THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND & WALES

Dialogue in corporate governance

Beyond the myth of Anglo-American corporate governance

Policy dialogue

Effective corporate governance frameworks

Encouraging enterprise and market confidence

Dialogue in corporate governance

The globalisation of capital markets and capital flows, corporate scandals and newly developing economies are encouraging demands for consistency in corporate governance practices so as to reduce complexity and confusion. Dialogue can help facilitate a better understanding of different approaches to corporate governance and foster an appreciation of equivalent systems.

Difficulties arise in striving to achieve a single, global approach to corporate governance. There are too many deep-rooted cultural and structural differences for a single approach to work equally well in all countries and for all companies regardless of their stage of development and business. The ICAEW has launched the *Dialogue in corporate governance* initiative to challenge commonly held assumptions, identify fundamental questions, set challenges for future research and generate practical proposals. This will include:

- **Beyond the myth of Anglo-American corporate governance** – Contrasting US and UK securities markets and how they impact national and international policy, investment, business and accounting.
- **EU approaches to corporate governance** – Contrasting models of corporate governance in EU Member States, drawing out potential implications for future convergence.
- **Matching corporate governance to investor needs** – Exploring the different sources of finance as businesses evolve and the implications for corporate governance.

About the ICAEW

The ICAEW is the largest professional accountancy body in Europe and has over 128,000 members in 142 countries worldwide. Since the establishment of the Cadbury Committee in 1991, the ICAEW has played a significant role in the development of corporate governance in the UK.

If you would like to know more about *Dialogue in corporate governance* or *Beyond the myth of Anglo-American corporate governance* and relevant events and publications visit www.icaew.co.uk/dialogueincorpgov

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Scope and use

Corporate governance is a broad discipline and this discussion paper is not intended to cover every aspect of corporate governance. It provides information on issues raised in the *Pressure Points* consultation paper and generally focuses on publicly quoted companies and institutional investors, particularly those operating internationally.

This discussion paper should be read in conjunction with the other papers in the *Beyond the myth of Anglo-American corporate governance* series focused on business, investment and accounting issues and the *Pressure Points* consultation.

Beyond the myth of Anglo-American corporate governance

In June 2005, The Institute of Chartered Accountants in England & Wales (ICAEW) launched the *Beyond the myth of Anglo-American corporate governance* initiative. Its aim is to explore differences between US and UK corporate governance systems and the pressures these differences create for international business and investment. The intention is for this work to help inform policy makers on both sides of the Atlantic.

As part of the initiative the *Pressure Points* consultation paper was published in December 2005 and is relevant to boards, investors, the accountancy profession and policy makers. It highlights 21 questions representing some of the most challenging aspects of cross-border corporate governance and the comparability of US and UK governance systems.

As context for responses to the *Pressure Points* consultation, four discussion papers provide information on the current state of corporate governance in the US and the UK.

- **Policy dialogue: *Effective corporate governance frameworks – encouraging enterprise and market confidence***

- **Business dialogue: *Board responsibilities and creating value – demonstrating leadership and accountability***

- **Investment dialogue: *Shareholder responsibilities and the investing public – exercising ownership rights through engagement***

- **Accounting dialogue: *Disclosure responsibilities and building trust – promoting transparent and reliable information***

The initiative also encourages on-going dialogue through face-to-face meetings. At the ICAEW transatlantic roundtable in Washington DC in December 2005, the importance of dialogue around corporate governance for global capital markets was emphasised by SEC Commissioner Cynthia A. Glassman:

'We have much to learn from each other on how to regulate wisely and make global markets efficient... Our analysis of regulatory policy needs to be rigorous, yet flexible. We need to be clear about our goals, but recognize that there is more than one way to achieve them.'[1]

A paper summarising the findings of the *Beyond the myth of Anglo-American corporate governance* initiative is expected to be finalised in late 2006. It will include evidence from responses to the *Pressure Points* consultation and feedback from face-to-face meetings and roundtable events on both sides of the Atlantic.

[1] Remarks of SEC Commissioner Cynthia A. Glassman at the ICAEW *Beyond the myth of Anglo-American corporate governance* roundtable, Washington DC, 6 December 2005.

Effective corporate governance frameworks

Encouraging enterprise and market confidence

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Introduction

Corporate governance is commonly referred to as the way in which companies are directed and controlled. Companies play a significant role in society by creating wealth, providing employment, paying taxes and generating investment returns. Some of the world's biggest companies have market capitalisations larger than the gross domestic product of entire economies. The enterprise and accountability of such companies are therefore highly important as reflected in the words of Anne Simpson, Executive Officer of the International Corporate Governance Network:

'Corporate governance... is the meeting of the private interest and the public good: shareholders rely upon effective governance for the investment returns which fund pensions and insurance and protect savings; for companies it underpins both enterprise and accountability; for the wider community transparency and accountability in governance is vital for ensuring prosperity and the contribution to the public purse upon which social welfare relies.'[2]

All countries have their own unique system of corporate governance reflecting different economic, cultural and legal circumstances. The effectiveness of corporate governance is dependent on a myriad of factors and cannot simply be measured by profitability, growth or share performance. There are many variables that affect each measure. However, it is a fair assumption that good corporate governance helps to underpin market confidence and financial stability. The US and the UK both have long traditions of corporate governance and both have successful economies as indicated in the statistics below:

Table 1: Economic statistics (2005)[3]

	United States	United Kingdom
Population	294 million	60 million
Gross National Income per capita (US$)	41,440	33,630
GDP (US$ billions)	11,711.8	2,124.4

Efficient capital markets rely upon a number of factors including good liquidity and low transaction costs. The availability of high quality and transparent information also aids efficiency through helping to maintain investor confidence and overall market attractiveness. A number of legislative and regulatory measures support efficient markets through requirements and recommendations for good corporate governance, coupled with a robust and independent judicial system to prosecute failures.

Policy makers are responsible for encouraging enterprise, promoting the attractiveness of capital markets and maintaining market confidence. They are challenged with reaching an appropriate balance of regulation and voluntary action in determining a national corporate governance framework. In addition, the globalisation of capital is encouraging increased communication and co-operation between policy makers who increasingly consider international influences on national traditions when developing policy on corporate governance matters.

[2] Introduction to the *International Corporate Governance Network Yearbook* 2005, Anne Simpson, ICGN.

[3] 'Key development data and statistics', Data for US and UK, 2005 World Development Indicators, The World Bank Group.

This discussion paper, *Effective corporate governance frameworks – encouraging enterprise and market confidence*, outlines the legal, regulatory and voluntary corporate governance frameworks of the US and the UK and identifies the relevant supervisory and enforcement authorities in each country. It provides information relevant to the questions in the *Policy dialogue* section of the *Pressure Points* consultation paper. These questions are reproduced below and cross-referenced to the relevant pages in this paper:

	***Pressure Points* questions**	**Page**
Q1.	How can the exchange of information and co-operation between policy makers be encouraged to mitigate regulatory conflict and overload?	6
Q2.	Is there a danger of regulation affecting the long-term attractiveness of US securities markets to non-US companies?	11
Q3.	What are the benefits and disadvantages of both a shareholder-led and a regulator-led approach to corporate governance?	17
Q4.	In a takeover, should the law enable directors as fiduciaries to pursue a corporate interest that differs from that of the current shareholders?	24

1. The drivers for international harmonisation

The increasingly international nature of business and investment, coupled with regulatory responses to corporate scandals, are encouraging demands from companies and investors for consistency in corporate governance practices across borders. Establishing comparable standards and harmonising them, where possible, is important in areas such as shareholder rights, board responsibilities and disclosure. Comparability can provide real benefits to business and investment by helping to reduce complexity and potential confusion.

While one system of corporate governance cannot apply to all countries, there are opportunities for commonly accepted practices to encourage more efficient global capital markets. For example the European Commission's Company Law and Corporate Governance Action Plan[4] with its variety of directives and other measures is aimed at harmonising, where possible, key aspects of company law and corporate governance in all Member States.

The *Pressure Points* consultation paper raises the following question:

Q1. How can the exchange of information and co-operation between policy makers be encouraged to mitigate regulatory conflict and overload?

In considering this question, the following areas are relevant:

- US and UK responses to corporate scandals.
- Advantages and difficulties with cross-border shareholder engagement.
- Trends of foreign initial public offerings.
- International regulatory co-operation.

1.1 Strengthening market confidence

Corporate scandals on both sides of the Atlantic accentuated the need for governments and regulators to reinforce business integrity and instil market confidence. The US responded to Enron and WorldCom by building on the 1930s Securities Acts, themselves introduced as a response to the stock market crash of 1929, with the enactment of the Sarbanes-Oxley Act in 2002.

In Europe in 2003, a number of high profile scandals, including Ahold in the Netherlands and Parmalat in Italy, damaged market confidence. At the same time in the UK the Higgs[5] and the Smith[6] reports examined the role of non-executive directors and audit committees respectively. The UK response was to strengthen the Combined Code on Corporate Governance[7] by refining existing recommendations and introducing new ones in 2003. The European Commission also acted to help instil market confidence, the importance of which was stressed by Alexander Schaub, Director-General of DG Internal Market and Services at the European Commission:

'Good corporate governance is an essential prerequisite for the integrity and the credibility of financial institutions, stock exchanges, individual companies, and indeed the whole market economy. By ensuring greater transparency, fairness and accountability with respect to shareholders and other stakeholders, good corporate governance builds economic confidence

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[4] 'Action Plan on modernising company law and enhancing corporate governance in the European Union', European Commission, 2003.

[5] 'Review of the role and the effectiveness of non-executive directors', Department of Trade & Industry, January 2003.

