ICGN
International Corporate Governance Network
Inspiring good governance & stewardship

Monitoring Commissie Corporate Governance Code
p/a Ministerie van Economische Zaken
Postbus 20401
2500 EK Den Haag

Via email: secretariaat@mccg.nl

14th April 2022

Dear Secretariaat,

Re: **Consultation Document: Proposal to Update the Dutch Corporate Governance Code 2022**

The International Corporate Governance Network (ICGN) appreciates the opportunity to comment on the Proposal to update the Dutch Corporate Governance Code (2016). We believe this review is timely given the ongoing rise in the application of environmental, social and governance (ESG) considerations for companies, investors, and stakeholders and subsequent updating of codes, laws, and regulations around the world to promote sustainable business approaches generating long-term value creation and enhanced accountability.

Led by investors responsible for assets under management of around $59 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship. Headquartered in London, our membership is based in more than 45 countries and includes investors, companies, and other stakeholders. ICGN offers an important international perspective on corporate governance and investor stewardship to help inform public policy development and the encouragement of good practices by capital market participants. For more information on the ICGN, please visit www.icgn.org.

ICGN has two seminal policy documents that provide the basis for our comments to the themes and draft language identified in the Proposal. The ICGN Global Governance Principles[1] (GGP) and the ICGN Global Stewardship Principles (GGP)[2] set out best practices in relation to governance and stewardship obligations. Both documents form the core foundation of ICGN's policy framework and embody ICGN's mission to advance the highest standards of corporate governance and investor stewardship worldwide in pursuit of long-term value creation, contributing to healthy and sustainable economies, society, and the environment.

ICGN largely supports the proposed revisions, with the exception of a few areas which we believe may merit further consideration as follows:

1. Inclusion of provisions for investors in the corporate governance code;
2. Long-term value creation;
3. The role of shareholders;
4. Diversity and inclusion;
5. Other adjustments owing to amended laws and regulations; and
6. Recommendations in strengthening the accountability chain.

[1] ICGN Global Governance Principles 2021 (2021)
[2] ICGN Global Stewardship Principles | ICGN (2020)

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1. Inclusion of provisions for investors in the corporate governance code

We note that some of the proposed amendments to the Dutch Corporate Governance Code include new language with provisions for companies *and* shareholders. While some of the proposed provisions should naturally refer to both parties, the inclusion of responsibilities for shareholders within a code that is largely developed for the purposes of providing governance guidance for a corporate board could lead to confusion. Both boards of directors in the two-tier system in the Netherlands and investors have fiduciary duties to fulfil, however, the way in which they address ESG and sustainability issues comes from different legal requirements and voluntary codes.

Boards of directors must promote the best interests of the company and consider shareholders within the bounds of their fiduciary duties to preserve and enhance long-term corporate value. Investors, as shareholders, serve as fiduciaries for their ultimate beneficiaries and are required to hold corporate boards to account through the exercise of stewardship responsibilities, primarily investee company monitoring voting, and engagement. These distinct responsibilities are the main reasons that separate 1) corporate governance codes for companies and their boards of directors and 2) stewardship codes for investors, have been adopted across the world.

While there may be scope for cross-reference, we believe it is most sensible for corporate governance codes and investor stewardship codes to be separate documents addressed to different audiences, i.e., corporate boards and institutional investors respectively. As a frame of reference, the ICGN Global Governance Principles and ICGN Global Stewardship Principles provide separate but interdependent guidance for companies and investors - one set of principles does not take precedence over the other. They are companion pieces to be considered as a way to create a complete set of policy guidance for company and investor duties and responsibilities.

Taking this view into account, it is our recommendation that the following provisions for shareholders be moved to the Dutch Stewardship Code or included in the Corporate Governance Code as an entirely separate section:

- 1.1.5- 5 Role of shareholders
- 4.3.1- Voting as deemed fit
- 4.3.5- Publication of institutional investors' voting policy
- 4.3.6- Reporting by institutional investors on implementation of their engagement policy
- 4.3.7- Abstention in the event of a larger short than long position
- 4.3.8- Lent Shares

2. Long-term value creation

Long-term value creation is at the core of the interrelated connections that exist between companies, investors, stakeholders, and employees. Since the last update of the Dutch Corporate Governance Code, there is a growing awareness that companies are much more than sources of capital to investors. They are a large part of the fabric of our society, embracing cultural and societal norms that support global and local economies.

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Institutional investor stewardship is an important driver of a just transition as they work to address climate risk, human rights, social equality, and geopolitical concerns. Investors and other stakeholders are asking companies about their current and ongoing approaches to address the climate crisis and other global challenges that impact long term value creation, financial and non-financial.

