

Corporate Governance Code changes to encourage appointment of women to boards

The Financial Reporting Council (“FRC”) has announced that it will make two changes to the Corporate Governance Code (“Code”) to strengthen gender diversity in the boardroom.

Background

The changes come as a result of a consultation by the FRC in this area, which itself was a response to Lord Davies’ report, “Women on Boards”.

In his report Lord Davies recommended that the FRC should amend the Code “to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy, and disclose annually a summary of the policy and the progress made in achieving the objectives”.

Disclosure of board’s diversity policy

The FRC’s consultation went further than the Davies recommendation by suggesting the addition of a sentence to Code Provision B.2.4. requiring that “[the Annual Report] should include a description of the board’s policy on gender diversity in the boardroom”. In response to views that gender diversity should not be singled out in this way (a number of respondents felt that diversity in other respects should also be emphasised), the final agreed amendment (set out below) uses the formulation already used in supporting principle B.2, “diversity, including gender”.

The FRC’s suggested amendment to the Code also differed from the Davies recommendation by requiring listed companies to disclose “any measurable objectives it has for implementing the [gender diversity] policy”. The Davies recommendation did not include the word “any”, and some respondents felt that the word “any” should be deleted, thereby requiring companies to set and disclose measurable objectives. This seemed to be

getting too close to requiring the setting of a quota and the FRC has retained the word “any”.

Code Provision B.2.4. will read: “A separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments. This section should include a description of the board’s policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives. An explanation should be given if neither an external search consultancy nor open advertising has been used in the appointment of a chairman or a non-executive director.”

Board effectiveness review

The final part of the Davies recommendation requires the disclosure of progress made in achieving the objectives the board has set for implementing the gender diversity policy. The FRC believes that boards could review their progress as part of the board evaluation process. Their consultation included a suggested new supporting principle to Principle B.6 (board evaluation) which sets out some of the key issues to be addressed in the board effectiveness review and specifically mentions gender diversity. Whilst there was opposition among listed company respondents to any further prescription on the board evaluation process, there was strong support among investors for the new supporting principle, and the FRC has decided to adopt it, whilst toning down the reference to gender diversity in the same way as the change to Code Provision B.2.4.

The new supporting principle will read: “Evaluation of the board should consider the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit, and other factors relevant to its effectiveness.”

Guidance on boardroom diversity policy

The FRC also consulted on whether it would be helpful to set out some of the elements that might be included in a gender diversity policy, either in the Code or elsewhere. There was little support for this and the FRC has decided not to provide guidance at this stage.

Timing and application

These changes will be implemented so as to apply to financial years beginning on or after 1 October 2012, although the FRC “strongly encourages” all listed companies to adopt the changes on a voluntary basis immediately. One of the reasons for the delay in implementation is that there are several other changes that might be made to the Code in the next 12 months, including changes relating to audit committees and audit tendering which the FRC intends to consult on early next year and possible changes resulting from Lord Sharman’s inquiry on going concern and liquidity risks. In addition, the Department for Business, Innovation and Skills is currently consulting on narrative reporting, with a stated intention of overhauling the structure of company reports.

The Code of Corporate Governance applies to all companies with a Premium Listing of equity shares on the London Stock Exchange. It is also observed by a number of companies whose shares are traded on AIM.

Comment

Stephanie Bates, Co-head of our London Capital Markets Group, commented: “These changes to the Code, together with this week’s publication by Cranfield University School of Management of the 6 month Monitoring Report on “Women on Boards”, indicate a gathering of momentum in this area. Progress is being made, albeit slowly, and the increased disclosure required as a result of these changes will provide a useful tool for shareholders to hold boards to account and may avoid the imposition of quotas in the future.”

Bernadette Daley, partner in our London Employment Group, commented: “Gender diversity at Board level is a hot topic for employers. However, there is a fine line between enabling and encouraging greater numbers of women on Boards (which is lawful) and appointing a woman rather than a man on the basis of gender alone (which is unlawful). There is limited scope within our discrimination legislation for positive action in recruitment and promotion and companies need to be careful how they approach gender diversity.”

If you have any questions or require specific advice on any matter discussed in this alert, please contact:

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