[6] 'Audit Committees Combined Code Guidance', Financial Reporting Council, January 2003.

[7] Combined Code on Corporate Governance, Financial Reporting Council, 2003.

and trust. It facilitates access to external financing and plays a critical role in channelling savings to productive investment.

In today's integrated markets, failure to deal with the regulatory issues associated with corporate governance can have strong repercussions on global financial markets and jeopardise financial stability.' [8]

However, the introduction of new regulatory measures cannot eliminate the risk of future scandals occurring. Enron is often cited as an example of a company that 'ticked all the boxes' but where directors were perceived as failing to uphold their fiduciary duties. In this respect, while regulation can set out minimum standards, a comply-or-explain approach through a code developed by key participants in the market can encourage good practice over and above legislative requirements. For example, the practice of separating the roles of the chairman and the CEO in the UK is not required but is nevertheless common. Likewise, there is no requirement under the Sarbanes-Oxley Act for the appointment of a lead independent director yet the position is becoming common in the US.

The complementary role of regulation and individual integrity were described by Cynthia A. Glassman, SEC Commissioner, as follows:

'...How do we achieve good corporate governance and is there a role for regulators in doing so? First and foremost, companies need to have an effective corporate governance process, and corporate boards and senior management must have integrity and promote ethical behaviour. I believe that most companies do have good corporate governance processes. They follow the rules not only to avoid reputation risk of an enforcement action, but also because it is just good business practice and the right thing to do. As regulators, while we cannot impose these values, we can encourage good behaviour through well-designed rules and discourage bad behaviour through civil and criminal law enforcement. In this way, we can help to bridge any gaps between owners' goals and management's goals.'[9]

Regulation and corporate governance principles aim to align the interests of directors, management and shareholders in pursuing the success of the company. Policy makers are challenged with striking the right balance between market forces and regulation in creating an effective corporate governance framework.

1.2 Shareholder engagement and co-operation across borders

Increased co-operation between shareholders around the world can encourage greater understanding of fundamental corporate governance principles. Shareholders are becoming more attuned to differences in areas such as shareholder rights and are encouraging the harmonisation of standards in the countries in which they invest. More investors are buying shares in companies outside their home market. For example, UK holdings of US equity and debt, as of 30 June 2004, totalled $488 billion – an increase of $98 billion from the year before.[10] US holdings of UK equity and debt, as of December 31 2004, amounted to $738 billion, the largest amount invested in any country outside the US.[11]

The influence of foreign shareholders on domestic companies is often apparent when there are issues of concern about the governance of a company. For example, CalPERS (the US pension fund) joined forces with UK investors regarding the recruitment of a new

[8] Keynote address by Alexander Schaub, Director-General of DG Internal Markets and Services, European Commission, at a Transatlantic Corporate Governance Dialogue event organised by the European Corporate Governance Institute and the American Law Institute, 27 September 2005.

[9] Remarks of SEC Commissioner Cynthia A. Glassman, at the ICAEW *Beyond the Myth of Anglo-American corporate governance* roundtable, Washington DC, 6 December 2005.

[10] Report on Foreign Portfolio Holdings of US Securities as of June 30, 2004, Department of the Treasury, Federal Reserve Bank of New York, Board of Governors of the Federal Reserve System, June 2005.

[11] Report on US Portfolio Holdings of Foreign Securities as of December 31, 2004, Department of the Treasury, Federal Reserve Bank of New York, Board of Governors of the Federal Reserve System, December 2005.

CEO, who was the son of the chairman, at BSkyB. They joined one of the largest pension funds in the UK, University Superannuation Scheme (USS), in reading out a joint public statement of discontent at the shareholders' annual meeting in 2003.

In another example, pension funds from around the world launched a class action law suit against News Corporation over the ability of shareholders to vote on the use of a poison pill as a takeover defence. The lawsuit was filed in the Delaware Chancery Court on behalf of twelve funds, two from the US, seven Australian funds and three European funds, including Hermes Pensions Management Ltd and USS from the UK. News Corporation reincorporated from Australia to the US state of Delaware in 2004 where shareholder approval is not required for the use of a poison pill. The management welcomed the new regime but the shareholders considered this to be a breach of the company's contractual commitment to seek shareholder approval for a poison pill. As a result of the shareholders' law suit, their right to vote on the poison pill was restored.

While foreign shareholders can influence corporate governance in national markets, there are many barriers to cross-border engagement resulting from disparate regulations in different countries. These include a general lack of familiarity with overseas markets, language difficulties, inadequate voting rights, practical difficulties in casting votes and lack of information. An example of the way these issues are being addressed is evident in the European Commission's proposed directive on shareholder rights published in January 2006 which is relevant to all listed companies in EU Member States and sets out minimum standards. In emphasising the importance of the directive, the European Commission's Internal Market and Services Commissioner, Charlie McCreevy said:

'Shareholders need to be able to get relevant information on time and vote without encountering unnecessary obstacles, wherever they are in the EU. Otherwise they can't exercise their influence properly and make sure that management is acting in their best interests. Our proposals will introduce a range of key minimum standards to make this happen – using modern, reliable technology. All this will help to strengthen the role of shareholders and spread EU investing.'[12]

1.3 Rising numbers of foreign initial public offerings

Stock exchanges in both the US and the UK attract high numbers of international companies. The foreign countries with the highest number of companies listed on the New York Stock Exchange (NYSE) and the London Stock Exchange (LSE) are indicated in the table below:

Table 2: Comparison of foreign companies on the NYSE[13] and the LSE[14]

NYSE		LSE	
Canada	82	Ireland	72
United Kingdom	52	United States	67
Brazil	34	Canada	48
Mexico	21	Australia	41
Japan	19	Bermuda	36
France	19	India	24
Netherlands	18	Israel	24
Chile	18	Japan	20
Germany	16	Cayman Islands	17
Bermuda	15	Netherlands	15
Other	145	Other	197
All countries	**439**	**All countries**	**561**

[12] 'Corporate governance: Commission proposals to make it easier for shareholders to exercise their rights within the EU' Press Release, Brussels, European Commission, 10 January 2006.

[13] 'Foreign companies registered and reporting with the U.S. Securities and Exchange Commission', Office of International Corporate Finance, Division of Corporate Finance, U.S. Securities and Exchange Commission, December 31, 2004.

[14] 'Companies Listed on the London Stock Exchange', 'About the Exchange: Statistics', London Stock Exchange website as at 21 March 2006.

The number of US companies on the LSE[15] is second only to Ireland, while the UK accounts for the largest number of foreign registrants of the US Securities and Exchange Commission (SEC) after Canada.[16] Relative geographic location and historical economic ties (for example between Commonwealth countries) are reflected in capital market choices. The type of corporate governance framework also has an effect on a company's decision to choose one jurisdiction over another.

The impact on national corporate governance practices of increased international business and investment can be significant. Companies listing on more than one stock exchange are often faced with difficult, duplicative and sometimes contradictory laws and regulation which result in extra cost. Some of the UK's largest companies have high proportions of their assets deployed overseas. For example, GlaxoSmithKline (GSK) has more than 50% of its sales in the US and the CEO along with many other board members are based in the US. Therefore while GSK is a UK company, it can be greatly influenced by US governance practice, for example on executive pay.

However, a wholly standardised approach to corporate governance cannot be imposed on all companies and all jurisdictions. Companies vary by size and industry and the environment they operate in is determined by legal and cultural traditions. The importance of flexibility in the design of mandatory and non-mandatory measures in an international context is aptly summarised by the late Peter Drucker:

'Because management deals with the integration of people in common venture, it is deeply embedded in culture. What managers do in Germany, in the United Kingdom, in the United States, in Japan, or in Brazil is exactly the same. How they do it may be quite different.'[17]

1.4 Increasing international regulatory co-operation

In the face of corporate scandals, policy makers have been challenged with adapting national laws and practices to mitigate problems while facilitating the adoption of internationally accepted standards. In addition, the costs and benefits of implementing new regulation must be assessed when considering its appropriateness as a policy measure. The extraterritorial impact of the Sarbanes-Oxley Act on foreign registrants of the SEC provides an example of the difficulties involved in developing appropriate national regulation, while talking into consideration the international impact of such measures. In addressing this issue SEC Commissioner Paul S. Atkins said:

'The SEC is interested in finding the "common ground" between the US's and the EU's approach to these issues. Since the passage of Sarbanes-Oxley, the SEC has hosted two interactive roundtables on the application of the Act to non-U.S. issuers. Further, the SEC has met with numerous foreign delegations and European securities regulators. I think I can state with confidence that the process is working and that your active participation in our rule-making process has helped the SEC understand the particular needs of non-U.S. issuers. Just because our approaches are different does not mean that they cannot work together effectively.'[18]

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[15] London Stock Exchange Statistics, June 2005.

[16] 'Foreign companies registered and reporting with the U.S. Securities and Exchange Commission', Office of International Corporate Finance, Division of Corporate Finance, U.S. Securities and Exchange Commission, December 31, 2004.

[17] 'Peter Drucker's Legacy Includes Simple Advice: It's About People', Scott Thurm and Joann S. Lublin, *Wall Street Journal*, 14 November, 2005.

[18] Speech by SEC Commissioner Paul S. Atkins, 'The Sarbanes-Oxley Act of 2002: Goals, Content, and Status of Implementation', *International Financial Law Review*, March 25, 2003.

