Mr McKerzie
Financial Conduct Authority
By email to: cp15-19@fca.org.uk

5 August 2015

Dear Mr McKerzie

GC100 response to the FCA Quarterly Consultation Paper (CP15/19)

I am writing on behalf of GC100.

GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE100. There are currently over 125 members of the group, representing some 81 companies in the FTSE100. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of GC100 or their employing companies.

We respond below only to those elements of the consultation on which we have comments.

1.1 Do you agree with our proposal to update the definition of the Code so that it applies across all sections of the Handbook?

Yes. However, it may be desirable to take this opportunity to amend the definition to refer to the Code as applicable from time to time and therefore "future proof" it.

1.2 Do you agree with the proposal to modify the LR requirements on going concern so as to refer to the reformulated requirements under the UK Corporate Governance Code and the associated FRC guidance?

The GC100 has been closely tracking the introduction of the viability statement in C2.2 of the UK Corporate Governance Code (Code) and has contributed to the various FRC consultations and joined various roundtable discussions.

The group is very concerned by the proposals to amend LR 9.8.6R (3) as the effect of the proposals would be to elevate the new provision of the Code from being one against which listed issuers can report on a comply or explain basis, alongside other provisions of the Code, to one which is mandatory under the Listing Rules. Whilst we appreciate the rationale for aligning the LR to require listed issuers to report to shareholders that it is appropriate to report on a going concern basis and that they are viable over the long term, this places a greater burden on issuers to put in place significant incremental procedures to determine, assure and then report on their viability.

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The flexibility afforded to listed issuers by the current comply or explain basis of reporting is, in our view, undermined by the adoption of this change with the risk being created that issuers will have to employ safe harbour provisions and set out assumptions if they are required to make longer term viability statements. At a very practical level, there may be situations where a listed issuer would prudently seek to explain non-compliance, for example, in the context of a takeover situation or where it is facing financial difficulties. This proposal would remove that option and undermines the essential "comply or explain" nature of the Code which has been a very successful cornerstone of UK corporate governance for many years. It would also change the liability regime for this confirmation. We would therefore anticipate that in practice, this could lead to an increased compliance burden (cost and management time) for issuers. This is likely to be particularly problematic for dual-listed UK companies or those with US filing obligations as such companies (and their boards) will face different liability regimes to those whose only listing is in the UK. The existing Code provisions enable dual-listed companies to make a judgement about balancing their approach to disclosure with the relevant liability regimes. The proposed Listing Rule amendments would inappropriately remove this discretion and, as a policy point, seem at odds with the government's desire for companies to have access to finance across global markets.

While acknowledging that existing LR 9.8.6R requires a UK incorporated premium listed company to include a going concern statement in its annual report and accounts, our members feel that the viability statement is distinct from, and less developed than, the going concern confirmation given the mature nature of that requirement and its extensive underpinning by the relevant accountancy standards and guidance. If, despite the significant concerns outlined above, the FCA remains of the view that it is necessary to amend LR 9.8.6R(3) as proposed, we would urge it to do so only in the medium term, once sufficient time has elapsed for regulation, guidance and practice in this area to have become more established.

The draft amendment would also seem to require UK companies to adhere, rather than have regard to, the Guidance on Risk Management, Internal Control and Related Financial and Business Reporting. This new guidance is in the process of being applied for the first time by many companies and may well evolve as practical points emerge. To the extent that a reference is retained to this guidance, we suggest that it refers to the guidance as it applies from time to time.

In conclusion, we are concerned that the proposed Listing Rule amendments would herald the erosion of the previously clear distinction between legal regulation, the Code and supporting guidance. We hope that the proposed changes do not signal an end to the successful UK principles-based system of regulation and governance.

1.3 Do you agree with our proposal to delete the requirements regarding electronic settlement for premium-listed companies (LR 6.1.23R, LR 6.1.24G, LR 6.1.24AG and LR 9.2.3R)?

Yes.

Yours sincerely,

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