

Cayman Islands Monetary Authority

PRIVATE SECTOR CONSULTATION



CORPORATE GOVERNANCE

A. Introduction

1. Section 34(1)(a) of the Monetary Authority Law (2008 Revision) (as amended) ("MAL") states that –

After private sector consultation and consultation with the Financial Secretary, the Authority may –

- (a) *issue or amend rules or statements of principle or guidance concerning the conduct of licensees and their officers and employees, and any other persons to whom and to the extent that the regulatory laws may apply;*

2. Requirements specific to the private sector consultation are outlined in section 4(1) of the MAL as follows:

When this Law requires private sector consultation in relation to a proposed measure–

- (a) *the Authority shall give to each private sector association a draft of the proposed measure, together with –*
 - (i) *an explanation of the purpose of the proposed measure;*
 - (ii) *an explanation of the Authority's reasons for believing that the proposed measure is compatible with the Authority's functions and duties under section 6;*
 - (iii) *an explanation of the extent to which a corresponding measure has been adopted in a country or territory outside the Islands;*
 - (iv) *an estimate of any significant costs of the proposed measure, together with an analysis of the benefits that will arise if the proposed measure is adopted; and*
 - (v) *notice that representations about the proposed measure may be made to the Authority within a period specified in the notice (not being less than thirty days or such shorter period as may be permitted by subsection (3)); and*
- (b) *before proceeding with the proposed measure, the Authority shall have regard to any representations made by the private sector associations, and shall give a written response, which shall be copied to all the private sector associations.*

3. This paper outlines corporate governance proposals that are intended to enhance and clarify corporate governance standards and provide greater transparency in the financial services markets. As is the

norm, the paper proposes changes to current guidance, regulations or laws. However, as corporate governance considerations impact on all financial services sectors and regulatory functions such as licensing; fit and proper assessment/approval; regulatory and supervisory powers of the Authority; regulatory filings and many regulatory laws and regulations; this consultation not only makes some proposals but also provides industry with an opportunity to feedback on certain issues the Authority is currently reviewing.

4. CIMA has commissioned a corporate governance industry survey to run concurrently with this consultation. The feedback received from this consultation will be consolidated with the feedback received from the industry survey, providing CIMA with a comprehensive assessment of industry views on corporate governance.
5. The Authority wants feedback from all interested parties and requests that regulated entities submit their comments via their private sector associations. Due to the significance of this consultation, the Authority will allow other interested stakeholders in the Cayman Islands financial services sector to respond to this paper. However, the Authority requests that where a submission is made by a non-regulated entity/person that the response explicitly states what role/interest the stakeholder has in the industry; for example an investor in Cayman Islands structures, funds, or Cayman Islands captives, etc.

B. Background

6. Analysis by international organisations, including the Financial Stability Board ('FSB') and the Basel Committee on Banking Supervision ('BCBS'), into the causes of the 2007/2008 financial crisis revealed deficiencies in corporate governance practices of regulated financial services entities as a fundamental reason for the crisis.¹ This resulted in a renewed focus and review of corporate governance standards in the financial services industry. As a consequence, the FSB, BSBS and the International Association of Insurance Supervisors ('IAIS') amongst others, revised their corporate governance expectations of regulated entities (see appendix A). The new expectations advised regulators that enhanced corporate governance standards were needed to reinforced financial stability and protect the financial markets.
7. Regulators around the world are responding to these expectations by enhancing the corporate governance requirements in their respective jurisdictions. These enhanced requirements demand improved corporate governance standards from regulated entities, with greater probity, transparency and accountability expected from regulated entities and their boards.
8. The global enhancement of corporate governance standards, in conjunction with the Authority's legal objectives² and the Cayman

¹ The October 2009 report, *Risk Management Lessons from the Global Banking Crisis of 2008* by the Senior Supervisors Group presented to the Financial Stability Board held: 'The global financial crisis highlighted a number of corporate governance failures and weaknesses, including insufficient board oversight of senior management, inadequate risk management and unduly complex or opaque firm organisational structures and activities.'