Commissioner Atkins' enthusiasm for increased dialogue between the US and Europe was also reflected in the words of Dr Alexander Schaub, Director-General of DG Internal Market and Services at the European Commission:

'Not only must we avoid unnecessary duplication of controls and costs for regulators, companies and auditors, but we must also ensure that regulatory authorities intervene effectively and in a timely manner. I am convinced that we have a lot to learn from each other. This is why a constructive and regular dialogue is important to appreciate where one system has developed a more sophisticated approach and to promote regulatory best practice.'[19]

In an attempt to introduce guidance for governments and regulators around how to implement good corporate governance practice, the Organisation for Economic Co-operation and Development (OECD) published the *OECD Principles of Corporate Governance* in 1999, subsequently revised in 2004 (see Appendix 1). Recognising that there is no single right approach, the principles provide a reference point for all countries, in shaping their corporate governance frameworks:

'If countries are to reap the full benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible, well understood across borders and adhere to internationally accepted principles. Even if corporations do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of domestic investors, reduce the cost of capital, underpin the good functioning of financial markets, and ultimately induce more stable sources of finance.'[20]

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[19] Keynote address by Dr Alexander Schaub, Director-General of DG Internal Markets and Services, European Commission, at a Transatlantic Corporate Governance Dialogue event organised by the European Corporate Governance Institute and the American Law Institute, 27 September 2005.

[20] *OECD Principles of Corporate Governance* (2004) Preamble, p. 13.

2. US regulator-led corporate governance

The US approach to corporate governance can be characterised as a regulator-led system predominantly enforced through SEC regulation, stock exchange listing rules and state law. The US does not have a code of corporate governance similar to that of the UK, given the federal nature of its constitution. While the internal aspects of corporate governance, such as directors' duties and shareholder rights, are a matter for state law, the SEC and stock exchanges also play a significant role in the governance of listed companies.

The roles of the various regulatory authorities in the US are described by Mark Roe of Harvard Law School:

'We do not have a purely state-based system of law governing the American corporation. The federal players, just to be clear are principally four. First, is the United States Congress, which passed the securities laws and approximately every 10 years or so undertakes a major update of those laws. Second is the Securities and Exchange Commission, which promulgates regulations under the securities laws and often proposes changes to Congress. The courts then are the third player interpreting those laws. And the fourth is the stock exchange, which may look from Europe to be a purely private actor, but which makes major corporate governance law, usually when the SEC – a federal administrative agency created by the United States Congress and given, by Congress, substantial power over the exchange – asks (or perhaps the better word is, directs) it to make those rules.'[21]

The *Pressure Points* consultation paper raises the following question:

Q2. Is there a danger of regulation affecting the long-term attractiveness of US securities markets to non-US companies?

In considering this question, the following areas are relevant:

- The decentralised approach to US company law.
- The roles of the SEC and the Public Company Accounting Oversight Board (PCAOB) and relevant regulations.
- The trend of companies registering with the SEC.
- The Listing Rules of the NYSE and NASDAQ related to corporate governance.

2.1 State company law and the Model Business Corporation Act

The US has no central body of company law and each state is free to establish its own model. The state of Delaware is particularly influential as it is the domicile of more than half of all US listed companies. In addition, many states adopt recommendations from the Model Business Corporation Act. The differences in company law between states can be said to give rise to 'company law shopping' where states compete for company incorporation. This system of competing state company law is described below by Stephen Mayson, Derek French and Christopher Ryan:

'The American system is commonly defended on the ground that competition is a good thing and in a market for incorporation where state laws are a 'product', competition must result in a better product. Fears that the most successful laws are those that favour a particular interest group are countered by saying that if other interest groups really felt disadvantaged

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[21] 'Regulatory Competition in making Corporate Law in the United States – And its Limits', Mark J. Roe, *Oxford Review of Economic Policy*, Vol. 21, No 2, Oxford University Press, 2005.

they would stop dealing with companies incorporated under the disadvantageous laws, and those laws would cease to be the most successful. In particular it is argued that if different state laws had different effects on shareholders then this would be reflected in share prices but in fact there seems to be no evidence that moving to Delaware, for example, affects a company's share price.'[22]

The US approach to the oversight of corporate governance at a state level is less reliant on shareholder engagement than in the UK where shareholders are empowered through rights in company law to play an active role. However, the use (or threat) of shareholder class action law suits is more prevalent in the US and can be an effective measure to bring about change.

There is also, generally, more deference to board decision-making in the US than in the UK as described below by Stephen M. Bainbridge:

'The board of directors is not an agent of the shareholders; rather, the board is the embodiment of the corporate principal, serving as the nexus of the various contracts making up the corporation. From the descriptive perspective, director primacy claims that fiat – centralised decision-making – is the essential attribute of efficient corporate governance. From the normative perspective, director primacy acknowledges that vesting the power of fiat in the board of directors raises legitimate accountability concerns.'[23]

2.2 The Securities and Exchange Commission

In the US, the 1933 Securities Act is the most significant piece of legislation governing the securities markets. It was created primarily to ensure an efficient and transparent securities market and to mitigate the risk of fraudulently misleading financial statements. The 1934 Securities Exchange Act followed with the establishment of the SEC as the regulatory agency for promoting market stability, enforcing securities laws and, ultimately, protecting investors.

Publicly listed companies registered with the SEC are expected to adhere to strict disclosure requirements. They are required to file annual and quarterly reports, registration documents for initial purchase offerings and copies of proxy materials sent to shareholders before an annual general meeting. The SEC also obliges companies involved in a takeover situation to disclose documents concerning tender offers and documents related to mergers and acquisitions.

Providing shareholders with information upon which they can make investment decisions is a key priority of the SEC:

'The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve this, the SEC requires public companies to disclose meaningful financial and other information to the public. This provides a common pool of knowledge for all investors to use to judge for themselves whether to buy, sell, or hold a particular security. Only through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions.'[24]

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[22] *Company Law*, 21st Edition 2004-2005, Stephen Mayson, Derek French and Christopher Ryan, Oxford University Press.

[23] 'The Business Judgment Rule as Abstention Doctrine', Stephen M. Bainbridge, 57 *Vanderbilt Law Review* 83-130, 2004.

[24] 'About the SEC: What we do, the investors' advocate: How the SEC protects investors, maintains market integrity and facilitates capital formation', www.sec.gov.

In the year to October 2004 the SEC made around 600 legal filings[25] against companies and individuals for violations. This was an increase from 2001 (480 legal filings) and may reflect more stringent oversight since the enactment of the Sarbanes-Oxley Act. The most common violations that may lead to SEC investigations include:

- *'insider trading: buying or selling a security in breach of a relationship of trust and confidence while in possession of material, non-public information about the security;*
- *misrepresentation or omission of important information about securities;*
- *manipulating the market prices of securities;*
- *stealing customers' funds or securities;*
- *violating broker-dealers' responsibility to treat customers fairly; and*
- *sale of securities without proper registration.'*[26]

2.3 Implications of the Sarbanes-Oxley Act for foreign companies

In July 2002, in response to the Enron and WorldCom scandals, the Sarbanes-Oxley Act was enacted in an effort to maintain investor confidence and combat fraud on the market. The Act introduced measures to strengthen the composition and independence of audit committees, enhance financial disclosures and set up the PCAOB to oversee the auditing profession and thus protect the interest of shareholders.

The key activities of the PCAOB as determined by the Sarbanes-Oxley Act are as follows:

- *Registration – Accounting firms must now register with the PCAOB in order to issue audit reports on SEC registrant companies.*
- *Inspections – The PCAOB carries out inspections of the registered accounting firms in relation to their performance of audits and related issues.*
- *Standard setting – The PCAOB has the power to create standards relevant to the accountancy profession.*
- *Enforcement – The PCAOB can investigate potential violations and impose disciplinary sanctions against firms.*[27]

SEC registered companies are required to abide by the Sarbanes-Oxley Act and the rules implemented by the SEC, although the implementation of rules is sometimes deferred for foreign private issuers (FPI) and small US companies. For example, there is a timetable for deferred implementation of the requirements of Section 404 whereby management must attest to the effectiveness of internal controls over financial reporting.

There are around 1,350 FPIs registered with the SEC, of which approximately 10% are from the UK. Since 2001, there has been a decrease of approximately 25% of UK companies registered with the SEC, compared to an overall decrease of all foreign companies of 8%, as indicated in the latest available statistics over:

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[25] *Financial Times*, 24 August 2004.

[26] 'About the SEC: What we do, the investors' advocate: How the SEC protects investors, maintains market integrity and facilitates capital formation', www.sec.gov.

[27] Summarised from the 2004 Annual Report, PCAOB.

Table 3: Foreign companies registered and reporting with the SEC[28]

Year	UK registrants	All foreign registrants
2004	107	1,240
2003	115	1,232
2002	134	1,319
2001	143	1,344

For FPIs with a low number of US equity shareholders the administrative costs of compliance with SEC requirements can outweigh the benefits of a US listing leading to a decision to deregister as summarised in the case of Cable & Wireless plc below:

Cable & Wireless plc[29]

Intention to Delist from NYSE and terminate ADR Programme and SEC registration

Cable and Wireless plc today announces that it intends to terminate its American Depositary Receipt programme on 13 December 2005 and to delist voluntarily from the New York Stock Exchange...

Rationale for Delisting and Termination of ADR Programme

ADRs represent a very small proportion of Cable & Wireless' equity: as of close of business on 31 August, 2005, only 3.5% of Cable & Wireless' issued equity was held in ADR form.

ADR trading volumes are very low: less than 1.0% of Cable & Wireless' shares traded over the three months to 31 August 2005 were represented by ADRs.

Currently the majority of the holdings of US residents in Cable & Wireless are represented by ordinary shares.

Following its exit from the US during the course of 2004, Cable & Wireless does not carry out any material business in the US.

