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Corporate M&A

New Corporate Governance Code for Irish Financial Sector

Date: Mon 14 Mar 2011

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Whilst the Code[1] includes reinsurance undertakings, captive insurers are expressly excluded. Additional more onerous requirements are placed on entities which are designated by the Bank as Major Institutions. The unprecedented amount of submissions made prior to its publication demonstrates the level of interest and concern stoked by the provisions of the Code, which is intended to set a higher standard than existing international best practice.

General Requirements and Supervision

According to the Bank the Code contains the minimum requirements that an Institution must meet in the interests of promoting strong and effective governance. A key objective of the Code is to prevent any one individual from having unfettered powers of decision within an Institution by placing primary responsibility for corporate governance with the board of directors.

Adherence to the required standards is monitored by the Bank through ongoing supervision; an institution is required to report any deviations from the Code to the Bank within 5 business days of it becoming apparent.

Each Institution must submit a compliance statement specifying that it has complied with the Code on at least an annual basis.

The Board of Directors

The board of an Institution must be of sufficient size and expertise to adequately oversee the operations of the Institution and the role, responsibilities and performance of the board, its committees and senior management must be clearly documented. It shall appoint the senior executive management. The board must meet at least quarterly.

The board must consist of at least five directors, the majority of whom must be Independent Non-Executive Directors ("INEDS"). An exception to this rule exists for the board of a subsidiary company of an Institution which must consist of at least two INEDs and a majority of non-executive group directors.

[1] The Code is located at http://www.financialregulator.ie/regulation/poldocs/consultation-papers/Documents/CP41%20-%20Corporate%20Governance%20Requirements/Corporate%20Governance%20Paper%20-%204%20November%20(3)%20Amended%2023%20Feb%202011.pdf

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The Code defines ‘independence' in a director as the ability to exercise sound judgement and decision making independent of the views of management, political interests or inappropriate outside interests. A number of factors relevant for considering director independence are set out in the Code including:

- Any financial obligations to the company;
- A shareholding in the company; or
- A close business or personal relationship with any of the company's directors or senior employees.

A non-executive director does not have executive management responsibilities for the Institution. A group director is a director who would be independent save for his existing relationship within the Institution's group.

The number of directorships of Institutions which a director of an Institution may hold is limited to five. This restriction does not apply to directorships within a financial services group. Holding more than five will create a rebuttable presumption that the director has insufficient time available to fulfil the requirements of his role as a director of an Institution. Should a director seek to hold more than five directorships the Institution will have to satisfy itself that this is appropriate and then seek the prior approval of the Bank.

The number of directorships outside of Institutions ("non financial directorships") which a director of an Institution may hold is limited to eight. Holding more than eight will again create the rebuttable presumption that the director has insufficient time available to fulfil his duties and the Institution will have to satisfy itself that this is appropriate and then seek the approval of the Bank.

Institutions must review board membership at least once every three years. An Institution should formerly and clearly document why any person has been a board member for nine years or more.

The minimum criteria for the appointment of each type of director and the obligations imposed on him are clearly set out in the Code.

Other Requirements of the Board

The Board is required to document the risk to which an Institution may be exposed due to the nature of its business; this is the Institution's ‘Risk Appetite.'

The board is required to establish both an audit committee and a risk committee. Where the board comprises only 5 members the full board may act as either or both of these committees. Remuneration and nomination committees may also be established. The general requirements of each of the committees is set out in the Code and their terms of reference should be documented.

The Chairman and the Chief Executive Officer

The Code imposes stringent criteria for the terms of appointment of both the chairman and the Chief Executive Officer ("CEO") and other roles that each of them may perform whilst carrying on that role. Each must have the necessary qualities, integrity, knowledge, skills and experience to understand the Institution's business. Each of the chairman and the CEO is restricted from holding the same position in more than one Institution at any one time.

The roles of chairman and CEO must be separate. An Institution must appoint a chairman, who must be selected from among the INEDs except in the case of a group subsidiary where the chairman can be a group non-executive director. The roles of chairman and CEO must be separate. The CEO is restricted from holding the position of CEO in more than one Institution at a time.

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Major Institutions

The Bank has considered separately and in more detail whether or not an Institution should be designated as a "Major Institution". The Bank has notified such Institutions. The decisions were based on the Institution's characteristics, examples of which are set out in the Code including

- It has a significantly large presence in the local market;
- It carries on significant international activities outside the state; and/or
- It is significant by reference to size, substitutability, reputation and other relevant considerations.

Institutions so designated face additional obligations under the Code such as:

- The board shall have a minimum of seven directors, the majority of whom must be INEDs with the same "group director" exception as above applicable;
- The number of directorships held by any one person may not exceed three where one of those directorships is in a major institution;
- The board has to meet at least 11 times during any calendar year and at least once per calendar month for 11 months of the year; and
- The board is obliged to form remuneration and nomination committees, in addition to forming the audit and risk committees.

Implementation

The Code applies to existing boards and directors from 1 January 2011.

The bank produced a useful 46 page FAQ in April 2012 which addresses many practical implementation issues and can be found at http://www.centralbank.ie/regulation/poldocs/consultation-papers/Documents/CP41%20%20Corporate%20Governance%20Requirements/Corporate%20Governance%20Code%20for%20Credit%20Institutions%20and%20Insurance%20Undertakings%20-%20Frequently%20Asked%20Questions.pdf

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