Value creation is so intertwined with the roles and responsibilities of boards that the ICGN GGP mentions "value creation" 16 times.[3] The GGP states:

> The role and purpose of the corporation has faced renewed scrutiny, and stakeholder capitalism has emerged as a challenge to the model of shareholder primacy that prevails in many markets. In the context of this debate, ICGN's position has been, and remains, to focus on the sustainable success and value creation of the company itself which involves meeting legitimate shareholder needs for returns on capital while maintaining positive relations with key stakeholders, including the workforce, customers, suppliers, communities, and civil society more broadly. This infers the need for both investors and companies to focus not only preserving and building a company's financial capital, but also its human and natural capital.[4]

With respect to the Proposal's commentary regarding long-term value creation and ESG, ICGN recommends the following:

i. As part of their strategy for long-term value creation, companies should formulate a clear ESG strategy and set specific objectives (best practice provision 1.1.1).

ICGN agrees that companies should create a clear ESG strategy that entails specific objectives to be measured against outcomes over the course of several years and the ESG strategy should be fully integrated into the corporate strategy and communicated to shareholders and stakeholders.

In the ICGN Global Governance Principles, ICGN calls for boards of directors (in a one or two-tier system) to oversee "the company's risk assessment and management (including relevant systemic risks such as climate change, ecological degradation, social inequality and digital transformation) that affect sustainable value creation and preservation and reviewing policies annually, or with any significant business change[.][5] With this perspective, ICGN believes that a company's ESG strategies and objectives should not be viewed separately from a company's business strategy. We agree with the language in Principle 1.1.1 that ESG plans and activities should be included in the overall business strategy, creating a fully developed business approach that fosters long-term value creation. We also support the proposed language in Section 1.1.1, which includes language for "vi, the balanced contribution to the communities in which the company operates through the payment of taxes; and vii. the ESG-related impact of the company and its affiliated enterprise, throughout the entire production and value chain".

[3] Ibid, pp. 4-39.
[4] ICGN Global Governance Principles 2021, pp. 4-5.
[5] ICGN Global Governance Principles 2021, p. 9.

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By way of reference, according to the Value Reporting Foundation, in 2021, more than half of the S&P Global 1200 disclosed ESG reporting in line with SASB standards.[6] In addition, the 2020 KPMG Survey of Sustainability Reporting found almost all (96%) of the world's largest 250 companies (the G250) report on their sustainability performance. For the N100 –5,200 companies comprising the largest 100 firms in 52 countries – 80% do so. Across all companies surveyed, the GRI Standards is the only sustainability reporting framework that can demonstrate widespread global adoption. Around three-quarters (73%) of the G250 and two-thirds (67%) of the N100 now use GRI."[7]

ii. The ESG strategy, actions, and results, including the impact on the production and value chain, should be accounted for in the management report (best practice provision 1.1.4).

The new provision would require that the management board describe the ESG strategy and objectives, the impact operational management has had on the production and value chain (quantified and monetised, where possible), how it takes account of the interests of stakeholders, what action has been taken in that context, and the extent to which the objectives have been achieved.[8]

ICGN supports the proposed language. The ICGN GGP 7.4 on Corporate Reporting states that "Sustainability reporting should support and enhance the information in the financial statements and help investors to form an assessment of the company's position, performance and long-term prospects."[9] Investors and other stakeholders would benefit from being able to review management reports that address the full company ESG strategy and implementation timeline.

A company's ESG footprint goes beyond its headquarters, campus environment, manufacturing facilities and satellite offices. The impact from supply chains that feed production and the related service industries that support a company's bottom line are part and parcel of the ESG equation. As we have seen from the pandemic, disruption of one element within the supply chain can have a ripple effect that stops or slows production, leading to risks for the company, investors and communities. In Europe, the concept of "double materiality" has also been advocated, which would require companies to consider and report upon the impact of their activities on the environment and society, in addition to any impact on the company's financial performance and returns to investors.[10] ICGN recommends that a sustainability report be included as part of the annual reporting cycle.