Given the relatively low participation in the ADR programme, Cable & Wireless does not believe that the benefits to it of maintaining the programme and NYSE listing justify the additional administration.

SEC Registration

Notwithstanding the delisting, Cable & Wireless' registration under the US Securities Exchange Act of 1934 remains in effect and Cable & Wireless will continue to comply with its obligations. However, Cable & Wireless believes that the increasing costs of maintaining its registration in the US and complying with SEC reporting and other applicable US obligations outweigh the benefits obtained by the Company and its shareholders as a whole. Therefore Cable & Wireless intends to convene an extraordinary general meeting later in the year to amend its Articles of Association to facilitate termination of registration with the SEC and its SEC reporting and other applicable obligations.

[28] 'Foreign companies registered and reporting with the U.S. Securities and Exchange Commission', Office of International Corporate Finance, Division of Corporate Finance, U.S. Securities and Exchange Commission, December 31, 2004.

[29] 'Cable & Wireless PLC – NYSE delisting and termination of ADR Programme', News Alert, Hemscott Price Alerts, 9 September 2005.

The consequence of recent regulation in the US was recently referred to by Alan Greenspan, former chairman of the US Federal Reserve. While recognising that the Sarbanes-Oxley Act had brought benefits, he emphasised the heavy regulatory burden it has created for companies:

'Section 404 creates a heavy burden on the accounting system and is particularly an anathema to foreigners who would essentially be issuing or endeavour to issue initial public offerings and other stock in the United States, and have in the last couple of years chosen not to. I am acutely aware and disturbed by the fact that initial public offerings have moved away from the US – and to a large extent have moved to London.

My impression is that there will be changes – not so much because of the foreign issues that are involved here but the fairly significant concern domestically whether the amount of supervision, regulation and reporting is more than what was necessary to address the very real problems we confronted in 2002 as a consequence of the corporate scandals which I am sure you are all familiar with.'[30]

Mr Greenspan's views were echoed in the UK where a survey of over 60 chairmen (including 40 chairmen from FTSE 100 companies) conducted by Russell Reynold's Associates found that:

- *'Most chairmen (68%) of companies listed in the US would consider de-listing because of the impact of complying with the Sarbanes-Oxley Act; and*
- *Most chairmen of companies not listed in the US are dissuaded from seeking a US listing because of the regulation.'*[31]

Not all commentators take the view that the regulatory burden since the enactment of the Sarbanes-Oxley Act is detrimental to the attractiveness of the US stock markets. The former Mayor of New York, Rudy Giuliani, stated that London and Tokyo will eventually adopt regulations as tough as those in the US.[32] At the World Economic Forum in Davos in 2005, John Thain (CEO of the NYSE) emphasised the view that European and Asian companies would still want to list on US exchanges because of the access to US capital:

'It is a good sign for investors of them (foreign companies) to be able to say that they are compliant with the world's most stringent listing requirements. Sarbanes-Oxley will get picked up by European regulators. The regulatory arbitrage that the European exchanges are marketing will not last very long.'[33]

However, the increasing trend for foreign initial public offerings (IPOs) to choose markets outside the US to raise capital was highlighted in March 2006 by Peter Weinberg, former CEO of Goldman Sachs International, in the *Financial Times*:

'There was a time when the US stock exchanges hosted the largest IPOs in the world. Most of the big capital raisers were based in the US and New York was the unquestioned centre of liquidity. A look at the largest 25 IPOs executed in 2005 suggests that this is no longer the case: nine were listed in Europe; nine were in Australasia; five were in London and only two were in the US. The reason for this is the mix of geographic location of the issuer as well as the unwanted burdens of Sarbanes-Oxley compliance.'[34]

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[30] 'Greenspan predicts US governance revamp', *Financial Times*, 13 April, 2006.

[31] 'The Chairman's report – corporate governance for good or ill?', Russell Reynold's Associates, 2005.

[32] 'Greenspan predicts US governance revamp', *Financial Times*, 13 April 2006.

[33] 'NYSE chief expects Europe to move closer to Sarbanes-Oxley', John Gapper, *Financial Times*, 28 January 2005.

[34] 'How London Can Close the Gap on Wall Street', Peter Weinberg, *Financial Times*, 30 March 2006.

2.4 The Listing Rules of the NYSE and NASDAQ

The NYSE was established in 1792 and is the world's largest exchange by market capitalisation. It has seventeen times the number of trades and four and a half times the market capitalisation of the LSE.[35] There are around 3,100 US companies and 430 non-US companies listed on the NYSE.[36] NASDAQ, established in 1971, was the world's first electronic computer-based stock market and has around 3,300 listed companies including about 290 foreign companies.[37]

Both the NYSE and NASDAQ redrafted their Listing Rules to accommodate changes introduced by the Sarbanes-Oxley Act (see Appendix 2 for NYSE corporate governance standards). These new requirements have been largely harmonised between the two exchanges and were approved by the SEC in 2003. The listing rule changes, along with new SEC regulation, have been credited with a subtle power shift on boards of directors in the US, away from the concentrated power of the chief executive to the collective decision-making of the entire board. This change is generally encouraged through an increase in the role and independence of non-executive directors, the enhanced role and responsibility of the audit committee, and increased shareholder participation in governance matters, for example through the approval of equity compensation plans.

On both the NYSE and NASDAQ, the new corporate governance standards are applicable to all companies listing ordinary ('common') equity shares. Failure to comply with the corporate governance standards could lead to trading being suspended or the company being de-listed from the exchange. However there are some exceptions, for example companies with controlling shareholders (i.e. those with more than 50% of the voting power) need not:

- comply with independence criteria;
- have a nomination ('nominating') committee;
- or have a remuneration ('compensation') committee.

Foreign companies are also exempt from the corporate governance standards, with the exception of provisions mirroring requirements of the Sarbanes-Oxley Act, for example, in relation to the mandatory requirement for audit committees. However, they are expected to follow the corporate governance rules of the home country and are required to disclose any significant ways in which their corporate governance practices differ from those followed by US domestic companies under NYSE listing standards.

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[35] 'How London Can Close the Gap on Wall Street', Peter Weinberg, *Financial Times*, 30 March 2006.

[36] www.nyse.com.

[37] 'Foreign companies registered and reporting with the U.S. Securities and Exchange Commission', Office of International Corporate Finance, Division of Corporate Finance, U.S. Securities and Exchange Commission, December 31, 2004.

3. UK shareholder-led corporate governance

Modern corporate governance in the UK began in the early 1990s in the wake of corporate scandals such as Polly Peck International[38] and Maxwell.[39] In response to these scandals, the UK government encouraged the market to develop a solution to mitigate the risk of more scandals occurring and to improve market confidence. This led to the development of the Combined Code, the cornerstone of the comply-or-explain approach to corporate governance.

Although the UK approach to good governance is often referred to as 'self-regulatory' or 'principles-based', it is underpinned by a robust system of company law and market regulation. Shareholders in the UK play an active role in corporate governance and are accorded genuine power and influence through company law to hold boards to account, hence the reference to the shareholder-led approach.

The *Pressure Points* consultation paper raises the following question:

Q3. What are the benefits and disadvantages of both a shareholder-led and a regulator-led approach to corporate governance?

In considering this question, the following areas (in addition to the previous chapter) are relevant:

- The Companies Acts and shareholder rights.
- The roles of the Financial Services Authority (FSA) and the Financial Reporting Council (FRC) and relevant regulations.
- The London Stock Exchange.
- The evolution of the comply-or-explain system.

3.1 The Companies Acts

Company law in England and Wales is governed by the Companies Act of 1985 and the Companies Act 1989. Companies may follow a model set of Articles of Association known as Table A which provides rules regarding the internal governance of companies. Table A will apply as a default set of Articles or, alternatively, companies can create their own Articles ensuring they comply with the Companies Acts.

The Companies Acts provide for strong shareholder rights, over and above the basic rights associated with the rights to receive dividends and to buy, sell and transfer shares. They include rights to call extraordinary general meetings, approve dividends, exercise pre-emption rights on new share issues and, ultimately, remove a director from the board. The Acts' provisions enable a democratic process for board accountability, informed by additional disclosures resulting from the Combined Code on Corporate Governance, and activated by the general willingness of UK institutional shareholders to assume a governance oversight role.

UK company law is currently undergoing a comprehensive review, pursuant to the government's objectives to '*enhance shareholder engagement and a long-term investment*

[38] The downfall of Polly Peck International in 1990 was linked to Asil Nadir who obtained a controlling stake in the company and pursued highly geared growth through acquisition.

[39] The Maxwell scandal was attributed to an over-concentration of power in the hands of Robert Maxwell who headed the Mirror Group PLC. More than £550 million of investments disappeared from the group's pension funds prior to its collapse.

culture.'[40] The Company Law Reform Bill aims to clarify and simplify certain areas of existing company law, including directors' obligations to the company, its members and other stakeholders. European company law directives also have a continuing impact on the UK's corporate governance legal framework.

3.2 The Financial Services Authority and the Financial Reporting Council

The Financial Services and Markets Act 2000 (FSMA) provides the framework for the regulation of the financial services industry in the UK. The Act placed new responsibilities on the FSA giving it statutory powers to issue rules and guidance across the UK financial services industry. The FSA is funded by the financial services industry (i.e. fees from firms regulated by the FSA) and is independent from government. Its four objectives are as follows:

- *market confidence: maintaining confidence in the financial system;*
- *public awareness: promoting public understanding of the financial system;*
- *consumer protection: securing the appropriate degree of protection for consumers; and*
- *the reduction of financial crime: reducing the extent to which it is possible for a business to be used for a purpose connected with financial crime.*[41]

The FSA is responsible for the UK Listing Authority (UKLA) which regulates the admission of securities to the Main Market of the LSE through Listing Rules. The FSA has the power to impose unlimited civil penalties on companies and directors if Listing Rules are breached. While a rare occurrence, it may withdraw the authorisation of a company from the Main Market and, in extreme cases, may carry out criminal prosecutions through the courts.

