

Review of the Role and Effectiveness of Non-executive Directors

Response of Jeremy P Gorman

I am a Fellow of the Institute of Chartered Accountants in England & Wales, with some twenty-five years' experience of acting as Financial Director and/or Company Secretary to small/medium sized quoted plc's. Regrettably, I have had insufficient time to comment on the entire Consultation Paper, but there are two specific aspects on which I would like to put forward my views.

1. The Role of the Company Secretary in small/medium sized plc's

Much has been written about the independence of Non-executive Directors ("NED") within the Boardroom, but the independence and role of the Company Secretary, and his ability or otherwise to support the NED's, in my opinion, needs to be reconsidered.

Within large quoted companies, the Company Secretary will have a dedicated role, may well be a solicitor, and is likely to have had both company secretarial and corporate governance experience. Other than perhaps heading up the legal department, he is unlikely to have any other significant management function, and would be expected to be wholly capable of advising objectively, and providing support to, any member of the Board.

In small/medium sized quoted plc's, it is often the case that the company secretarial workload does not, and cannot, justify the appointment of a full time Company Secretary. Accordingly, this role forms part of the duties of the Financial Director.

When company secretarial duties were once largely procedural, this approach may well have been appropriate. However, with the introduction since 1994 of a structured Corporate Governance regime within the UK Boardroom, and the strengthening of the concept of the independent NED, it is my contention that it is no longer appropriate for any Executive Director to carry out additionally the role of company secretary.

The principal reason is that the Company Secretary is appointed to serve the whole Board, and a Financial or other Executive Director cannot do so properly if he is otherwise engaged in the full time management of the business. The scope for potential conflicts of interest, particularly for example in advising the NED's, makes this an unsatisfactory structure and, looking forward, one which is likely to become increasingly so over the next decade.

Possible Solution

One solution would be to stipulate that, in future, Executive Directors may not also hold the office of Company Secretary. This would place greater focus on the independent role of the Company Secretary in corporate governance matters. This would be particularly beneficial in respect of the report on Corporate Governance compliance included in the

Statutory Accounts, which would be more credible if it were specifically signed off by an officer who was not also an executive director.

An alternative would be to require small/medium quoted plc's to split out, from the company secretarial role, a separate corporate governance function, thereby enabling the Finance Director to continue dealing with routine secretarial matters, while recognising the need for an independent focus within the Boardroom on corporate governance issues.

In this latter situation, the separate responsibility for corporate governance matters could be held by a Non-executive Director with particularly relevant qualifications or experience.

2. Directors and Officers' Insurance Policies

It is unlikely that statute will seek to limit the potential liabilities of the NED. He is, and always has been, effectively a Trustee of the company's affairs, and should remain so.

On that basis, an NED's potential personal financial exposure can be mitigated only by the Company's D&O Policy, where cover may be set at a level with which the director is not comfortable. From the Company's standpoint, overall D&O premiums are now rising to prohibitive levels.

Some years ago, personal D&O Policies existed whereby a Director could obtain Liability Insurance to cover all his Directorships. Cover could be amended to suit personal circumstances, and decisions made even on which Directorships to cover. The Directors' Personal Indemnity Policy currently available through the Institute of Directors provides, as far as I am aware, a maximum indemnity of £1m, but otherwise these personal Indemnity policies appear to be no longer obtainable.

In view of the increasing recognition that NED's take equal responsibility with Executive Directors, it is likely that it will be increasingly difficult for small/medium quoted plc's to recruit NED's of appropriate calibre and experience unless adequate insurance cover is available.

Overall, conditions need to be created where there is a significant number of appropriately qualified NED's able and willing to take up Board appointments. It would therefore be constructive if the insurance industry were encouraged to design and market a generally available indemnity policy specifically written for NED's, providing cover in excess of £1m, i.e. at levels more appropriate to modern conditions.