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BY EMAIL TO: codereview@frc.org.uk

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Dear Mr Styles

Consultation on the UK Corporate Governance Code

1. We are writing as a group of individual corporate General Counsel and interested parties in response to the FRC's consultation on the UK Corporate Governance Code (the 'Code'). We are writing in our capacities as in-house lawyers with significant corporate governance experience and responsibilities within our respective organisations or an interest in the same. We are not writing on behalf of those organisations.
2. At a critical moment for society in respect of the call for increased corporate responsibility and transparency, the FRC's review and consultation is an important opportunity in pursuit of continuous improvement in the levels of corporate governance within the UK. We support your objectives in terms of governing quality audit and reporting, improving accountability, building trust, managing risk effectively and supporting stewardship decision-making. As corporate officers whose individual responsibilities and professional duties directly intersect with those objectives, we appreciate the opportunity to comment on this timely consultation.
3. The most significant observation underpinning our response is that the General Counsel (or Chief Legal Officer) of any company has fundamental professional duties¹ that align with and reinforce the corporate governance objectives of the FRC and the Code. This is backed by our collective experience and academic research demonstrating the efficacy of in-house lawyers in risk mitigation (see below).

¹ These professional duties are those of regulated lawyers, who usually fill the role of General Counsel or Chief Legal Officer. The primary regulators of lawyers in the UK are the Solicitors Regulatory Authority and the Bar Standards Board, both of which stipulate relevant professional and ethical standards to be followed.

<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>

<https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html>

4. Given that fact, we find it extraordinary for there to be no specific reference within the Code or its supporting Guidance to the role of the General Counsel.
5. This is all the more important given that in some organisations there is weakness in governance from the General Counsel reporting to individuals who themselves do not sit on the board and who may have operationally conflicting priorities. In this respect, we maintain that the FRC's intentions through issuing the Code are actually undermined and can be remedied as a priority through this consultation process.
6. At an international level, we also suggest that the FRC is in a unique position to advance the leadership position of the UK in matters of business, and have a positive impact in terms of corporate governance within global organisations. Through both the direct and indirect adoption of the Code in multinationals, there is a wide benefit to society and the global economy. For UK-based multinationals, the Group General Counsel has a particularly broad influence across the full range of topics that the Code seeks to support, whether pure governance, ethical and cultural standards, or enterprise risk management.
7. At a high level, we believe that there are a number of considerations that are critical to effective corporate governance across key areas of the consultation:
 - a. ***Culture and the role of the General Counsel*** - The importance of the culture of an organisation has been highlighted by the FRC on many occasions in recent years, including its podcast series, Creating Positive Culture (May-December 2022). On its website, the FRC underlines that "*Culture, integrity and diversity are central*" to the Code. As Sir Jonathan Thompson stated, "*...emphasising the importance of culture will lead to more open and insightful reporting, and improved access to capital [...] improving companies' ability to achieve sustainable success over the long term.*" As General Counsel, frequently responsible for dealing with the fallout of failings in culture, we strongly agree with the FRC's emphasis. Accordingly, we expect the FRC's revised versions of the Code (for example, Provision 2) and the Guidance on Board Effectiveness to reflect the benefit in the General Counsel being an integral role in creating and maintaining a strong and healthy corporate culture.
 - b. ***Risk Management and the role of the General Counsel*** – It is a reality in most listed companies, as well as private companies, that the General Counsel is uniquely positioned to support corporate risk management objectives, and therefore the ambitions of the Code in ensuring high standards of risk management in terms of advice, process and oversight. By the nature of the role, the General Counsel and their team has visibility across the whole organisation and is involved in strategic and operational decision-making at all levels, including with respect to risk management policies, processes and controls. Whereas other functions are either purely first line or second line in their