While the FSA can penalise companies for violations of the Listing Rules and other market related regulations, the FRC is generally responsible for monitoring the use of the Combined Code on Corporate Governance which is appended to the Listing Rules. The FRC is the UK's independent regulator for corporate reporting and governance and has some statutory powers derived from Parliament.

The FRC plays a significant part in corporate governance in the UK because of its oversight role in relation to the accountancy profession and its responsibility for setting and enforcing standards. After the Enron and WorldCom scandals the UK government strengthened the role of the FRC and extended its oversight role so that it covered the Accounting Standards Board, the Auditing Practices Board, the Professional Oversight Board for Accountancy, the Financial Reporting Review Panel and the Accounting Investigation and Discipline Board. Subsequently, plans have been developed to bring the actuarial profession and standard setting into the FRC structure.

The FRC, which is currently funded equally by the UK government, listed companies and the accountancy profession, defines its aim and objectives as follows:

'Our aim is to promote confidence in corporate reporting and governance. In pursuit of this aim our five objectives are to promote:

1. high quality reporting

2. high quality auditing

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[40] Company Law Reform Bill, White Paper 2005, Department of Trade & Industry.

[41] 'Statutory Objectives', Financial Services Authority, www.fsa.gov.uk/Pages/about/aims/statutory.

3. high standards of corporate governance

4. the integrity, competitiveness and transparency of the accounting profession

5. our effectiveness as a unified independent regulator.'[42]

3.3 The London Stock Exchange: Main Market and AIM

The LSE was formally established in 1801 and is now a publicly listed company. It is the largest stock exchange in Europe and is comprised of the Main Market with around 1,350 companies and the Alternative Investment Market (AIM) which comprises around 1,400 mainly smaller, growing companies.

The LSE Main Market and AIM have around 560 overseas companies, 67 of which are from the US.[43] A survey published in December 2005 found that the number of foreign initial public offerings in 2005 on the LSE increased by 82% from the year before with 129 foreign companies from 29 different countries. While access to capital was the main reason cited for choosing to list on the LSE, 90% of survey respondents cited requirements generated by the Sarbanes-Oxley Act as a substantive reason for not listing in the US.[44]

Companies listed on the Main Market and AIM, are required to abide by continuing obligations. These include the requirements to publish accounts that conform to Generally Accepted Accounting Principles, adopt the Model Code and make regulatory filings in accordance with company law and listing rules. However, there are differences between the two markets as summarised in the table below:

Table 4: Differences in admission criteria between Main Market and AIM listed companies[45]

Main Market	AIM
Minimum 25% shares in public hands	No minimum shares to be in public hands
Normally 3 year trading record required	No trading record requirement
Prior shareholder approval required for substantial acquisitions and disposals	No prior shareholder approval for transactions
Pre-vetting of admission documents by the UKLA	Admission documents not pre-vetted by Exchange nor by the UKLA in most circumstances. The UKLA will only vet an AIM admission document where it is also a Prospectus under the EU Prospectus Directive
Sponsors needed for certain transactions	Nominated adviser required at all times
Minimum market capitalisation	No minimum market capitalisation

[42] 'Regulatory Strategy', Financial Reporting Council, December 2005.

[43] 'Companies listed on the London Stock Exchange', About the Exchange: Statistics, London Stock Exchange website as at 21 March 2006.

[44] 'LSE attracts record number of international firms', Reuters, London, 20 December 2005.

[45] Table reproduced from the AIM website: www.londonstockexchange.com.

Main Market corporate governance regulations

Companies listed on the LSE's Main Market need to comply with the Listing Rules. This includes Rule 9.8.6 which states that the following items must be included in the annual report and accounts of domestic companies:

- a narrative statement of how it has applied the principles set out in Section 1 of the Combined Code on Corporate Governance, providing explanation which enables investors to evaluate how the principles have been applied; and

- a statement as to whether or not the company has complied throughout the accounting period with the Code provisions set out in Section 1 of the Combined Code. A company that has not complied in full with the Code provisions, or complied with only some of the Code provisions, throughout its accounting period, must specify the Code provisions with which it has not complied and give reasons for non-compliance.

The Combined Code (see Appendix 3) provides recommendations in two parts:

- Section 1 contains recommendations for companies covering directors, board structure, remuneration, accountability and audit, and relations with shareholders; and

- Section 2 contains recommendations for institutional shareholders covering their responsibilities to enter into dialogue with companies, to evaluate governance disclosures and make considered use of their votes.

The effective implementation of the Combined Code in the UK relies on the ability of shareholders to exercise effective influence over boards through rights accorded to them in company legislation. While both the FSA (through the UKLA) and the FRC have oversight responsibilities for the Listing Rules and the Combined Code respectively, they do not make judgements on the accuracy or adequacy of corporate governance disclosure. Directors are obliged to disclose how they have complied, or not as the case may be, with the provisions of the Code and to explain any non-compliance to shareholders who, in effect, act as quasi-regulators.

Foreign companies are not required to abide by the recommendations of the Combined Code. However, Listing Rule 9.8.7 states that:

'An overseas company with a primary listing must disclose in its annual report and accounts:

1) *whether or not it complies with the corporate governance regime of its country of incorporation;*

2) *the significant ways in which its actual corporate governance practices differ from those set out in the Combined Code.'*

The European Commission's 4th revised Company Law Directive will also require all companies incorporated in EU Member States and listed on a stock exchange in the Member States to make a corporate governance statement in their annual report.

AIM corporate governance regulations

The requirements on a company for listing on AIM are less demanding than for the Main Market. For example, there are no thresholds on company size, trading record or proportion of shares in public hands. AIM listed companies are also not subject to the Listing Rules but are governed by AIM Rules[46] published by the LSE. Directors of AIM companies are also subject to the Model Code and the Criminal Justice Act 1993.

While AIM listed companies are not obliged to follow the Combined Code they are required to appoint a nominated advisor (NOMAD) who is responsible for ensuring that the company is complying with its relevant listing rules. NOMADs also help in the preparation of a company's prospectus, the application process for an AIM listing and the matching of buyers and sellers of a company's shares and generally facilitate communication between the company and the investment community.

AIM companies are less inclined to have large institutional shareholdings and therefore shareholders play a less significant oversight role. In this respect NOMADs play a corporate governance oversight role by acting as quasi-regulators. Ultimately, the NOMAD's reputation depends upon the effective functioning of AIM and the companies they advise. The oversight of NOMADs themselves is the responsibility of the LSE which acts as their supervisory authority.

The increased popularity of AIM, particularly since the advent of the Sarbanes-Oxley Act in the US and its effect on smaller companies, was reflected in a recent article in *Corporate Financier* magazine:

'2005 was a landmark year for AIM, during which its number of international constituents rose by 90% – to 220, or 16% of the total – against a 30% increase in domestic listings. Furthermore, 32% of new AIM listings in the fourth quarter of 2005 came from outside the UK, an all time high, taking the number of countries represented on the market to 25.'[47]

3.4 Practical application of the comply-or-explain approach

Initial corporate governance developments in the UK began in the early 1990s in the wake of corporate scandals leading to the establishment of a committee led by Sir Adrian Cadbury. The resulting 'Report of the Committee on the Financial Aspects of Corporate Governance' (Cadbury Report)[48] published in 1992 outlined a number of recommendations around the separation of the role of the chief executive and chairman, balanced composition of the board, selection processes for non-executive directors, transparency of financial reporting and the need for good internal controls. The Cadbury Report included a Code of Best Practice and its recommendations were appended to the Listing Rules of the LSE.

In 1995, following concerns about directors' pay and share options, a committee chaired by Sir Richard Greenbury published a report on directors' remuneration[49] (Greenbury Report). The report recommended extensive disclosure in annual reports on remuneration and recommended the establishment of a remuneration committee comprised of non-executive directors. Again, the majority of the recommendations were appended to the Listing Rules as good practice.

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[46] 'AIM Rules for Companies', London Stock Exchange, July 2005.

[47] 'European dream?', *Corporate Financier*, ICAEW, April 2006.

[48] 'Report of the Committee on the Financial Aspects of Corporate Governance', Gee Publishing Ltd, 1 December 1992.

[49] 'Directors' Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury', Gee Publishing Ltd, 17 July 1995.

In 1996, the Hampel Committee was established to review the extent to which the Cadbury and Greenbury Reports had been implemented and whether the objectives had been met. The Hampel Report[50] led to the publication of the Combined Code on Corporate Governance (1998)[51] covering areas relating to the structure and operation of the board, directors' remuneration, accountability and audit, relations with institutional shareholders and the responsibilities of institutional shareholders.

In July 2002, the Department of Trade & Industry (DTI) and HM Treasury commissioned an independent review by Sir Derek Higgs on 'The Role and Effectiveness of Non-Executive Directors' which was published in January 2003. Recommendations from the review included recommendations related to: a definition of 'independence' and the proportion of independent non-executive directors on the board and its committees; an expansion of the role of the senior independent director to provide an alternative channel to shareholders and lead evaluations on the chairman's performance; added emphasis on the process of nominations to the board through a transparent and rigorous process; and evaluation of the performance of the board, its committees and individual directors.