Across indices, the number of companies utilizing global standards to report ESG progress will continue to grow. As such ICGN welcomed the establishment of the International Sustainability Standards Board (ISSB) in October 2021 which aims to promote a "comprehensive global baseline of sustainability-related disclosure standards that provide investors and other capital market participants with information about companies' sustainability-related risks and opportunities to help them make informed decisions."[11] It will help to harmonise sustainability reporting standards across borders, and coordinate with standards on financial statements under the International Accounting Standard Board. This is critical for investors to

[6] The Value Reporting Foundation, *More Than Half of S&P Global 1200 Now Disclose Using SASB Standards,* September 22, 2021.
[7] GRI - 2020-12-01 Sustainability reporting is growing, with GRI the global common language (globalreporting.org)
[8] Consultation-Document-Dutch-Corporate-Governance-Code-proposal-for-update-2022 (3).pdf, p. 14.
[9] ICGN Global Governance Principles 2021, p. 27.
[10] The Materiality Debate and ESG Disclosure: Investors May Have the Last Word | Cleary Gottlieb. See also Double Materiality Guidelines (efrag.org)
[11] IFRS - International Sustainability Standards Board, December 1, 2020.

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enable better investment decision-making through consistent, comparable, and verifiable disclosure across sectors, markets, and industries.

iii. Shareholders, including institutional investors (pension funds, insurance companies, investment institutions and asset managers), recognise the importance of a strategy focused on long-term value creation (new best practice provision 1.1.5).

Shareholders recognise the need for companies to report on ESG strategies. In turn, companies should acknowledge (and many do) that shareholders are depending on companies to provide accurate reporting on how they are approaching long-term value creation. There is an effort to help companies simplify reporting.

Many companies and investors have been concerned with what some have called the "alphabet soup" of ESG reporting frameworks and standards, making it difficult to compare data and reporting structures. Efforts to create international standards have been part of the ICGN's advocacy for several years. Companies that adopt a comprehensive approach to ESG will be able to address more than shareholder concerns; stakeholders, communities and employees will have an interest in the strategy for a sustainable future. ICGN, as a global organization, including many Dutch members, supports this provision and continues to promote such awareness globally.

As noted above, we welcomed the announcement from the IFRS Foundation on the creation of ISSB which consolidated the Climate Disclosure Standards Board and the Value Reporting Foundation (which houses the Sustainability Accounting Standards Board and the International Integrated Reporting Framework) which is an important signal of international alignment. The recent press release by the IFRS Foundation and Global Reporting Initiative (GRI) on a collaboration agreement under which their respective standard setting boards, the International Sustainability Standards Board (ISSB) and the Global Sustainability Standards Board (GSSB), will seek to coordinate their work programmes and standard-setting activities, is also welcome news.[12]

iv. The interests of relevant stakeholders should be taken into account by the management board when determining the ESG strategy and, to that end, a policy for stakeholder dialogue should be drawn up, with the management board facilitating such dialogue (new best practice provision 1.1.6).

ICGN has advised companies, through their boards of directors and management to engage with investors *and* stakeholders, when considering an ESG strategy and as part of a regular engagement approach. The GGP Principle 1: Board role and responsibilities states:

> *1.4 Dialogue*. The board, particularly the chair, lead (or senior) independent director and committee chairs, should constructively engage with shareholders and relevant stakeholders (particularly the workforce) for meaningful dialogue. This infers two-way communication between companies and shareholders/ stakeholders and not a unilateral presentation from just one party. Such dialogue should encompass all matters of

[12] GRI - IFRS Foundation and GRI to align capital market and multi-stakeholder standards (globalreporting.org), March 24, 2022.

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material relevance to a company's governance, strategy, innovation, risk management and performance as well as environmental and social policies and practices.[13]

ICGN recommends the addition of language that includes "boards of directors" along with management (such as the two-tier Dutch model) when drawing up ESG strategies after consultation from investors and stakeholders.

v. The management report should account for the culture, values and behaviour encouraged within the company and explain how a contribution is made to long-term value creation (amendment of best practice 2.5.4, in connection with which best practice provision 2.5.1 will also be clarified).

ICGN recognizes that each company's sustainability report should be unique to the company's purpose, vision, values, and culture. That said, there are standard provisions that should be included in these reports. Corporate culture, including the treatment of workers, is an issue that has been extensively elevated since the onset of the Covid-19 pandemic, and has become a flashpoint when company statements do not mirror its actions.

The GGP, in Principle 4, Corporate Culture, states that "The board should instil and demonstrate a culture of high standards of business ethics and integrity aligned with the company's purpose and values at board level and throughout the workforce."[14] Recent studies of corporate culture demonstrate that high standards of ethics and integrity are market drivers for corporate success. According to research from the Yale School of Management,

> While some corporations generate expansive wealth for their investors, offer innovative solutions to problems, and are persistently more productive, otherwise similar corporations are much less successful. Executives believe these differences are linked to culture. In a large-scale survey of corporate executives, culture ranked as the number one long-term value driver (Graham et al., 2021).[15]

ICGN supports the addition of language to require a management report, aligned with the company's purpose and values embraced by the boards and management, to account for culture, values, and behavior.[16]