responsibilities, the legal function operates as both second line in support of Compliance and Audit teams, as well as advisers to the first line functions. As such, the General Counsel, through the legal function, has the opportunity to have visibility across all aspects of the business. Furthermore, the General Counsel intervenes on risk issues without the hindrance of internal business conflicts that other executives may suffer. They are also strengthened by the professional duties of legal services regulation that require and enable them as an 'authorised person' to hold the business accountable to its responsibilities, while maintaining professional independence from the organisation as its legal advisor. In this they hold a primary duty to protect the rule of law and, in situations of doubt, to do so in ways that protect the public interest, particularly the public interest in the administration of justice. In this, we refer the FRC to the legislative status General Counsel were given as corporate gatekeepers in the United States post Enron, with Sarbanes Oxley, and post financial crisis in the Dodd-Frank Act. In this context, the Code and its guidance must be explicit in identifying the key nature of an effective General Counsel in support of the Board, the Audit Committee and other functions (including Internal Audit and Compliance) in their respective roles in ensuring strong governance over risk management. The Code and its guidance should also direct organisations to establish and maintain governance around the role of the General Counsel to enable its fulfilment.

- c. Further, while the General Counsel role is not yet formalised in legislation as in other jurisdictions, we recommend including a direction in the Code for organisations above a certain size and risk profile, to demonstrate how they are operationally managing legal and associated risks, for example by having an internal legal function or external legal advisors with full access and oversight. We also recommend strong best practice guidance for companies that have a statutory duty to appoint a Company Secretary, also to have a General Counsel or equivalent. In addition, we recommend that similar revisions are made to the Wates Principles applying to large private companies. Where there is an internal legal function, standards should also be specified for its efficacy, such as formal responsibility for all legal matters being allocated to a senior lead of appropriate experience in the form of a General Counsel or CLO, with such function being allocated appropriate resources.
- d. ***Financial Reporting and the role of the General Counsel*** – The General Counsel will, as a matter of course, be involved in supporting the preparation of financial reporting, and increasingly non-financial reporting. This part of a General Counsel's role will frequently involve advising the finance function and the Audit Committee on reporting rules as well as matters relating to corporate transactions and corporate litigation/enforcement cases. Studies have found that organisations with General Counsel in top leadership positions had [lower audit](#)

[costs based on default and financial misstatement risk](#)² and [fewer stock price crashes](#).³ The Code and its Guidance should incorporate this role of the General Counsel if the FRC is to set and optimise best practice in terms of the internal arrangements within companies to ensure their reporting is of the highest standard and accuracy.

8. Against this background, we believe there are a number of areas within the Code and its Guidance that would benefit from incorporating specific principles, provisions and guidance relating to the responsibilities of the General Counsel. We set these out on a non-exhaustive basis below by reference to the sections of the Code and, where applicable, the question in the Consultation Document. These all tally with the fundamental requirements enshrined in the Companies Act as a requirement to trade.⁴

Division of Responsibilities

9. Principle H refers to the board's support from the Company Secretary in ensuring it has the necessary resources and information to operate effectively. In our view, the support of the General Counsel to the board is equally important and should be referenced expressly.
10. Provision 16 provides: *"All directors should have access to the advice of the company secretary, who is responsible for advising the board on all governance matters. Both the appointment and removal of the company secretary should be a matter for the whole board."* We consider that the access of the board to the General Counsel, is equally an important feature of good corporate governance. The Code should therefore be amended to require that all directors have access to the General Counsel who is responsible for providing advice on legal matters, and that the General Counsel has the right to attend all board and board committee meetings. If this is not the case, a company would need to explain why not, given the 'comply or explain' regime of the Code. We also consider that the appointment and removal of the General Counsel should be a matter for the whole board, in order to reinforce the independence of the General Counsel from individual members of the executive to whom they may report operationally. We also recommend establishing and maintaining best practices⁵ regarding reporting lines of Company Secretaries and General Counsel, to avoid structures that degrade the efficacy of those roles through operational and oversight conflicts.