Around the same time the FRC published the report by the Working Group led by Sir Robert Smith 'Guidance on Audit Committee's'.[52] Both the Higgs and Smith Reports were published in January 2003, followed by the DTI-commissioned Tyson Report[53] on the recruitment and development of non-executive directors. The recommendations from the Higgs and Smith reports led to changes in the 'Combined Code on Corporate Governance'[54] published in July 2003. It supersedes the 1998 Code and applies to all UK registered companies listed on the Main Market of the LSE for reporting years commencing on or after 1 November 2003.

The FRC recently completed a review of the implementation of the Combined Code of 2003 and published its findings in January 2006. The findings from the review indicated that the Combined Code is having a positive impact on the quality of corporate governance among listed companies in the UK as indicated below:

'It was the overwhelming view of respondents to the consultation that there has been an improvement in the quality of corporate governance among listed companies since the Code came into force. Respondents noted improvements in many areas, for example one investor noted specific improvements concerning board structure both in terms of independence of the board and the splitting of the CEO/Chairman role.'[55]

This view that the Combined Code has led to an improvement in the quality of corporate governance is consistent with a survey[56] by the National Association of Pension Funds which found that 95% of large pension funds believed that corporate governance standards in the UK were continuing to evolve in a positive manner.

The FRC review also found strong support for the comply-or-explain approach of implementing the Code amongst companies noting:

'A FTSE 100 company considered comply-or-explain to be a particular strength of the Code. This allows for a level of flexibility which is critical in allowing companies to conduct

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[50] 'Final Report of the Committee on Corporate Governance, Hampel Committee', Gee Publishing Ltd, January 1998.

[51] 'Principles of Good Governance and Code of Best Practice', Gee Publishing Ltd, 1998.

[52] The Smith Guidance on Audit Committees, Financial Reporting Council, January 2003.

[53] The Tyson Report on the Recruitment and Development of Non-Executive Directors, Department for Trade & Industry, June 2003.

[54] Financial Reporting Council, July 2003.

[55] 'Summary of responses to the review', Review of the 2003 Combined Code, Financial Reporting Council, January 2006.

[56] 'Pension Funds' Engagement with Companies', NAPF, August 2005.

their business in ways which are in the best interest of their shareholders. There may be circumstances where non-compliance with certain aspects of the Code on some occasions may be sensible for a particular company. Through ensuring transparency, the Code provides the company with an opportunity to justify any non-compliance and therefore allowing a shareholder to determine whether or not it accepts the explanation."[57]

The use of corporate governance codes is now common across Europe and the rest of the world. In 2005, the World Bank's Global Corporate Governance Forum[58] published a Toolkit to assist developing countries on how to develop and implement a code of corporate governance. In February 2006, the European Corporate Governance Forum ('The Forum') which was established by the European Commission in October 2004, published a statement of principles advocating the importance of the comply-or-explain approach in Europe stating:

'The Forum strongly and unanimously supports this approach, which is best suited to take into account the variety of situations of individual companies, and fits well with the differences between national legal and governance frameworks. The Forum believes that, when it is effectively implemented, this is better and more efficient than detailed regulation...

The Forum urges Member States who have not yet adopted a code to do so. It intends to continue to monitor the implementation of the comply-or-explain approach in the countries of the European Union. The Forum will set up links with national organisations within the Member States charged with the responsibility for corporate governance codes and the monitoring of their application. It will report from time to time about progress made or outstanding issues.'[59]

The Forum also identified the following criteria in order for the implementation of a code of corporate governance to be effective. There needs to be:

- *'A real obligation to comply-or-explain. Depending on the countries, this obligation can result from corporate law, from the regulatory authority, or from listing standards;*
- *A high level of transparency, with coherent and focused disclosures; and*
- *A way for shareholders to hold company boards (unitary or dual) ultimately accountable for their decisions to comply-or-explain and the quality of their disclosures.'*[60]

The Forum's criteria for the effectiveness of a comply-or-explain approach reflect the views of Mario Draghi, formerly Vice Chairman and Managing Director of Goldman Sachs International:

'When the comply-or-explain principle does break down due to fraud, or if investors are insufficiently active, then political pressures mount to do something more prescriptive and we are bound to accept more regulation. In which case because of regulation, we may deprive the system of flexibility, and instead of comply-or-explain, we end up with comply-or-nothing... The real key to effectiveness of the comply-or-explain system is shareholder activism. Parmalat shows clearly that the comply-or-explain system breaks down if no one asks questions where there is no compliance.'[61]

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[57] Review of the 2003 Combined Code, Financial Reporting Council, January 2006.

[58] Volume 1: Module 2 – Defining Codes of Best Practice, Toolkit 2: Developing Corporate Governance Codes of Best Practice, Global Corporate Governance Forum, 2005.

[59] 'Statement of the European Corporate Governance Forum on the comply or explain principle', European Corporate Governance Forum, February 2006.

[60] 'Statement of the European Corporate Governance Forum on the comply or explain principle', European Corporate Governance Forum, February 2006.

[61] Keynote address by Mario Draghi, Vice Chairman and Managing Director of Goldman Sachs International Transatlantic Corporate Governance Dialogue event organised by the European Corporate Governance Institute and the American Law Institute, 2004.

4. The market for corporate control

The powers and responsibilities accorded to boards, shareholders and regulators of a target company in response to a takeover bid are very different between the US and the UK. These differences are aptly summarised by Dan Konigsburg of Standard & Poors:

'The takeover debate is a good example of how the two markets at times do not speak the same language. In this area the British governance system runs counter to the anything-goes, litigious system of the US and its takeover defences, under the belief that there is a conflict of interest when boards decide on mergers. However, most US boards would claim it is in fact their responsibility to protect shareholders against opportunistic takeovers. The US approach emphasizes directors' fiduciary duty to adopt maximum defences, particularly in industries where volatile share prices and ready cash make them more attractive targets. These differing conceptions of the role of the board and the duties of directors are marked, particularly the extent to which shareholders delegate decision-making to the board.'[62]

In the UK, the market acts within a self-regulatory process determined by the City Code on Takeovers and Mergers ('Takeover Code'), backed up by relevant company legislation and market regulation. In the US, at a federal level, the Williams Act 1968 clarifies the rules governing acquisitions and state law governs the use of defence mechanisms.

The *Pressure Points* consultation paper raises the following question:

Q4. In a takeover, should the law enable directors as fiduciaries to pursue a corporate interest that differs from that of the current shareholders?

In considering this question, the following areas are relevant:

- The market for corporate control and corporate governance.

- Takeover regulation in the US and the UK.

- The role and powers of directors and shareholders in takeover situations.

- Global market integration and implications for takeover regimes.

4.1 Markets for control and agency conflicts

A fundamental proposition of capitalism is that a company is an entity of joint enterprise between those who control it (i.e. the directors) and those who own it (i.e. the shareholders). Directors are responsible for acting in the best interests of the company and pursuing its success for the benefit of shareholders. Shareholders in turn, empower directors to lead the company in a fiduciary capacity, while maintaining a degree of decision-making control through incorporation rights.

Agency theory applies where there is a separation of ownership and control and asserts that a misalignment can occur between the interests of those in control of the company and those who own it, resulting in conflicts.[63, 64] The ways in which these conflicts can be mitigated are described in each of the other discussion papers in the *Beyond the myth of Anglo-American corporate governance* series which describe:

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[62] D. Konigsburg, 'Similarities and Differences in the United States and United Kingdom', in *Governance and Risk* (G. Dallas, ed.), ch.16-3, New York: McGraw-Hill, 2004, © The McGraw-hill Companies, Inc.

[63] *'The Modern Corporation and Private Property'* A. Berle and G. Means, New York, Harcourt Brace & World Inc, 1952.

[64] 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure', M. Jenson and W. Meckling, *Journal of Financial Economics*, Vol. 3, 1976.

- the effective functioning of the board through demonstrating leadership and independent oversight of management;
- the ownership rights and responsibilities of shareholders to hold boards to account; and
- the provision of reliable information by the board to shareholders which permits meaningful analysis of company performance.

An effective market for corporate control can be considered another mechanism by which agency conflicts can be addressed and checks on the efficacy of a company's management can be maintained. Put simply, if the incumbent management are not considered to be effectively pursuing the success of the company to maximise shareholder value, then they may become vulnerable to takeover bids from other companies. However, well-managed companies may also be vulnerable to takeover given the premiums arising as a result of a proposed takeover and the readiness of some institutional investors to capitalise on this.

4.2 Regulation in the UK: the Companies Act 1985 and the Takeover Code

In the UK, shareholders are the ultimate arbiters in deciding whether or not a hostile takeover should succeed or fail and they must be willing to sell their shares in order for a takeover to be successful. The Companies Act 1985 provides that if holders of 90 percent of the company's shares accept an offer within four months then the bidder may compulsorily purchase the remainder.[65]

Section 134 of the Companies Act 1985 obliges a shareholder owning three per cent of a company's shares to inform the target company that they have reached this threshold. They must subsequently advise the company if the shareholding falls or rises by one percentage point and Section 212 of the Companies Act compels shareholders to identify themselves if required so to do by the company. The Act also includes provisions around equality of shareholders, insider dealing and restrictions on the ability of a company to buy its own shares.

When an offer is made for a company, market participants are expected to follow the Takeover Code issued by the Panel on Takeovers and Mergers ('Takeover Panel') which was established in 1968. The Takeover Panel is comprised of representatives from business, investment and financial institutions with expertise in takeovers and securities markets.[66] It was traditionally a non-statutory body but implementation of the European Takeover Directive[67] changed its status to a body with legislative powers. These powers include enforcement authority for the mandatory requirement for bid information to be disclosed and the power to seek financial compensation on behalf of shareholders.