3. The role of shareholders

i. the introduction of a provision to encourage dialogue between shareholders and companies (best practice provision 4.2.2);

The new provision includes language that "Shareholders and the company are prepared to enter into a dialogue, where appropriate and at their own discretion. The company is expected to facilitate such dialogue unless, in the opinion of the management board, this is not in the interest of the company and its affiliated enterprise. In the event a shareholder enters into

[13] ICGN Global Governance Principles 2021.pdf, p. 10. See also the ICGN Global Stewardship Principles for the investor's engagement responsibilities. ICGN Global Stewardship Principles 2020_1.pdf, p. 17.
[14] ICGN Global Governance Principles 2021.pdf, p. 18.
[15] Corporate Culture (harvard.edu), December 9, 2021.
[16] See the Global Governance Principles and Global Stewardship Principles noted in footnote 15.

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dialogue with the company outside the context of a general meeting, the shareholder shall disclose its full equity holding (long and short) at the request of the company."

ICGN has concerns that the proposed language mixes the responsibilities between the company and its shareholders when dialogue occurs. From many discussions with ICGN management and investor representatives, the need for dialogue between the parties becomes vitally clear. ICGN has included guidance in both the GGP and the GSP to enable both parties to employ communication avenues like dialogue in an effort to work out differences prior to escalation. We believe that dialogue should be encouraged not restrained.

In a recent ICGN Viewpoint on *Shareholder Proposals – An Essential Instrument for Ensuring Corporate Accountability*, we noted that effective dialogue and engagement between companies and investors can lead to better long-term outcomes. The filing of shareholder proposals is but one escalation technique that may result in outcomes that companies could have avoided with a willingness to engage in discussions with shareholders.[17] The Viewpoint concluded:

> From discussions with institutional investors and special interest groups, it became clear that the filing of a proposal typically comes into scope when the dialogue with company management on a given issue stalls or is unproductive. The filing of shareholder proposals for several organizations is an important element of their ongoing engagement to address perceived shortcomings in a company's ESG policies and practices. As a general rule, investors and interest organisations indicated that they only consider the option of (co-)filing a proposal after a longer period of dialogue ends unsuccessfully, as recommended in the ICGN Global Stewardship Principles.[18]

ii. the encouragement of informed voting by shareholders and, if the services of a voting adviser are used, the encouragement of dialogue between voting advisers and companies (best practice provision 4.3.1);

ICGN recognizes that many investors, particularly institutional investors, make use of proxy voting advisers to assist with voting the thousands of companies in their portfolios. In the ICGN Global Stewardship Principles, we have called for investors to make informed votes on behalf of their beneficiaries and as part of their fiduciary duty.

In GSP, Principle 5, Exercising and protecting voting rights, it states:

> 5.6 Voting Services. Investors should disclose the extent to which they use proxy research and voting services, including the identity of the provider and the degree to which any recommendations are followed. Use of a proxy voting advisor is not a substitute for the investor's own responsibility to ensure that votes are cast in an informed and responsible manner. Investors should clearly specify how they wish votes to be cast and should ensure that such votes are cast in a manner consistent with their own voting policies.[19]

Proxy advisory firms have instituted meetings with companies and investors, when considering updates to their annual voting guidelines. This type of dialogue is encouraging. In addition, ICGN recommends the Best Practice Principles for Providers of Shareholder Voting Research &

[17] Shareholder Proposals – An Essential Instrument for Ensuring Corporate Accountability, December 2021.
[18] Shareholder Proposals – An Essential Instrument for Ensuring Corporate Accountability, p. 4. See also ICGN Global Stewardship Principles 2020, Principle 4, Engaging Companies and Investor Collaboration, p. 19.
[19] ICGN Global Stewardship Principles 2020, p. 22.

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Analysis 2019, which “have been developed to be applied by providers of shareholder voting research and analysis globally, even though the Principles were originally conceived as a soft-regulatory mechanism in the European Union (“EU”).[20] The Principles describe a code of conduct for providers of shareholder voting research and analysis. Proxy advisory firms have been sharing research reports with companies to ensure accuracy when information should be updated and correct any reporting of material issues. In several markets, proxy advisors have created “gateways” for an exchange of information between companies and these advisors, that enhance the actual dialogue and discussion.[21] This is another good communication tool. ICGN is mindful that the proxy advisor’s research on proxy voting specifics for companies is paid for by the investors who seek these services, as an independent source of proxy material. The corporate perspective is captured in the company’s proxy voting materials which accompany the ballot.

iii. the introduction of rules pertaining to the engagement policy for institutional investors (best practice provisions 4.3.5 and 4.3.6);

