BERMUDA MONETARY AUTHORITY

CONSULTATION PAPER

CORPORATE GOVERNANCE POLICY

TRUST (REGULATION OF TRUST BUSINESS) ACT 2001
INVESTMENT BUSINESS ACT 2003
INVESTMENT FUNDS ACT 2006

DECEMBER 2012

Table of Contents

I. INTRODUCTION

1. In its 2012 Business Plan, the Bermuda Monetary Authority (the "Authority") undertook to consult on the introduction of a Corporate Governance Policy (the "Policy") for entities licensed under the Trust (Regulation of Trust Business) Act 2001, the Investment Business Act 2003, and the Investment Funds Act 2006[1] (collectively, the "Regulatory Acts"). Publication of this consultation paper, which sets out nine principles and related guidance which reinforce key elements of corporate governance, fulfills this commitment.

2. The Organisation for Economic Cooperation and Development ("OECD") describes corporate governance as "a set of relationships between a company's management, its board, its shareholders, and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring. The presence of an effective corporate governance system, within an individual company or group and across an economy as a whole, helps to provide a degree of confidence that is necessary for the proper functioning of a market economy."[2]

3. All institutions licensed under the Regulatory Acts are required, as a minimum criterion of licensing, to conduct business in a prudent manner and the Authority views the adoption of a sound corporate governance framework as an essential element of a prudently run business. The Authority will propose that a dedicated corporate governance licensing criterion be added to the respective schedules of the Regulatory Acts prior to formal publication of the Policy in final form. That is, the Policy would be linked to the relevant Statement of Principles which in turn interprets the licensing criteria of the relevant Regulatory Act.

4. It should be noted that this Policy does not replace or reduce any existing statutory requirements.

5. Licensed institutions and other interested parties are invited to submit their views on the proposals set out in this paper. Comments should be sent to the Authority and addressed to policy@bma.bm no later than 28th February 2013.

---

[1] The Policy applies to fund administrators licensed under the Investment Funds Act 2006, but does not apply to investment funds.

[2] OECD Principles of Corporate Governance, revised April 2004, originally issued June 1999, available at www.oecd.org/dataoecd/32/18/31557724.pdf.

Scope

6. The Policy is applicable to all entities licensed under the Trust (Regulation of Trust Business) Act 2001 ("TBA"), entities licensed under the Investment Business Act 2003 ("IBA"), or entities licensed as a Fund Administrator under the Investment Funds Act 2006 ("IFA").

7. The Policy consists of principles and underlying guidance. The principles are the core of the Policy and the Authority expects institutions to comply with the principles.

8. There is, however, a degree of discretion afforded to institutions in how they comply with the Policy. In assessing compliance, the Authority will adopt a proportional approach that reflects the size, complexity, structure, and risk profile of an institution's business and recognises that approaches to corporate governance among different institutions may vary.

9. Notwithstanding the application of the general principle of proportionality, to assist institutions the Authority has tailored its implementation guidance, where applicable, to reflect the importance of individual principles to institutions of varying levels of size and complexity. Smaller, less complex institutions, however, are not precluded from applying guidance for more complex institutions where appropriate.

10. Larger more complex institutions should also give consideration to application of the principles and guidance under the Banks and Deposit Companies Act 1999: Corporate Governance Policy[3] where appropriate.

Unincorporated Licenceholders

11. The Policy has been drafted from the perspective of a company, the most common structure employed by licenceholders. However, the licensing of partnerships or individuals is permitted under certain regulatory regimes. In general, the principles should be applied to all licenceholders, with references to the board of directors substituted with references to the partners or owners as applicable. Principles which seek to address the alignment of ownership, oversight, and management may not be applicable to such licenceholders and generally guidance relating to small, less complex institutions will be relevant. If a licenceholder is uncertain as to the application of this Policy to their business they are encouraged to contact the Authority for clarification.

[3] Banks and Deposit Companies Act 1999: Corporate Governance Policy, issued November 2012, available at www.bma.bm.

Group Governance

12. In general, the board of a Bermuda licensed subsidiary should adhere to the corporate values and governance principles espoused by its parent company and the subsidiary may place reliance on group oversight and control functions. However, in doing so the parent board should take into account the nature of the business of the subsidiary and the specific legal requirements that are applicable, and make appropriate adjustments to its corporate governance practices.

13. Where the parent company is not a Bermuda licensed entity, the board of a Bermuda licensed subsidiary should evaluate any group level decisions or practices to ensure that they do not put the regulated subsidiary in breach of Bermuda laws and regulations or in a position that contravenes the Policy. In such cases, the composition of the subsidiary board should be such as to allow independent evaluation.