The comprehensive mix of market participants on the Takeover Panel encourages acceptance of the Takeover Code from all sides. Companies that do not abide by the Takeover Code's recommendations and have been publicly criticised by the Panel are often treated with caution by shareholders. While the Takeover Code is voluntary, it has been endorsed by the FSA under the FSMA 2000. Therefore, anyone in breach of the Takeover Code may be liable for prosecution or sanctions.

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[65] Companies Act 1985, Part XIIIA (Sec 428-430f).

[66] The Takeover Panel includes representatives from: Association of British Insurers; Association of Investment Trust Companies; Association of Private Client Investment Managers and Stockbrokers; British Bankers' Association; Confederation of British Industry; Institute of Chartered Accountants in England & Wales; Investment Management Association; London Investment Banking Association; and National Association of Pension Funds.

[67] European Commission Directive 2004/25/EC, April 21, 2004.

'The Code has not, and does not seek to have, the force of law. It has, however, been acknowledged by both government and other regulatory authorities that those who seek to take advantage of the facilities of the securities markets in the United Kingdom should conduct themselves in matters relating to takeovers in accordance with high business standards and so according to the Code....

Therefore, those who do not conduct themselves in accordance with high business standards and so according to the code may find that, by way of sanction, the facilities of the securities markets of the United Kingdom are withheld.'

The aim of the Takeover Code is to ensure equality of treatment for all shareholders in takeover bids and is relevant to public companies which are resident in the UK, the Channel Islands and the Isle of Man. In some circumstances private companies are also subject to the Code, for example if they have been listed on the LSE within the previous 10 years.

The Takeover Code has 6 general principles which are summarised as follows:

General Principles

1. *All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.*

2. *The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.*

3. *The board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.*

4. *False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.*

5. *An offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.*

6. *An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.*[68]

The Takeover Code places the protection of the rights of shareholders, as equity owners of a company, as a primary objective in a takeover situation. However, Paul Myners, former Chairman of Gartmore Investment Management Ltd, has criticised the sometimes short-term nature of shareholders and their desire for the share price premiums awarded in a takeover bid. He also contends that the Takeover Code provides very little time for a target company to organise their defence. In the UK, a hostile bid can be closed within only 21 days and even in a longer bid the defending board can produce new information only in the first 39 days of the offer:

[68] 'The Takeover Code', General Principles, The Panel on Takeovers and Mergers, Section B1.

'The speed with which the board of a target company reacts in the first few days of an offer is now frequently critical to the outcome. This is because many traditional, long-only investors sell out early to hedge funds and proprietary trading desks, often before the target company's board has had an opportunity to assemble and articulate a defence. They don't wait for a considered debate. Many institutions just don't want to miss the immediate bid premium.'[69]

European law affects the takeover regime in the UK. In April 2004, the European Commission's Takeover Directive was passed setting out minimum standards for takeover bids on companies listed on stock exchanges within European Union Member States. The Directive is largely based on the UK approach as embodied in the Takeover Code and was implemented in the national laws of EU Member States on 20 May 2006.

The Office of Fair Trading, which was established under the Monopolies and Mergers Act 1965, may also intervene in a takeover on competition grounds. It can make a referral to the Competition Commission who may propose to the Department of Trade & Industry that a takeover be disallowed if it is deemed not to be in the public interest.

4.3 Regulation in the US: the Williams Act 1968 and state law

In the US, takeover activity is governed at a federal level through regulation established by the Williams Act passed by Congress in 1968. The Act was introduced to protect shareholders and clarified rules governing acquisitions and tender offers in a takeover situation through SEC disclosure regulation. This includes disclosure relating to shareholding levels where anyone acquiring more than five per cent of a company's shares must make the relevant SEC filing under Section 13(d)(1) of the Exchange Act. Details of the purchaser's identity and intentions must be disclosed within 10 days of the share purchase. The SEC also requires a bidder to make an offer within a minimum time period.

Individual US states also play a significant role in the oversight of takeover activity in the US. Each state varies in its approach to takeover law but the state of Delaware has specific provisions preventing or deterring companies from attempting hostile takeovers. According to Roberta Romano:

'Delaware has only one takeover statute, while most states have multiple statutes, and the Delaware statute is far milder (less restrictive of bids) than the comparable statutes of other states. Kahan and Kamar rightly notes that states enacting takeover statutes may have the welfare of constituents other than shareholders in mind which is another difference with Delaware, where shareholder-manager interests have greater influence compared to those of third parties, and where no one firm can have sufficient political clout to obtain protective takeover legislation, given the large number of incorporations.'[70]

In the US, directors do not need to seek shareholder opinion to use takeover defences and are protected by the Business Judgment Rule in their fiduciary capacity to make decisions on behalf of the company and its shareholders. In short, the decision for a target company to accept an offer from another company is entirely at the board's discretion. In the UK, directors must seek shareholder approval in a takeover situation and management's power to use defence tactics is limited.

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[69] 'We're selling Britain too cheaply', *Sunday Telegraph*, 19 February, 2006.

[70] 'Is regulatory competition a problem or irrelevant for corporate governance?', Roberta Romano, *Oxford Review of Economic Policy*, Vol 21, No 2, 2005, Oxford University Press.

Defence tactics can include simply advising shareholders why a bid should not be accepted or publishing favourable future performance targets. More complicated defence tactics include the issuing of new shares to a friendly third party who would not then sell the shares to a potential bidder, consequently thwarting the attempt for the bidder to take over the company.

It is common practice in the US for directors to ensure that there are anti-takeover devices in place such as poison pills or staggered boards to inhibit the possibility of a hostile takeover. For example, target companies set up poison pills (known as shareholders' rights plans) which dilute the shares held by the potential bidder. Poison pills are effective by either allowing existing shareholders (except the bidder) to buy more shares at a discount or allowing shareholders to buy the acquirer's shares at a discounted price after the takeover has occurred. The late Jonathan Charkham described the use of the poison pill in the US in his book, *Keeping Better Company*:

'Poison pills have rarely if ever been swallowed – it is not their purpose, which is delay – but they have been effective in preventing hostile two-tier offers, which have all but disappeared. Companies with poison pills tend to fetch far better prices than those without, because they strengthen management's bargaining position and bidders cannot go direct to shareholders over management's heads. However, they may deter bidders from attacking a company where management is incompetent. They are based on the principle that it is right for management to nanny shareholders and understate the agency costs implicit in management's personal interests. Companies did not have to consult their shareholders before putting a poison pill in place, but shareholder activism has often targeted such arrangements and many have now been dismantled.'[71]

4.4 Globalisation of capital markets and takeover regulation

The globalisation of financial markets is increasing the appetite for foreign takeovers, for example the takeover of P&O by the Dubai Ports Authority. By diversifying into new markets the bidder can often benefit from economies of scale and capitalise on opportunities not available in its home market. On occasion a foreign takeover bid can give rise to a degree of protectionism where governments may wish to protect national assets from foreign ownership. At a recent ICAEW conference the Director General of the Takeover Panel, Mark Warham, emphasised that it was not the responsibility of the Takeover Panel to protect UK companies from foreign bids:

'There is a feeling in the UK that we are flogging the great firms that defined our industrial history to Johnny Foreigner. It is not the role of the Takeover Panel to become involved. The Panel's focus is to protect shareholders and leave shareholders to decide the outcome of bids.'[72]

The openness of UK companies to takeover bids, including foreign bids, is illustrated by the case of the LSE which has recently been the target of a number of takeover approaches including one from NASDAQ. The former CEO of Goldman Sachs International, Peter Weinberg, was recently quoted in the *Financial Times* emphasising the benefits of consolidation between US and UK stock exchanges:

'These two forces – a bias to issue equity outside the US and less scale among the UK and European exchanges – cry out for consolidation. The best result for London would be a merger with one of the US exchanges, which would make an already attractive market cheaper and even more appealing.'[73]

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[71] *Keeping Better Company*, Jonathan Charkham, Oxford University Press, 2005, p. 278.

[72] 'Takeover Panel refuses to block foreign buyers', *Accountancy Age*, 13 April 2006.

[73] 'How London Can Close the Gap on Wall Street', Peter Weinberg, *Financial Times*, 30 March 2006.

The lack of international harmonisation of rules governing takeover activity is a reflection of the difficulties in striving to achieve consistency in corporate governance standards worldwide. Difficulties arise because of differences in squeeze-out and sell-out rules, requirements for mandatory bids, ownership disclosure thresholds, the equality of shareholders and the powers of directors to take decisions. While the European Commission's Takeover Directive does much to assist consistency in these areas among EU Member States, it could not gain agreement around the use of defensive tactics and the rights of shareholder to approve such tactics. Consequently, Member States can choose whether or not to permit pre-bid or post-bid defence tactics through the adoption of Articles 11 and 9 respectively.

The difficulty of developing consistent takeover legislation across borders was highlighted by Marco Becht, Tim Jenkinson and Colin Mayer:

'An illustration of where it has been particularly difficult to obtain agreement over harmonized rules of regulation has been in relation to takeovers. The market for corporate control goes to the heart of differences in financial systems and threatens the relationships that exist in some countries between the various parties to the firm. Faced with this threat, countries and states have resisted pressures to accept unimpeded markets in corporate control. To date, this has been the least successful area of corporate legislation in Europe, and is one for which there is no immediate prospect of resolution.'[74]

[74] 'Corporate Governance: An Assessment', Marco Becht, Tim Jenkinson, Colin Mayer, *Oxford Review of Economic Policy*, Vol. 21. No 2, Oxford University Press, 2005.

Appendix 1

OECD Principles of Corporate Governance

1. Ensuring the basis for an effective corporate governance framework

The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.