² The Authority's objectives are to:

- act in the best economic interests of the Cayman Islands;
- promote and maintain a sound financial system in the Cayman Islands;

Islands' standing as an international financial centre, necessitates a review of the jurisdiction's corporate governance regulatory standards.

9. This consultation paper focuses on clarifying corporate governance expectations; rationalising and modernising the regulatory framework; and presenting corporate governance factors to be considered subsequent to this consultation.
10. The paper reviews corporate governance across all industry sectors. Unless the paper states otherwise, all proposals would apply across all sectors.

C. Purpose of the Corporate Governance Review

11. The transition of corporate governance into a fundamental consideration in the operation of a business occurred in the last 25-30 years. The 2007/2008 financial crisis ('the Financial Crisis') resulted in Corporate Governance becoming a focal point in the global regulatory reform agenda.
12. One consequence of the Financial Crisis is the extensive call, by international organisations responsible for promoting effective supervision of the financial services industry, for enhanced Corporate Governance standards. In the 2-3 years following the Financial Crisis:
 - a. The Basel Committee for Banking Supervision, in December 2011, consulted on the review and modernisation of its Core Principles for Banking Supervision. The updated Core Principles now incorporate a new corporate governance standard (see Appendix A).
 - b. The Technical Committee of the International Organization of Securities Commissions' ('IOSCO') recently published *Mitigating Systemic Risk – A Role for Securities Regulators*. This paper focuses on the role securities regulators play in addressing systemic risk and assesses corporate governance considerations such as appropriately managing conflict of interests and the increased prevalence of non-risk focused incentive structures.
 - c. The IAIS published, in October 2011, its updated Core Principles introducing new corporate governance expectations of regulators (see appendix A).
 - d. The Organisation for Economic Co-operation and Development reiterated some key messages in its latest report on Corporate Governance and the Financial Crisis issued in February 2010.
 - e. The FSB issued Corporate Governance papers in 2011 on compensation, improved supervisory powers and monitoring, and bolstering financial stability through corporate governance.

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- endeavour to promote and enhance market confidence, consumer protection and the reputation of the Cayman Islands as a financial centre; and
 - recognise the international character of financial services/markets and the need to be competitive for consumers and suppliers while complying with appropriate and relevant international standards.

13. These international developments recommend or require greater probity, transparency and accountability at a national level.
14. Section 6(2) of the Monetary Authority Law ('MAL') requires the Authority to:
 - (a) *act in the best economic interests of the Islands;*
 - (b) *promote and maintain a sound financial system in the Islands;...*
15. In section 6(3) the MAL stipulates further that "*In performing its regulatory functions and its co-operative functions, the Authority shall, in addition to complying with the requirements of subsection (2)*":
 - (a) *endeavour to promote and enhance market confidence, consumer protection and the reputation of the Islands as a financial centre;*
 - (b) *endeavour to reduce the possibility of financial services business or relevant financial business being used for the purpose of money laundering or other crime;*
 - (c) *recognise the international character of financial services and markets and the necessity of maintaining the competitive position of the Islands, from the point of view of both consumers and suppliers of financial services, while conforming to internationally applied standards insofar as they are relevant and appropriate to the circumstances of the Islands;*
 - (d) *recognise the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;*
 - (e) *recognise the desirability of facilitating innovation in financial services business; and ...*
16. Bearing in mind these legislative obligations resting on the Authority and the Cayman Islands' position as a leading international financial centre, the Authority considers regulating and supervising the Cayman Islands financial services industry to observed international standards - insofar as they are relevant and appropriate to the Cayman Islands - a key objective to meeting its obligations in section 6(2)(a) and (b) and section 6(3)(a). However, in seeking to meet these legislative obligations the Authority continuously strives to propose and implement standards that are proportionate to the anticipated benefits.
17. Thus, considering the developments emanating from international organisations and the resultant national developments occurring globally, the Authority considers the modernising of the corporate governance standards in the Cayman Islands financial services sector necessary and beneficial to the continued international standing of the jurisdiction. The Authority further considers the purpose of these proposals being compatible with its legislative obligations and strategic objectives.

