Informal Conformance in UK Corporate Governance

“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

* Lecturer in Law, University of Bristol. An earlier version of this article was presented at the ESRC/World Economy and Finance Programme Colloquium “The Globalisation of Corporate Governance? Reform Pressures and Processes in an Era of Financial Crises” held at Queen’s University Belfast in September 2008. The article expands on the argument presented in an earlier work “Averting the Overprescription of UK Corporate Governance Norms” (2008) 2(1) Journal of Securities Law, Regulation and Compliance 71. I also presented some of the material from this paper at a Corporate and Financial Law Reading Group held at the University of Oxford in April 2008. I am grateful for feedback received from participants at both these events, and in particular for comments made by John Armour and Arad Reisberg. Thanks to Harry McVea for his opinions on an earlier draft of this article, and also to the anonymous JCLS reviewer for the constructive insights on some key issues in the paper. The usual disclaimer applies.