II. PRINCIPLES AND GUIDANCE

Overarching Principle

Principle 1: Every institution should have an effective corporate governance framework in place that is appropriate to its size, complexity, structure and risk profile. This framework should establish a structure through which the objectives of the institution can be set, monitored and achieved and which provides incentives to align the interests of owners, directors and management.

Board Practices

Principle 2: Institutions should be governed by an effective board of directors.

Role of the Board

14. The board has ultimate responsibility for the institution's business, risk strategy, and financial soundness, as well as for how the institution organises and governs itself. The board is responsible for setting strategy and adopting a formal business plan designed to achieve the institution's objectives. The board is responsible for approving all key policies including those relating to risk management, internal controls, and compliance.

15. The board remains responsible for the oversight of all material functions of the business, even where such functions may be outsourced.

Role of the Chairperson

16. The chairperson of the board plays a crucial role in the proper functioning of the board. He or she provides leadership to the board and is responsible for the board's effective overall functioning. The chairperson should possess the requisite experience, competencies and personal qualities in order to fulfill these responsibilities.

17. In a smaller, less complex, owner-managed institution, a single person may fulfill the roles of both chairperson and chief executive. However, the person holding both roles should remember that the responsibilities of chairperson and chief executive are distinct, and should be viewed separately.[4]

18. In the case of a larger, more complex institution, ideally the role of chairperson will be filled by an independent non-executive director. In cases where the role of chairperson and chief executive are vested in the same person, the Authority expects that appropriate additional checks will be built into the board structure (e.g. by having a lead board member, senior independent board member or a similar position).

Board Committees

19. The board may delegate authority to board committees subject to full board oversight and ratification of key decisions that materially impact the institution's operations.

Board Meetings

20. The board should meet sufficiently regularly to discharge its duties effectively.

21. Each meeting should have a structured agenda and should be minuted.

22. Board meetings should be distinguished from management meetings, even in owner-managed institutions.

Principle 3: The size and composition of the board should reflect the scale and complexity of the institution's activities.

23. Ideally the board should be comprised of members with a range of experience and expertise appropriate to the institution's activities. The composition of the board should allow it to collectively

[4] Guidance on the role of senior management is given under Principle 5.

discharge its duties and responsibilities effectively and to reduce the risk of dominance by any one individual or group of individuals.

24. This risk of dominance can be mitigated through the appointment of non-executive directors with an independent perspective and willingness to challenge decisions. Non-executive directors may also introduce particular skills and experience not otherwise available amongst the executive directors.

25. The boards of smaller, less complex, owner-managed institutions may be composed of a small number of executive directors; however the appointment of appropriately qualified independent directors is encouraged.

26. The degree of non-executive and independent board representation should be greater for larger, more complex institutions.

Principle 4: Directors should be, and remain, qualified, including through training, for their positions. They should have a clear understanding of their role in corporate governance and be able to exercise sound and objective judgment about the affairs of the institution.

Duty to the Institution

27. Directors in exercising their powers and discharging their duties should:

a. act honestly and in good faith with a view to the best interests of the institution; and

b. exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

Director Qualification

28. It is a statutory minimum criterion of licensing that a director should be a fit and proper person to fill that position. Directors should be of high integrity and have relevant experience, sufficient skills, knowledge, and soundness of judgment to properly undertake and fulfill their duties and responsibilities.[5]

Training and Development

29. All directors should regularly update and refresh their skills and knowledge. Non-executive directors should receive appropriate induction upon joining the board. All directors should be aware of their legal duties and regulatory responsibilities.

[5] Fitness and propriety is interpreted further in the applicable Statement of Principles, issued pursuant to the relevant Regulatory Act.

Commitment

30. Non-executive board appointees should have sufficient available time to effectively discharge their duties. Other significant commitments should be disclosed to the board before appointment and the board should be informed of subsequent changes.

Performance Evaluation

31. The board should carry out periodic assessments of both the board as a whole and of individual board members as well as its governance practices, and take any corrective actions or make any improvements deemed necessary or appropriate. In the case of larger, more complex institutions it is expected that a formal assessment process will be adopted to ascertain continuing suitability.

Conflicts of Interest

32. Directors have a duty to avoid, manage or minimise conflicts of interest and should, wherever possible, arrange their personal and business affairs so as to avoid direct and indirect conflicts of interest.

33. The board should have a formal written conflicts of interest policy appropriate to its size and organisation and the nature, scale and complexity of its business, and an objective compliance process for implementing the policy.

Senior Management

Principle 5: Under the direction of the board, senior management should ensure that the institution's activities are consistent with the business strategy, risk appetite and policies approved by the board.