ICGN has provided guidance to investors who act as fiduciaries for their beneficiaries. In the GSP, ICGN has recommended that investors publish their proxy voting guidelines, voting patterns and engagement results:

> Principle 5: Investors with voting rights should seek to vote shares held and make informed and independent voting decisions, applying due care, diligence, and judgement across their entire portfolio in the interests of beneficiaries or clients.[22]

It also states that “Investors should publicly disclose clear voting policies which should be reviewed periodically. The voting policy should outline the principles guiding voting decisions, highlight scope for derogation in specific cases and make clear any differences in approach between domestic and international holdings.” It calls for investors to regularly post their voting results.[23]

The requirement that investors post their voting policies and voting results on an annual basis is considered in the ICGN Guidance on Investor Fiduciary Duties.[24] The Guidance calls for the “Development and use of bespoke proxy voting guidelines and corporate governance principles to adequately manage shareholder rights. The investor fiduciary should take care to ensure votes are cast in the interests of beneficiaries or clients and that the shareholder voice is appropriately exercised[.][25]

The Proposal recommends quarterly reporting for investors to share how they have voted as shareholders at general meetings. The report would be posted on the website of the institutional investor and list each company and each voting item. ICGN would recognize that some of the larger institutional investors may already post results on a quarterly basis, however, smaller sized investors may have difficulty posting voting results every quarter. A practice of semi-annual reporting may be more practical and less onerous.

[20] 2019-Best-Practice-Principles-for-Shareholder-Voting-Research-Analysis.pdf (bppgrp.info)
[21] FAQs regarding ISS Proxy Research | ISS (issgovernance.com)
[22] ICGN Global Stewardship Principles 2020, p. 21.
[23] ICGN Global Stewardship Principles 2020, p. 21.
[24] ICGN Guidance on Investor Fiduciary Duties
[25] ICGN Guidance on Investor Fiduciary Duties, p. 18.

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iv. the introduction of rules regarding abstention from voting by shareholders with greater short than long positions and on the recall of lent shares (best practice provisions 4.3.7 and 4.3.8).

At issue here is the practice of investors shorting company shares, in which certain investors take up these short positions that may or may not be to the advantage of long-term investors. While the shorting investors may believe the stock will go down, their intention is to "sell" once the price rises. The problem is that they do not actually own the stock outright, which differentiates them from longer-term investors. A shareholder with a larger amount of short positions may be seeking to accelerate changes at the company, which could be advantageous for other investors, or only seek to exert influence of their own purposes. ICGN does not believe that deliberate actions to suppress voting or diminish share voting by these means are acceptable. However, we recognise the potential for voting abuses and strongly discourage potential attempts of shorting investors to put at risk the long-term success of the company to achieve their own short term financial objectives.[26]

ICGN encourages investors to recall shares, particularly in the case of contested votes, to facilitate the voting of those shares on key matters listed on the company's proxy.

With respect to the recall of lent shares, ICGN has two references for its members. In the GSP, Principle 5, Exercising and protecting voting rights, it states:

> 5.7 Stock lending. Investors should disclose their approach to stock lending and voting in a clear policy which should clarify the types of circumstances where shares would be recalled for voting and how stock lending of individual shares may have affected voting activity. In order to preserve the integrity of the shareholders' meeting, shares should not be borrowed or lent for the primary purpose of voting them.[27]

In the ICGN Guidance on Securities Lending, the Guidance advises:

> 4.2 Improper borrowing and lending practices. The borrowing of shares for the primary purpose of exerting influence or gaining control of a company without sharing the risks of ownership is a violation of good practice. Similarly, the borrowing of shares in order to deliberately reduce or suppress the vote at a shareholders' meeting is not an acceptable practice.
>
> The borrowing of shares for the purpose of exercising the right of the shareholder's vote is to be actively discouraged by all lenders. It should not be sanctioned or allowed.[28]

4. Diversity and inclusion

i. The management board, the supervisory board and the executive committee should be composed so that there is a good balance between expertise, experience, competencies, personal qualities, age, gender identity, nationality, background, including cultural background, and – as regards the supervisory board – independence (principle 2.1).

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[26] See also 2019-Best-Practice-Principles-for-Shareholder-Voting-Research-Analysis.pdf (bppgrp.info); Eumedion Stewardship Code, 2018-07-dutch-stewardship-code-final-version.pdf (eumedion.nl)
[27] ICGN Global Stewardship Principles 2020, p. 22.
[28] ICGN Guidance On Securities Lending (2016), p. 16.