D. Implementation in other jurisdictions

18. In the 24 months subsequent to the onset of the Financial Crisis, the BVI Financial Services Commission, the Central Bank of Ireland, the Jersey Financial Services Commission, the Bermuda Monetary Authority, the Guernsey Financial Services Commission, the Bahamas Financial Services Board and the Isle of Man Supervision Commission all updated their Corporate Governance codes, laws and/or regulations to accommodate the international developments.
19. These amendments occurred in various forms, including laws, regulations, Codes of Conduct and guidance. Many of these jurisdictions have the key directors' duties in their Companies Law or the equivalent thereof. Generally these jurisdictions supplement these laws with guidance for their industry.

E. The Proposals

E1 Statement of Guidance: Corporate Governance

17. The Statement of Guidance on Corporate Governance ('SOG') currently applies to licensees only. However, the heightened expectation of investors and providers of capital is demanding more prudent corporate governance standards from all financial services entities. Having reviewed the financial services sectors, the Authority recognised the importance of registered and administered entities applying appropriate corporate governance standards.
18. Therefore, the proposal is to extend the current SOG to registrants. Simultaneously, the Authority proposes to amend the current SOG. The objectives for the amendments are:
 - a. to make the SOG more generic and suitable for cross-sectoral application, i.e. to make the SOG relevant to the funds, insurance, banking and fiduciary sectors alike; and
 - b. to reinforce fundamental corporate governance standards expected from entities regulated and supervised by the Authority. This is to be achieved by explicitly outlining in the SOG key management oversight and corporate governance principles and the primary duties of the board directors.
19. The proposed amended SOG is attached in appendix B. Your comments are sought on the draft SOG. In particular, the Authority would like to know whether the addition of key corporate governance principles enunciated in sections 3-6 are useful in clarifying what the minimum expectations of the board and its directors are.
20. The Authority has refrained from proposing the implementation of a rule or code setting out compulsory standards for the industry. The Authority considers this to predominantly be a sophisticated financial services jurisdiction with suitably qualified participants and service providers. Our research indicates an appropriate awareness of corporate governance expectations and a suitable application of these standards in day-to-day operations.

21. Each sector law allows the Authority to take specified action where the Authority considers the direction and management of a licensee's business not to have been conducted in a fit and proper manner.³ The Authority will be recommending legislative amendments within each of these laws (in footnote 2) confirming that the Authority will assess and consider adherence with the SOG when deciding whether a licensee's business has been conducted in a fit and proper manner.

In addition to views on issues raised above the Authority asks for industry views on the following questions:

Question 1: To facilitate the cross-sectoral application of the SOG, the Authority has restricted the corporate governance guidance in the SOG to fundamental principles and requirements. Does the industry find this useful and appropriate or would the industry prefer more detailed guidance?

Question 2: Does industry approve of the cross-sectoral application of the SOG or would you prefer sector-specific guidance? If you would prefer sector-specific guidance explain the reasons for your preference.

E2 Public Database

22. The Authority has been considering the development of a public database, operated and controlled by the Authority, for access by interested stakeholders. With the international call for heightened disclosure and transparency we believe that a public database will not only complement current due diligence processes but also enhance the reputation of its financial services industry. The database would be accessible online.
23. To accommodate the cost of setting up the database, it is proposed to grant access to the database upon the payment of a fee. The Authority has not yet decided whether the fee would be an annual fee or a fee charged per search or whether both options would be provided. The database would incorporate all sectors and would contain information relating to licensees and registrants alike. It is currently envisaged that the database be searchable using the regulated entity's name. Once a search is conducted, the database will provide, as a minimum, the name/s of the entity's directors and its registered office. The Authority is considering what further information could be provided on the database and is interested in your views on how you could benefit from the database.
24. The Authority is cautious in defining the criteria and information to be provided in the database to ensure that the information provided is relevant, appropriate and useful for those using the database.

