. While it may be said that boards are directed to consider "ethical issues" by paragraphs (b), (c), (d) and (e) of section 172(1) of the Companies Act 2006<sup>1</sup>, we do not think it would serve a useful purpose for the Higgs Guidance to overlay these statutory requirements with further advice.
- 2.2.3 Questions of ethics are often subjective and can potentially be controversial (for example, some view involvement with tobacco companies or the sale of weapons as unethical). We do not think it would be helpful to put at risk the largely uncontroversial nature of the Higgs Guidance by including new material on ethical issues.

### 3. ARE THERE OTHER AREAS WHICH THE GUIDANCE SHOULD LOOK AT?

- 3.1 New Principle A4 of the revised Code refers to the unitary nature of the board. We believe it is important that the guidance should endorse the comments on the unitary nature of the board and the collective responsibility of directors for the actions and omissions of the board that were included in section 4 of the Higgs Guidance.
- 3.2 It would also be useful for the guidance to update the pre-appointment due diligence checklist for new board members, the induction checklist and the sample letter of non-executive director appointment.
- 3.3 We recognise ICSA's potential interest in board evaluation (noted in section 2.3 of the ICSA paper) but believe it would be helpful for the Review to include in the guidance the conclusions from the FRC's discussions with the providers of evaluation services which are referred to in paragraph 3.42 of the FRC's Final Report – namely, appropriate standards for the evaluation process and the management of potential conflicts of interest. Alternatively, those conclusions might appear in some other publically available document.

If you wish to discuss any of the above points, please contact Martin Webster of Pinsent Masons LLP, on +44 (0)20 7418 9598.

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<sup>1</sup> Section 172(1) provides: "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –

(a) [...]

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct [...]."