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In 2016, ICGN updated the ICGN Guidance on Diversity on Boards which built on the earlier Guidance on Gender Diversity on Boards, published in 2013. We acknowledged at that time:

> The business case for diversity on boards increasingly has been recognised as essential for improving a company's organisational effectiveness, including the time taken to reach critical decisions; the generation of new ideas; the ability of companies to attract new talent; and access to expertise and global experience. Greater diversity in senior executive and board levels is correlated with measures of organisational excellence and stronger financial results, such as operating profitability and returns on equity, than that exhibited by less diverse peers.[29]

Companies themselves don't create value – it is people that create value - by innovating, taking risks, and leading the company in alignment with its purpose and long-term strategy.

At a corporate board level, this relies on having a mix of genuinely diverse directors with relevant knowledge, independence, competence, and experience to help ensure effective, equitable and inclusive decision-making. And by 'genuinely diverse' we mean individuals from different genders, age, ethnicity, economic origin, profession, cognitive diversity and so on.

This sentiment is reflected in ICGN's Global Governance Principles which many Members default to for their voting policies and company engagements. We recommend that companies demonstrate their commitment to board diversity in clear policies expressing goals, action plans and measurable, time-bound objectives and annually report on progress to investors.[30]

The inclusion of diversity and inclusion amongst the management board, supervisory board and executive committee is essential for a company to reflect its investors, customers, and employee base. The word, *equity*,[31] however, is not included in this draft and is one recommendation for its inclusion that ICGN would strongly make.

ICGN recommends that DEI efforts are cascaded throughout a company's organisational model, thereby instilling it beyond management and board positions.

ii. Information about gender *identity* (rather than simply gender) should be included in the report of the supervisory board if a supervisory board member so requests (best practice provision 2.1.2).

ICGN recognises that how an individual decides to identify themselves is their own decision and should be voluntarily offered.

iii. Companies should have a firmwide diversity and inclusion policy that covers all aspects and personal characteristics in which people may differ, including gender identity, age, ethnicity, occupational disabilities, and sexual orientation (best practice provision 2.1.5).

ICGN agrees, however, would again note that a firmwide policy of diversity, *equity,* and inclusion should be adopted by companies to cover all aspects and personal characteristics.

[29] ICGN Guidance on Diversity on Boards, p. 5.
[30] ICGN Global Governance Principles, p. 15.
[31] Equity is often used interchangeably with equality, but there's a core difference: Where equality is a system in which each individual is offered the same opportunities regardless of circumstance, equity distributes resources based on needs. We live in a disproportionate society, and equity tries to correct its imbalance by creating more opportunities for people who have historically had less access. What Is Diversity, Equity & Inclusion (DEI)? (inclusionhub.com), November 2020.

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Diversity, equity, and inclusion (DEI) must be woven into efforts by companies to address issues such as board diversity and within the company, wage disparity, promotional opportunities, advancement, culture, recruitment, and retention.

iv. Information pertaining to the inflow, progression and retention of diverse talent within the organization should be included when reporting on the diversity and inclusion policy (best practice provision 2.1.6).

Investors would like to know how companies are working toward a more diverse pool of talent for supervisory boards, directorate boards and within the company to advance the diversity, *equity,* and inclusion policy. In the Guidance on Board Diversity, it states:

> 2.7 Enterprise Diversity. Boards should hold management accountable for establishing internal diversity programmes to foster an inclusive culture. Internal diversity programmes can focus on inclusive culture and help to develop high-potential talent for future board director positions to increase the number of diverse candidates in the director candidate pool. Programme examples include:
>
> - Appropriately tailored recruitment policies;
> - On-going skills development and mentoring;
> - Leadership training;
> - Human capital strategy development; and
> - Flexible working and telecommuting opportunities.
>
> Diversity policies, programmes, and objectives are more effective with clear endorsement and support from the Board and senior management.[32]

ICGN recommends that the Proposal include language that management should prepare an annual report to the board and for shareholders on the level of diversity in the workforce, how the company is fostering inclusion and equity, and how any gender/wage gaps that are uncovered, are being addressed. This would provide the company and its shareholders with an annual report to monitor progress on DEI initiatives.

4. Remuneration

According to the release, the implementation of SRD II led to new provisions of the Dutch Civil Code regarding the remuneration policy and the remuneration report of public and private limited companies established in the Netherlands and listed on a regulated market in the EU.[33]

The Committee has posed the question whether best practice provisions 3.1.2 and 3.4.1 should be amended. The law contains more detailed provisions for certain aspects than the Code, although the Code has a broader scope of application. As far as the objectives for the strategy to achieve long-term value creation (best practice provision 3.1.2.i) are concerned, attention will be paid, in particular, to integrating ESG objectives into the remuneration policy and the relevant criteria to achieve those objectives.