³ section 18(1)(e) of the Bank and Trust Companies Law (2009 revision)
section 18(1)(e) of the Companies Management Law (2003 revision)
section 24(1)(f) of the Insurance Law (2010 revision)
section 30(1)(d) of the Mutual Funds Law (2009 revision)
section 17(2)(e) of the Securities Investment Business Law (2011 revision)

25. The independent information provided by the database will facilitate the due diligence process involved during investment or capital injection decisions. The proposed database will make the due diligence process more efficient and cost effective for industry. It is anticipated this positive development would result in investors seeking to invest their assets and capital to look favourably upon Cayman Islands' incorporated entities.
26. The Authority also anticipates the disclosures in the database to contribute to market discipline objectives; thus adding a constructive supplement to the supervisory actions of the Authority.
27. We will recommend legislative amendments to the MAL to explicitly incorporate regulatory powers to provide the public database.

In addition to views on issues raised above the Authority asks for industry views on the following questions:

Question 3: Do you consider the information proposed to be available on the public database to be relevant and appropriate or would it be beneficial to include further information such as (where applicable) custodian, fund administrator, insurance manager, or auditor?

E3 Application of the Companies Management Law

28. Section 3(3) of the Companies Management Law ('CML') states that a natural person shall not be deemed to be in the business of company management '*merely by virtue of being a director of one of more companies.*'. The intention of this provision was to ensure that only individuals who were providing directorship services in the course of their business or as a professional director and for profit or reward would be classified as conducting company management business. The intention of this provision was not the blanket exemption of individuals acting as directors. The Authority will recommend amendments to the CML that clarify this position.
29. The Authority considers clarifying the scope of application of the CML beneficial to the industry and the supervision thereof. The intention at all times was for the CML to apply to all persons or entities who offer, provide or arrange others to act as directors, or to persons who themselves act as directors.
30. The CML and Mutual Funds Law both include the provision of directors in their respective definitions. These laws refer to the 'provision', 'offering', 'arranging' of 'directors' or 'operators'. Having this service regulated by two separate laws, and - by extension - two divisions in the Authority potentially obscures the understanding of the law and the supervision of this service. In addition, the various terms used to describe the service may contribute to uncertainty in the industry. Thus, in addition to clarifying the application of the CML, the Authority will also recommend legislative changes that simplify and clarify the provision of this service and the definition thereof.
31. In clarifying the supervisory structure, the Authority proposes to implement greater consistency in the regulation and supervision of

directorship services. Complementing the removal of section 3(3), the Authority will recommend legislative amendments confirming who the CML applies to (with regard to the provision of directorship services). The objective is to:

- a. continue applying the CML to entities or persons who provide, offer or arrange directorship services; and
- b. require persons or entities who:
 - i. act as a director; and
 - ii. do so for six or more entities; and
 - iii. do so for profit or reward;

to require permission to act or be offered or provided as a director. We will recommend a legislative amendment prohibiting persons falling within the definition of paragraph 31(b) above from being offered or provided or acting as directors without first being registered with the Authority. To ensure consistent application, this will apply to all persons meeting the definition in paragraph 31(b) irrespective of their geographical location.

32. The intention is to better define and regulate directorship services by allowing the Authority to assess and approve persons acting as directors as a profession. This approval process is to receive assurance that the persons being offered and acting in this capacity have a sound financial background and are sufficiently competent and experienced to act as directors. It is anticipated that this approval process will contribute to the sound and proficient provision of this service.

E4 Directors' registration

33. To support the realignment of the supervision of directorship services, the Authority wants to enhance the supervision of this service and the provision thereof. Although corporate governance expectations are dependent on the type of business an entity conducts and the nature, scale and complexity of the business, corporate governance standards are a key factor in all regulated activities.
34. The Authority proposes implementing a requirement for all directors of regulated entities, who are not being approved as directors of licensees or via the 'professional' director route (i.e. the Companies Management Law amendment) to register with the Authority. This registration will entail a proposed director providing personal and contact details; information regarding the role; the director's experience and knowledge of the sector s/he will be overseeing; and information regarding any previous or on-going regulatory, legal or judicial enforcement action against the director. This information would be submitted together with an entity's registration documents or, if the appointment occurs after registration, upon appointment.
35. The Authority will also recommend a legislative amendment requiring the directors to inform the Authority, within a certain timeframe, of any changes to the information submitted. This process is expected to improve the Authority's industry data and should improve efficiencies when supervising corporate governance standards. This information

should enable the Authority to more readily contact directors when seeking responses to queries it may have.