2. The rights of shareholders and key ownership functions

The corporate governance framework should protect and facilitate the exercise of shareholders' rights.

3. The equitable treatment of shareholders

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.

4. The role of shareholders in corporate governance

The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises.

5. Disclosure and transparency

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

6. The responsibilities of the board

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.[75]

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[75] *OECD Principles of Corporate Governance*, OECD Publications, 2004.

Appendix 2

NYSE Corporate Governance Rules: Section 303A

1. Listed companies must have a majority of independent directors.

2. In order to tighten the definition of 'independent director' for purposes of these standards: (a) no director qualifies as 'independent' unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organisation that has a relationship with the company). Companies must identify which directors are independent and disclose the basis for that determination. [The rules then stipulate a number of criteria for determining whether a director is not independent.]

3. To empower non-management directors to serve as a more effective check on management, the non-management directors of each listed company must meet at regularly scheduled executive sessions without management.

4. (a) Listed companies must have a nominating/corporate governance committee composed entirely of independent directors.

   (b) The nominating committee must have a written charter. [The rules then stipulate what the charter should address.]

5. (a) Listed companies must have a compensation committee composed entirely of independent directors.

   (b) The compensation committee must have a written charter. [The rules then stipulate what the charter should address.]

6. Listed companies must have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act.

7. (a) The audit committee must have a minimum of three members.

   (b) In addition to any requirement at Rule 10A.3(b)(1), all audit committee members must satisfy the requirements for independence set out in Section 303A.02.

   (c) The audit committee must have a written charter. [The rules then stipulate what the charter should address.]

   (d) Each listed company should have an internal audit function.

8. No change.

9. Listed companies must adopt and disclose corporate governance guidelines.

10. Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.

11. Listed foreign private issuers must disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards.

12. (a) Each listed company CEO must certify to the NYSE each year that he or she is not aware of any violation by the company of NYSE corporate governance listing standards, qualifying the certification to the extent necessary.

    (b) Each listed company CEO must promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any material non-compliance with any applicable provisions of this Section 303A.

    (c) Each listed company must submit an executed Written Affirmation annually to the NYSE.

13. The NYSE may issue a public reprimand letter to any listed company that violates a NYSE listing standard.[76]

[76] Section 303A, NYSE Listed Company Manual. The Corporate Governance Listing Rules set out in Section 303A of the NYSE Listed Company Manual were initially approved by the SEC on November 4, 2003.

Appendix 3

Main Principles of the Combined Code on Corporate Governance

Section 1: Companies

A. Directors

A.1. Every company should be headed by an effective board, which is collectively responsible for the success of the company.

A.2. There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. No one individual should have unfettered powers of decision.

A.3. The board should include a balance of executive and non-executive directors (and in particular independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision taking.

A.4. There should be a formal, rigorous and transparent procedure for the appointment of new directors to the board.

A.5. The board should be supplied in a timely manner with information in a form and of a quality appropriate to enable it to discharge its duties. All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.

A.6. The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.

A.7. All directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance. The board should ensure planned and progressive refreshing of the board.

B. Remuneration

B.1. Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose. A significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance.

B.2. There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration.

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[77] The Combined Code on Corporate Governance, Financial Reporting Council, 2003.

C. Accountability and audit

C.1. The board should present a balanced and understandable assessment of the company's position and prospects.

C.2. The board should maintain a sound system of internal control to safeguard shareholders' investment and the company's assets.

C.3. The board should establish formal and transparent arrangements for considering how they should apply the financial reporting and internal control principles and for maintaining an appropriate relationship with the company's auditors.

D. Relations with institutional shareholders

D.1. There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place.

D.2. The board should use the AGM to communicate with investors and to encourage their participation.

Section 2: Institutional shareholders

E. Institutional shareholders

E.1. Institutional shareholders should enter into a dialogue with companies based on the mutual understanding of objectives.

E.2. When evaluating companies' governance arrangements, particularly those relating to board structure and composition, institutional shareholders should give due weight to all relevant factors drawn to their attention.

E.3. Institutional shareholders have a responsibility to make considered use of their votes.[77]

Useful contacts

United Kingdom

Accounting Standards Board – www.frc.org.uk/asb

Association of British Insurers – www.abi.org.uk

Auditing Practices Board – www.frc.org.uk/apb

Bank of England – www.bankofengland.com

Companies House – www.companieshouse.gov.uk

Confederation of British Industry – www.cbi.org.uk

Department of Trade & Industry – www.dti.gov.uk

Financial Reporting Council – www.frc.org.uk

Financial Reporting Review Panel – www.frc.org.uk/frrp

Financial Services Authority – www.fsa.gov.uk

Her Majesty's Treasury – www.hm-treasury.gov.uk

Hermes Pensions Management Ltd -www.hermes.co.uk

Institute of Chartered Accountants in England & Wales – www.icaew.co.uk

Institute of Chartered Secretaries and Administrators – www.icsa.org.uk

Institute of Directors – www.iod.com

Investment Management Association – www.investmentuk.org

London Stock Exchange – www.londonstockexchange.com

National Association of Pension Funds – www.napf.co.uk

Pensions & Investment Research Consultants Limited – www.pirc.co.uk

United States

American Bar Association – www.abanet.org

American Institute of Certified of Public Accountants – www.aicpa.org

American Stock Exchange – www.amex.com

Business Roundtable – www.brtable.org

CalPERS – www.calpers.ca.gov

Caux Round Table – www.cauxroundtable.org

Conference Board – www.conference-board.org

Corporate Library – www.thecorporatelibrary.com

Council of Institutional Investors – www.cii.org

Financial Accounting Standards Board – www.fasb.org

Global Proxy Watch – www.davisglobal.com

Governance Metrics International – www.governancemetrics.com

Institutional Shareholder Services – www.issproxy.com

Investor Responsibility Research Consultancy – www.irrc.org

NASDAQ – www.NASDAQ.com

National Association of Corporate Directors – www.nacdonline.org

National Association of Securities Dealers – www.nasd.com

National Association of State Boards of Accountancy – www.nasba.org

New York Stock Exchange – www.nyse.com

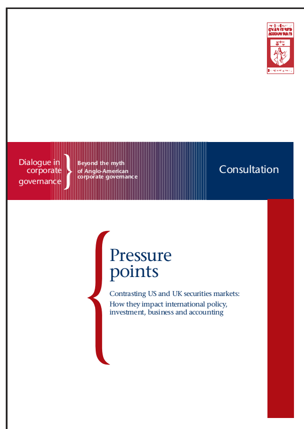
Public Company Accounting Oversight Board – www.pcaob.org

Securities and Exchange Commission – www.sec.gov

Securities Lawyer's Deskbook – www.law.uc.edu/CCL

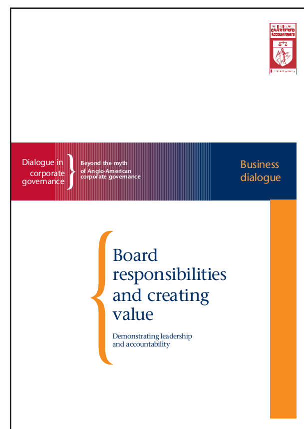
TIAA-CREF – www.tiaa-crefinstitute.org

Pressure Points consultation and other discussion papers



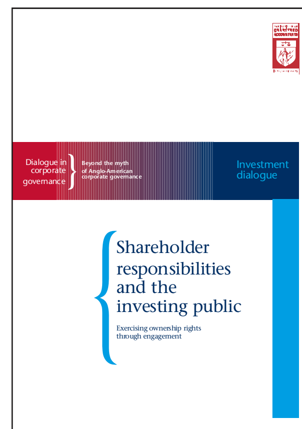
Pressure Points: Contrasting US and UK securities markets: How they impact international policy, investment, business and accounting

Discussion around the similarities and differences between US and UK systems of corporate governance challenges the commonly held presumption of an Anglo-American model. This consultation paper summarises key questions around how policy makers encourage business and investor confidence; how companies are directed and controlled; and how disclosure and reporting requirements are framed and enforced.



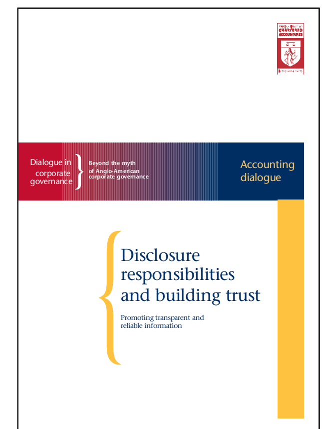
Business dialogue:
Board responsibilities and creating value – demonstrating leadership and accountability

Boards of directors are responsible for acting in the long-term best interests of the company for the benefit of shareholders. Effective boards require skilled leadership, balanced decision-making, informed risk-taking, good judgement and integrity. This paper explores how US and UK boards operate differently and the role, responsibilities and powers of directors in each jurisdiction.



Investment dialogue:
Shareholder responsibilities and the investing public – exercising ownership rights through engagement

Institutional investors play a significant role in the governance of companies in the US and the UK. They are the guardians of other people's money through the management of pensions, insurance and savings products and are expected to act responsibly in exercising their ownership rights. This paper explores the role of shareholders in corporate governance and their rights and responsibilities.



Accounting dialogue:
Disclosure responsibilities and building trust – promoting transparent and reliable information

The disclosure of meaningful, reliable and timely information to shareholders is of fundamental importance for informed investment decision-making and market confidence. High levels of financial disclosure are characteristic of both US and UK corporate governance models. This paper explores the role of the accountancy profession in helping to facilitate the flow of capital through transparent, efficient and trusted information.

Dialogue in corporate governance

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