[32] ICGN Guidance on Diversity on Boards, p. 13.
[33] Article 135a of Book 2 of the Dutch Civil Code or Article 135b of Book 2 of the Dutch Civil Code.

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ICGN understands that the clarification here is to note that the provisions on remuneration are made in addition to the statutory requirements in the Shareholder Rights Directive II and the rules on remuneration policies and reports that have been implemented in the Dutch Civil Code (for N.V.s and B.V.s that have a listing on a regulated market in the EU). The Committee does not propose making major changes to the content of these provisions, but rather intends to clarify in the explanatory notes how they relate to the amended legislation. The basic principle is that the Code supplements the law.

ICGN is continually advising companies and investors to seek the alignment of compensation with appropriate measures to compensate senior management and employees in their pursuit of positive financial results. In a recent study, it was observed that:

> Compensation is an important tool that managers can use to reinforce or work against the risk culture. Graham et al. (2021) shows that 85% of executives believe that having a poorly implemented or ineffective culture at a company increases the chances that an employee would do something unethical (or even illegal).[34]

In the GGP, ICGN has provided guidance for boards of directors, who are responsible for ensuring that executive remuneration is reasonable and equitable in both structure and quantum, and is determined within the context of company's values. It states:

> Principle 5. Remuneration should be designed to equitably and effectively align the interests of the CEO, executive officers and workforce with a company's strategy and purpose to help ensure long-term sustainable value preservation and creation. Aggregate remuneration should be appropriately balanced with the payment of dividends to shareholders and retention of capital for future investment and the level of quantum should be defendable relative to social considerations relating to income inequality.[35]

One recommendation is to enhance the role of supervisory boards in the effective implementation of and use of remuneration policies approved by shareholders. The policies may "incorporate sustainability-related performance factors that the executive team can be held accountable for over a long-term horizon. ."[36]

ICGN would also mention that under Dutch law, a remuneration policy of a financial firm should have a "remuneration retention requirement for certain components of fixed pay, the requirement to consider the social function of the financial firm in the remuneration policy and the tightening of an exemption to the Dutch bonus cap," which is set forth in the Dutch code.[37] The Dutch legislation would prevent "perverse incentives that may lead to jeopardising a firm's stability or neglecting customer interests."[38] In addition, ICGN would support language setting forth the ability for companies to withhold payments or clawback remuneration:

> Companies should include provisions in their incentive plans that enable the company to withhold the payment of any sum ('malus'), or recover sums paid ('clawback'), in the

[34] Corporate Culture, delivery.php (ssrn.com), October 28, 2021, p. 28.
[35] ICGN Global Governance Principles 2021, p. 20.
[36] ICGN Viewpoint Integrating ESG in Executive Compensation, p. 4.
[37] Simmons & Simmons | Stricter remuneration rules for the Dutch financial sector as of 2021 (simmons-simmons.com), July 2020.
[38] Ibid.

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event of serious misconduct or a material misstatement in the company's financial statements.[39]

5. Recommendations in Strengthening the Accountability Chain

i. It will be added in best practice provision 1.3.2 that an independent third party should assess the performance of the internal audit function at least once every five years.

ICGN recognizes the importance of having an independent third party provide the board of directors with an assessment of the internal audit function. While the recommendation is at least once every five years, ICGN recommends that the language include the need for more frequent external assessments if an internal audit uncovers material issues, there are questions on the qualifications, potential conflicts of interest, and independence of an external auditor or the audit review team. It is also important that boards consider whether a more frequent schedule should be adopted due to the size and complexity of the company's operations.

ii. It is stated in the explanatory notes to best practice provision 1.3.5 that the internal audit function should preferably report to the CEO.

ICGN believes that the internal audit function is one of the most important areas under which boards and companies can uncover risks and determine if there are corrective measures that must be taken. Given that the board of directors has oversight over the CEO's performance, the board should have a clear reporting link to the internal auditor, who should be able to speak to the Audit Committee and/or board with unfettered access about risks, challenges, and issues on which the internal auditor would need to report.

iii. It should be included in best practice provision 1.3.5 that the internal audit function should report the audit results to the management board and the audit committee (instead of reporting only the essence to the audit committee and the full results to the management board).

ICGN believes that all audit results and reports should be reported in full to the management board and the audit committee. Fully informed boards and audit committees are an important backstop to fraud, the exposure of conflicts of interest, proper protocols for financial and material matters and whether risks have been addressed by management, under direction of the board.

iv. It should be included in best practice provision 1.3.3 that the internal audit function's audit plan should be drawn up in consultation with the management board, the audit committee and the external auditor.