E5 Corporate Governance Survey

36. Concurrent with this consultation process, the Authority commissioned an industry survey on corporate governance standards, including canvassing views on implementing limits on the number of directorships held. The in-depth reviews the Authority has conducted on this issue show some advantages to implementing a limit; however the reviews also confirm shortcomings in imposing a limit. To complement the policy development process, the Authority commissioned the survey to collect comprehensive industry views on the topic.
37. Imposing a limit would be beneficial in pronouncing what the Authority considers an acceptable level of responsibility but it is challenging to design a limit that takes account the nature, size and complexity of the regulated entity. For example; a 'low' limit would not take account of the feasibility of a director being able to sit on the boards of connected entities where the majority of the decisions may apply to all the interconnected entities. Thus, such a director adhering to a limit may be disadvantaged because, having a large portion of his/her entities interlinked, would allow him to take on more directorships and yet remain able to apply adequately his/her mind to all entities. The corollary of this is that the same limit may be inappropriate for a fund director who also sits on the board of an international conglomerate as such a role may not allow the director to provide adequate attention to the fund directorships s/he may hold.
38. Another concern is that a limit would only take account of the directorships held in regulated entities. It would not be feasible to design a limit that takes into account a director's commitments outside the regulated arena. Thus, two individuals could each have the same number of directorships on regulated entities similar in nature, size and complexity, but one could, in addition to his directorship duties, be the managing director of a large corporation or professional services firm. A limit may be suitable for the person holding only the directorship positions but not suitable for the director holding the directorship positions in addition to being the MD of an organisation.
39. Whether a person is able to adequately apply his/her mind to all the directorships s/he holds is the fundamental question to be considered.
40. For the reasons outlined above, the Authority has decided that it would ask industry for its views on a limit through an industry survey.
41. This survey will also ask questions regarding the regulatory corporate governance framework, including whether it would be advantageous to recommend a legislative amendment requiring the number of directorships held by a director to be stipulated in an entity's founding documents (such as the offering memorandum of a regulated fund).

E6 Corporate directorships

42. Corporate directorship is not being consulted on in this paper; however the Authority intends to consult on this in the near future and would welcome any initial thoughts on allowing corporate directors to sit on the boards of certain regulated entities.
43. Internationally, the acceptance of corporate directors of regulated entities is fragmented with some jurisdictions allowing it, some prohibiting it, and some accepting it but with stringent conditions.
44. The Authority is particularly interested in receiving views on apportioning accountability as it relates to a corporate director; how to apply a limit on the number of directorships to a corporate director; and assessing the fitness and propriety of a corporate director. This will be consulted on but initial thoughts on this would contribute to our review of the topic.

F. Estimation of significant costs and benefits

a. Costs

18. There should not be any direct costs associated with the amended SOG as most of the standards are in the current version of the SOG and all new standards incorporated in the SOG are current common law principles that apply to Cayman Islands-registered companies.
19. The Authority has on-going IT initiatives that seek to enhance the effectiveness and efficiency of regulatory filings and reports. These initiatives will serve as a platform for the proposed public database. Thus, the majority of the costs are incorporated into approved IT projects. The additional cost of setting up the database will be subsidised by an administrative fee for access to the database. This fee will be borne by users of the database. There should be no tangible effect on due diligence costs as the database will improve due diligence processes for many stakeholders in the financial services industry.
20. The CML provisions are intended to capture individuals acting as directors, thus the clarification of this requirement does not impact on the costs of providing this service. Those entities currently providing operators (directors) under a Mutual Fund Administrators Licence will have reduced registration and licence fees under the CML.
21. The survey costs will be taken from the Authority's operational budget. There will no cost implication on the industry emanating from the commissioning of the survey.

b. Benefits

22. As outlined in Section B, inadequate corporate governance standards were a key factor in the Financial Crisis. Financial failures are costly to the shareholders, customers, suppliers and creditors of the failed entity. Research shows that better corporate governance reduces the possibility of financial failures. Modernising the corporate governance standards in the Cayman Islands will result in better managed entities;

better board oversight of an entity; more focused risk management practices and enhanced controls to mitigate risks.

