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European Banking Authority

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EBA consultation paper on draft Guidelines for assessing the suitability of member of the management body and key function holders of a credit institution

Initially we want to highlight some of our concerns. We believe the guidelines are too extensive and that some requirements will be difficult to meet, inter alia from a labour law perspective. Further we think it is important that the guidelines take different corporate governance systems into duly account, since there are significant differences in the legislative and regulatory frameworks across countries regarding the governance structure. In Sweden the Companies Act stipulates that companies must have three decision-making bodies in a hierarchical relationship to one another: the shareholders' meeting, the board of directors and the chief executive officer. In practice the CEO usually carries out his duties together with a management team. According to the Swedish Corporate Governance Code the shareholders' meeting's decisions on election and remuneration of the board of directors are to be prepared in a structured, clearly stated process governed by the shareholders (through the nomination committee) that provides conditions for well-informed decision-making. The task of the nomination committee is among others to specify the duties and profile of directors, including the chairman, appropriate to the company's operations and in line with the articles of association of the company and the interest of all shareholders. We firmly believe that the Swedish code is a good way to solve the issue. We also believe that for Swedish companies the requirements are sufficient and more specifications are not needed.

Status of EBA Guidelines

The scope of the guidelines includes not only members of the management board but also key function holders of a credit institution. The Directive 2006/48/EG and EU Commissions proposal of 20 July 2011 for a Directive on the access to the activity of credit institutions and the prudential supervision of credit institution and investments firms (CRD IV) only deal with the assessment of the members of the management board. Even though both of the Directives mentioned above stipulate that institutions



shall have robust governance arrangements it is our opinion that the proposal to specify requirements for the assessment of key function holders are too far reaching. The competent supervisory authorities already have the possibility to assess the governance arrangement and to take action if those arrangements are not sufficient. Furthermore the EBA guidelines on Internal Governance also stipulate that designated persons should have certain skills and experience, such as the Risk Control Function, Compliance Function and Internal Audit Function. Although it is guidelines, they will have binding effect when implemented in the Member States. Since the authorities already have the means to intervene the guidelines for assessing suitability should be restricted to the management board.

Article 1 Subject matter

Our opinion is that key function holders should be removed from the scope of the guidelines. In addition to the above we would like to point out that a broader scope of employees, such as key function holders, will create demarcation problems. This in turn could lead to an unsound interference by the authority in the company's operations. The election of board member is a concern of the shareholders' meeting. Same as today, the authority should have the option to reject a person. Selecting key function holders is a domain which should remain a responsibility for the company. An unclear division of responsibilities will likely open up for arbitrary judgements.

Article 2 Definitions

The definition of management body could be clarified to cover different governance systems. According to Swedish law the board of directors, which is elected by the general meeting, is responsible for the organization and management of the company. The chief executive officer is appointed by the board of directors. The definition of management body should in this respect therefore include board members and the chief executive officer.

Article 3 Scope and level of application

If the requirements on key function holders remain it should be clarified that the credit institution itself should define their key function holders based on the institution's organization and activities (subparagraph 4).

Article 4 Responsibilities

We agree that assessing the initial suitability of members of the management body should primarily be the responsibility of the shareholders of the company through, e.g. the nomination committee. According to Swedish law the board members should be elected or reelected each year, which means that the suitability of board members is checked once a year. If a new member shall be or has to be elected during the mandate period, the same procedure shall be used by the nomination



committee. We believe that the annual assessment fulfills the requirement of an ongoing assessment of the board members.

Assessing the initial and ongoing suitability of key function holders is a responsibility of the company and should remain as such.

Question 1

When using the proportionality regarding assessment criteria the basis should, as mentioned in article 5, contain the nature, scale and complexity of the business. In order to apply the proportionality principle it has to be flexible enough. Too detailed criteria will risk a too rigid application. We believe the wording in Article 5 is well balanced.

Question 2

As mentioned above the appointment and assessment of key function holders should remain with the institution. There should not be a requirement for the authority to assess the policy. Instead the authority may within its normal supervision, examine the policy, if necessary.

Article 9 Notification

According subparagraph 3 the obligation for the institution should be modified so that the institute should verify that the information provided is accurate according to the institute's knowledge.

Article 11 Assessment technique

The election of board members is the responsibility of the shareholders' meeting (under Swedish Law) and the task should remain a responsibility of the shareholders' meeting alone. The competent authority should assess if an elected board member is suitable in accordance with the stipulated criteria via an off-site inspection. There has to be a clear cut between the responsibility of the shareholders' meeting and the authority. It is important to clarify that the shareholders' meeting is responsible for electing members of the board and that the responsibility of the authority is to check that no unfit person is elected. There is no need for the authority to interview a person when assessing the suitability.

Further we would like to emphasize that the authority should not assess the suitability of key function holders.

Article 12 Supervisory corrective measures

When an authority considers a person to be unsuitable the authority should be required to specify the reason for the decision. It is also important that the authority



specifies how the person or the company may cure the deficiency and for how long the person may be considered unsuitable. It is further very important that both the person and the company have the possibility to appeal against the authority's position to the court. This seems particularly important since the assessment in many respects is based on discretionary grounds. Further consideration has to be taken to other regulation, e.g. labour-law and collective bargaining agreements. It might be difficult to dismiss or terminate an employment contract with reference to the ground that the person is not appropriate for reasons which are primarily based on speculations and rumours. An employment relationship has to be based on predictability and legal certainty.

Article 13 Reputation criteria

It should be clarified that the criteria that are held against a person is based on provable facts. Pure assumptions and subjective judgments should be avoided as far as possible to reach predictability and legal certainty. It is also important that the authority makes public the assessment criteria that will form the basis for an assessment and what weighting the authority makes (see article 11).

Article 14 Experience criteria

According to the proposed CRD IV the competent authorities shall require institutions to take into account diversity as one of the criteria for selection of members of the management body. In particular they shall put in place a policy promoting gender, age, geographical, educational and professional diversity on the management body. The proposed requirements in article 14 may mean that the company will have difficulties to comply with the requirements in the proposed CRD IV.

Regarding subparagraph 7, we refer to our statement under Article 11.

Article 15 Governance criteria

We understand that a certain level of independence must be required. The extent of the requirement must however be related to the ability of the parent company to manage and control the financial group. In most cases a subsidiary is fully owned by the parent company. Particularly in those cases it is difficult to see the purpose of the independence from the controlling shareholder. The dominant model at the Swedish market is the so-called control ownership model. This model normally represents a strong commitment from the owners by taking an active role at the shareholders meeting and in many cases, a seat on the nomination committees. Furthermore, whatever loyalties a member of the board may have, the Company Act has an unconditional requirement that a member of the board always must ensure the company's best and further treat all shareholders equally.



Article 16 Implementation

There should be a transitional provision regarding ongoing employment. Furthermore the requirements should be without prejudice to labour law. This is also stressed in the Swedish Code of corporate governance.

Annex 1 Documentation requirements for initial appointments

The requirements in section 2 f. are very comprehensive and needs to be limited in both time and content. The content should be limited to position/title, type of business and duration. It is also questionable if the history needs to go further back than 10-15 years. We think that the information needed according to the Swedish Code (rule 2.6) is sufficient and should be used as guidance.

According to section 4 the applicant shall submit relevant criminal investigations records. Under Swedish law only a few authorities have access to such a register. Individuals have no access to criminal investigations records. This requirement should therefore be deleted. The same partly applies to section 5 a.

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