ICGN would agree that each of these parties should be involved with the audit plan, its development, implementation and final reports.

v. Greater emphasis should be given to behaviour and culture in the evaluations of the management board and supervisory board (adjustment of best practice provisions 2.2.6 and 2.2.7).

[39] ICGN Global Governance Principles 2021.pdf, p. 21.

ICGN agrees with the importance of the annual evaluations of the management and supervisory boards. As noted in the study cited by the Yale School of Management, in a large-scale survey of corporate executives, culture ranked as the number one long-term value driver.[40] Not only should greater emphasis be given to behavior and culture in evaluating the management board and supervisory board actions, ICGN would recommend that senior management also be included. Having a tone at the top that sets and models ethical behavior and cultural differences through a robust DEI programme, can distinguish companies and be a part of a long-term value creation for investors.

vi. It should be added that the internal audit function should report any signs of actual or suspected material misconduct to the chair of the audit committee (new best practice provision 2.6.4).

The chair of the audit committee is one individual that should be informed of actual or suspected misconduct, whether it reaches what may be considered a "material" concern at the time of discovery. ICGN would recommend that the reporting requirement be expanded.

6. Other recommendations

1. In control statement- The 'in control statement' was not included in this proposal. The proposal does not address material risks that can reside outside the scope of financial reporting as well. ICGN would recommend that language be included to the proposal so that any in-control statement does not just relate to financial reporting risks, meaning that the scope of the in-control statement should be extended from reporting financial risks to also operational and compliance risks.

2. **Independent directors**- ICGN noted that the Consultation refers to independent supervision by non-executive directors that must be "sufficiently ensured independent status of non-executive directors." Under Section 2.1.7, the supervisory board members should be able to "operate independently and critically vis-à-vis one another, the management board, and any particular interests involved."[41] Under Section 2.1.9, the chair of the supervisory board should be independent.

ICGN would like to see under Section 2.3.4, that all chairs of the committees be independent, especially the audit and remuneration committees, beyond the requirement that the audit or remuneration committees "should not be chaired by the chair of the supervisory board or by a former member of the management board of the company. More than half of the members of the committees should be independent within the meaning of best practice provision 2.1.8."[42]

3. Cooling-off period and response period- In May 2021, the cooling-off period for a maximum period of 250 days was implemented in the Dutch Civil Code, which differs from the response period of 180 days as reflected in the Code. The Proposal proposes not to align the response period with the statutory cooling-off period. ICGN believes that if there is to be a cooling off period at all we would prefer a shorter time-period than 250 days. We might suggest

[40] Corporate Culture (harvard.edu) , Graham et al., 2021), December 9, 2021.
[41] Consultation-Document-Dutch-Corporate-Governance-Code-proposal-for-update-2022 (4).pdf, p. 39.
[42] Consultation-Document-Dutch-Corporate-Governance-Code-proposal-for-update-2022 (4).pdf, p. 42.

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that the final provision include a specific reference that both periods can be invoked depending on the situation or the duration of the response time that has lapsed will be deducted from the duration of the statutory reflection period.

It appears that the Monitoring Committee fails to substantiate why a double form of protection remains necessary for Dutch listed companies - in addition to the existing forms of protection under the articles of association that many Dutch listed companies also enjoy.

4. **Corporate risk oversight -** While there are provisions that address internal audit requirements that touch upon risk factors, the Proposal would benefit with the inclusion of risk oversight areas for companies, including cyber security, geopolitical risks, and any weaknesses in supply chains. While Principle 1.2 deals with risk management, it only applies to the internal risk management, not the external risks that could cause disruption for the company and its shareholders.[43]

As a frame of reference, ICGN recommends that boards should provide information to investors on specific risks faced by the company. ICGN Viewpoint on Corporate Risk Oversight, 3.3 Guidance on Disclosure states:

> Boards should provide investors with a statement that includes information on risk oversight procedures and board perspectives on risk in the approved strategy. This should be in a text identified as distinct from any reports or disclosures issued by management concerning specific risks faced by the company. The disclosure statement should be consistent with the size and complexity of the company.[44]

Thank you for the opportunity to provide our perspective on the Proposals. If you would like to follow up with questions or comments, please contact me or ICGN's Policy Director George Dallas at George.dallas@icgn.org

Yours faithfully,

Kerrie Waring

Chief Executive Officer, ICGN

CC: George Dallas, ICGN Policy Director: george.dallas@icgn.org

[43] Consultation-Document-Dutch-Corporate-Governance-Code-proposal-for-update-2022 (4).pdf, p. 33.
[44] ICGN Corp Risk Oversight, p. 16.

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