23. This should contribute not only to minimising corporate failures but also to protecting the reputation of the Cayman Islands' financial services sector.
24. The public database will provide industry with an independent and readily available source of information that should expedite the due diligence process for many investors. The central CIMA database should enable a more efficient and timely due diligence process that can contribute to reducing the cost of the process.
25. Regulating the provision of directors and operators under the CML will streamline the supervision of this business. It will reduce any potential for duplication of supervisory work between the Authority's Investment Services Division and the Fiduciary Division. This also promotes more consistent treatment of regulated entities.
26. As corporate governance standards have a significant effect on the strength and stability of the financial services sector, it is important that any proposals amending the corporate governance standards are considered and appropriate for this jurisdiction. To contribute to this objective, the Authority has commissioned a survey to receive direct feedback on certain issues from as wide a representation of the industry as possible. Not only will this feedback contribute to our current corporate governance research and analysis, but it will provide the Authority with a comprehensive and informed view from industry on these issues.
27. The Authority considers these corporate governance amendments as beneficial to the Cayman Islands, its standing in the international financial services sector and its reputation. The Authority also considers these amendments essential to the continued soundness and stability of the industry.
28. The Authority considers the benefits of these proposed measures to significantly outweigh their costs.

G. Comments and Consultation

29. The Authority seeks consultation through written comments and representations from the private sector associations concerning the issues detailed above.
30. The Authority must receive representations by 17H00, Monday, 18th March 2012.
31. Comments and representations must be addressed to

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Elizabethan Square
Grand Cayman KY1-1001
Cayman Islands

Tel: 345-949-7089

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32. The Authority shall have due regard to any representation made by the private sector associations and industry stakeholders. The Authority shall provide a written response collating the feedback received and the Authority's position on this feedback. This response shall be copied to all relevant private sector associations only.

Appendix A

Enhancements of International Standards

1. Basel Committee for Banking Supervision

Principle proposed in current BCBS consultation updating the its Core Principles:

Principle 14 – Corporate governance:

The supervisor determines that banks and banking groups have robust corporate governance policies and processes covering, for example, strategic direction, group and organisational structure, control environment, responsibilities of the banks' Boards and senior management, and compensation. These policies and processes are commensurate with the risk profile and systemic importance of the bank.

2. International Association of Insurance Supervisors

Updated Core Principles (October 2011)

ICP 7 Corporate Governance

The supervisor requires insurers to establish and implement a corporate governance framework which provides for sound and prudent management and oversight of the insurer's business and adequately recognises and protects the interests of policyholders.

Structure and governance of the Board

7.3 The supervisor requires the insurer's Board to have, on an on-going basis:

- an appropriate number and mix of individuals to ensure that there is an overall adequate level of knowledge, skills and expertise at the Board level commensurate with the governance structure and the nature, scale and complexity of the insurer's business;*
- appropriate internal governance practices and procedures to support the work of the Board in a manner that promotes the efficient, objective and independent judgment and decision making by the Board; and*
- adequate powers and resources to be able to discharge its duties fully and effectively.*

Duties of individual Board members

7.4 The supervisor requires the individual members of the Board to:

- act in good faith, honestly and reasonably;*
- exercise due care and diligence;*

- *act in the best interests of the insurer and policyholders, putting those interests of the insurer and policyholders ahead of his/her own interests;*
- *exercise independent judgment and objectivity in his/her decision making, taking due account of the interests of the insurer and policyholders; and*
- *not use his/her position to gain undue personal advantage or cause any detriment to the insurer.*

Transparency and communications

7.8 The supervisor requires the insurer's Board to have systems and controls to ensure the promotion of appropriate, timely and effective communications with the supervisor and relevant stakeholders on the governance of the insurer.

Supervisory review

7.10 The supervisor has the power to require the insurer to demonstrate the adequacy and effectiveness of its corporate governance framework.