Senior Management Responsibilities

34. Senior management[6] are responsible and should be held accountable by the board for overseeing the day-to-day management of the institution. Delegation of the management function does not absolve the board from its overall responsibility for the sound governance of the institution.

[6] Senior management should include, at a minimum, the chief executive and senior executives as defined under the Regulatory Acts.

Senior Management Qualification

35. Senior management should have the necessary experience, competencies and integrity to manage the businesses under their supervision. It should be noted that it is a statutory minimum criterion of licensing that a member of senior management, in their role as an officer or controller of the institution, should be a fit and proper person to fill that position.[7]

Management Structure

36. The management structure adopted should be appropriate to the size, complexity, structure and risk profile of an individual institution. In the case of smaller, less complex institutions, board and senior management may overlap but the responsibilities of the board and senior management are distinct and should be viewed separately.

37. In the case of a company, partnership or unincorporated association of persons, at least two individuals must effectively direct the business of the institution. In the case of a company, the individuals concerned should be either executive directors or persons granted executive powers by, and reporting immediately to, the board. In the case of a partnership, at least two partners should exercise day-to-day control and oversight. Each of the two persons must play a part in the decision-making process on all significant business decisions. In the case of a sole trader, where the scale and scope of business is limited, it may be acceptable for the business to be directed by one individual.[8]

Risk Management

Principle 6: The board is responsible for risk oversight and should establish and maintain a sound mechanism to identify and address the risks which are relevant to the institution.

Risk Appetite

38. The board should understand the risks to which the institution is exposed and establish a risk appetite, i.e. the level of aggregate risk that the institution's board is willing to assume and manage in the pursuit of the institution's objectives.

---

[7] Fitness and propriety is interpreted further in the applicable Statement of Principles, issued pursuant to the relevant Regulatory Act.

[8] Further interpretation of this element of the minimum licensing criterion is provided in the applicable Statement of principles, issued pursuant to the relevant Regulatory Act.

Policies and Procedures

39. The board is responsible for ensuring that appropriate policies and procedures are in place to identify, measure, monitor, control, mitigate, and report all material risks of the business.

Risk Management Function

40. An institution's approach to risk management should be commensurate with the size, complexity, structure and risk profile of the business. In the case of a small owner-managed institution, a dedicated risk management function may not be necessary, in which case the function would be directly addressed by the board and management. However, the risk appetite, risk policy and procedures should be documented and, at a minimum, a risk register should be maintained identifying the material risks.

41. Larger, more complex institutions would be expected to put in place a formal risk management function. This function should be adequately resourced by appropriately qualified personnel and sufficiently independent of the institution's business units.

42. While the risk management function may report to the chief executive or other senior management, it should also report or, at a minimum, have direct access to the board or the appropriate board committee.

Risk Review

43. The board should, at least annually, assess the effectiveness of the institution's risk management framework and make any necessary changes.

Contingency Planning and Testing

44. Institutions should have in place appropriate business continuity and contingency plans to safeguard against disruption of their operations and services and to mitigate risk. The board should review these plans at least annually.

Principle 7: The board should ensure that the institution has an effective system of internal controls.

Internal Control System

45. Internal controls are designed, among other things, to ensure that each key risk has an accompanying policy, process, or other measure, as well as a system of control to ensure that such policy,

process, or other measure is being applied and works as intended. Internal controls help provide comfort that financial and management information is reliable, timely and complete and that the institution is in compliance with its various obligations, including applicable laws and regulations. In order to avoid actions beyond the authority of the individual, or even fraud, internal controls also place reasonable checks on managerial and employee discretion.

46. The scale, structure, and nature of the business should be considered in the design of a control framework relevant to the institution.

Internal Control Review

47. The board should approve the internal control framework and review its appropriateness at least annually.

Principle 8: The board should ensure remuneration arrangements are consistent with effective risk management and the long-term interests of the business.

48. The board should ensure remuneration arrangements are consistent with effective risk management and avoid creating incentives that encourage inappropriate risk-taking inconsistent with the risk appetite established by the board.

Reporting

Principle 9: The board should ensure that an appropriate reporting framework is in place for both internal and external stakeholders.

Board Reporting

49. The board should ensure that it receives information, in a timely manner, in a form and of a quality appropriate to enable the discharge its duties, facilitate decision-making and allow for effective monitoring and management of company performance.

Statutory and Regulatory Reporting

50. The board should ensure that all applicable statutory disclosure and regulatory reporting requirements are met.

Disclosure to Stakeholders

51. Shareholders should be provided with sufficient information to enable them to assess the effectiveness of the board and senior management in governing the institution.

52. Institutions should have an appropriate mechanism for reporting to relevant stakeholders who are not directors or shareholders.