² John L. Abernathy, Thomas R. Kubick, Adi N.S. Masli, The effect of general counsel prominence on the pricing of audit services, *Journal of Accounting and Public Policy*, Volume 38, Issue 1, 2019, ISSN 0278-4254, <https://doi.org/10.1016/j.jaccpubpol.2019.01.001>.

³ MD Al Mamun, Balasingham Balachandran, Huu Nhan Duong & Ferdinand A Gul (2021) Are Corporate General Counsels in Top Management Effective Monitors? Evidence from Stock Price Crash Risk, *European Accounting Review*, 30:2, 405-437, DOI: [10.1080/09638180.2020.1763819](https://doi.org/10.1080/09638180.2020.1763819)

⁴ Section 172 Companies Act 2006

⁵ Moorhead, Richard Lewis and Clark, Trevor and Brener, Alan and Gilbert, Paul and Vaughan, Steven, In-House Lawyers and Non-Executive Directors: A Discussion About Best Practice (June 27, 2019). Available at SSRN: <https://ssrn.com/abstract=3410929>

Audit, risk and internal control (Question 13)

11. Provision 29 as revised provides: *“The board should carry out a robust assessment of the company’s emerging and principal risks. The board should confirm in the annual report that it has completed this assessment, including a description of its principal risks, and an explanation of how these are being managed or mitigated. The board should explain in the annual report what procedures are in place to identify and manage emerging risks and describe these risks.”* Consultation by the board and/or audit committee with the General Counsel should form part of the explicit procedures referenced in this provision. In many companies this will be the normal procedure but given the fact that the General Counsel and their team have an access and involvement across the whole organisation with regards to risks, the Code should include specific reference to ensure such good practice is recorded and followed as a matter of course. We recognise that this may be the subject of additional guidance separately from the provision in the Code.

Guidance on Board Effectiveness

12. We note that the FRC plans to conduct additional consultation with respect to the various guidance documents under the Code, following the current consultation on revisions to the Code itself. We take the opportunity here to anticipate that consultation and offer our support in ensuring the efficacy of its output.
13. Meanwhile, we would expect the Guidance on Board Effectiveness to reflect the role of the General Counsel specifically, consistently with the points made above. In particular, and by way of example, we do not understand why the General Counsel would not be included alongside the views of Internal Audit in paragraph 24 in the context of the board seeking input from various sources with regard to its review of the culture of a company. Similarly, in as much as the Guidance expects the board to consider whether Internal Audit has the appropriate degree of independence from management, the board should also be considering whether the General Counsel and their internal legal department also have the appropriate degree of independence.
14. The Guidance contemplates the board seeking evidence that the CEO listens to challenge and takes criticism appropriately. This is a prime example of where the General Counsel can assist the board in its effectiveness, as being an important source of such evidence.
15. Paragraph 80 of the Guidance, within the section on Division of Responsibilities, identifies that the Company Secretary may report to the CEO as well as to the Chair (to whom they report on matters of governance). The remuneration of the Company Secretary is to be determined by the remuneration committee of the board. Paragraph 85 states that the Company Secretary is well-placed to be a channel for concerns to be raised to the board regarding conduct failings or financial improprieties. All of these

facets of the role of Company Secretary should also be applied to the General Counsel (with relevant modification to take account of the wider role of the latter), in well-governed companies and for this reason should be explicitly set out in the Code and/or its Guidance. In our experience, where a General Counsel does not have at least a joint reporting line to the Chair as well as the CEO, nor direct access to the board and its committees, they are less able to influence and assure the strong governance shareholders, the FRC – and society at large – expect of corporates in today’s business environment. This topic is one we would like to discuss in depth with the FRC at the appropriate time.

Please do not hesitate to contact inhousegroupUK@gmail.com if you have any questions in relation to our response. We also would welcome working with you on the subsequent review of Guidance under the Code which is contemplated in the Consultation Document. If approached effectively and collaboratively, the Guidance offers an important opportunity to provide much needed practicality to organisations across the UK and beyond.

Yours sincerely



