"WHISPERING SWEET NOTHINGS": THE LIMITATIONS OF INFORMAL CONFORMANCE IN UK CORPORATE GOVERNANCE

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The principle of "comply or explain" lies at the heart of the UK's Combined Code on Corporate Governance, and is a characteristic feature of the unique London approach to financial market regulation. Over recent years, however, the practical effectiveness of this concept has arguably been undermined by a number of factors. This article assesses three particular challenges to the continuing operation of the "comply or explain" principle: (i) the increased prescriptiveness of the Code over recent years; (ii) the commonality of "box ticking" approaches by institutional investors towards their task of monitoring Code compliance; and (iii) the inclination of boards to produce perfunctory or "boiler-plate" corporate governance statements that fail to reference company-specific circumstances. The article seeks to demonstrate that, taken together, these factors jeopardise the Code's characteristic flexibility and, in turn, undermine its purported capacity to engender the design of effective, performance-enhancing boards on an individual company level. On this basis, the article makes some suggestions for regulatory reform that it is hoped will provide a framework for continuing policy discussions concerning the future development of the Code.

A. Introduction

Over the past four decades accountability and monitoring have become prominent themes in Anglo-American corporate governance.[1] This cultural and

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1 See JN Gordon, "The Rise of Independent Directors in the US, 1950–2005: Of Shareholder Value and Stock Market Prices" (2007) 59 *Stanford Law Review* 1465, 1510–40; RC Nolan, "The Legal Control of Directors' Conflicts of Interest in the UK: Non-Executive Directors Following the Higgs Report" in J Armour and JA McCahery (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Oxford, Hart Publishing, 2006), ch 11.