



American
Bankers
Association

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By Electronic Delivery

Secretariat of the Basel Committee on Banking Supervision
Bank for International Settlements
CH-4002 Basel
Switzerland

RE: Corporate Governance Principles for Banks

Dear Sirs/Mesdames:

The American Bankers Association (ABA)¹ appreciates the opportunity to provide comments to the Basel Committee on Banking Supervision (the Committee) on its Consultative Document released in October 2014, "Corporate governance principles for banks" (the Consultative Document).

ABA acknowledges the considerable effort, on the part of both the banking industry and national supervisors, in areas related to bank corporate governance since the Committee's October 2010 issuance of "*Principles for Enhancing Corporate Governance*." The United States Office of the Comptroller of the Currency (OCC), for example, has published detailed expectations, applicable to large banks chartered under U.S. national law, addressing the institutional governance of the risk management function. In addition, more broadly applicable corporate governance requirements and commonly implemented practices (for business beyond the banking industry) continue to develop in response to market changes since 2008. Accordingly, ABA commends the Committee for acknowledging the diversity of national standards in the area of corporate governance. We believe, however, that the Committee should clarify several specific areas in the final Consultative Document to reflect the diversity in size, complexity, and business models of banks within various jurisdictions, recognizing the significant variety in the structure of the banking industries among the various nations represented.

Areas of Specific Concern

ABA is concerned that the Consultative Document is ambiguous concerning the legal responsibilities and standards applicable to bank directors. For example, Paragraph 22 notes that the directors' "duty of loyalty" and "duty of care" are matters of national law and supervisory standards. On the other hand, however, Paragraphs 22 and 23 outline detailed activities supposedly required under those duties, which may or may not agree with national

¹ The American Bankers Association is the voice of the United States' \$15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$11 trillion in deposits and extend more than \$8 trillion in loans.

law in every or even most jurisdictions. National jurisdictions have an existing (and usually significant) body of law addressing such issues, promulgated by statute and judicial action, as well as by financial industry supervisors. The final Consultative Document should not, therefore, expand or purport to interpret these standards. In this connection, it should also acknowledge that, at least in certain jurisdictions, standards derived from general corporate law (rather than supervisory regimes specifically applicable to banks) govern these matters, and national supervisory authorities should take appropriate account of these standards.

In a related concern, ABA believes that the language of the Consultative Document might be interpreted as blurring the respective roles and responsibilities of board members and bank management. In some national regimes, though directors are responsible for oversight of management and overall institutional policy, they are legally restricted (in their capacity as directors) from exercising management functions, i.e., participating in the routine operation of the business. Though we agree that the board has ultimate responsibility for the bank's business strategy, as well as for oversight of management's actions that may affect the bank's financial soundness, we are concerned that the language of the Consultative Document could imply a guarantee or assurance of the bank's financial condition. In particular, the frequent use of the term, "ensure" in the Consultative Document, e.g., Paragraphs 24, 26 and 42, suggests a highly inappropriate degree of certainty, significantly in excess of the legal standards applicable to bank directors in many major jurisdictions. We note that in the United States, this issue has been carefully addressed by regulators and the banking industry. The OCC explicitly defines the role of the board of directors in "ensuring" the bank's compliance with certain enforcement orders as to: "(a) Require timely reporting by Bank management of such actions directed by the Board to be taken under this Order; (b) Follow-up on any non-compliance with such actions in a timely and appropriate manner; and (c) Require corrective action be taken in a timely manner for any noncompliance with such actions. "

Furthermore, the Consultative Document's recommendations concerning board oversight of bank risk-taking could be interpreted as implying a high degree of board involvement in day-to-day risk monitoring and mitigation activities. The existence of a dedicated risk function, independent of bank lines of business and with direct accountability to the board, can be a critical element of effective governance. A suggestion, however, that the board itself somehow assume these responsibilities is not necessary or realistic, as the board can and should exercise its supervisory and policy functions on the basis of detailed reporting from appropriate senior officers, selected (with board oversight and approval) for their substantive knowledge and experience and appropriately accountable to the board. The same approach is appropriate for the board's supervision of the bank's compensation programs.

In all respects, the final consultative document should make clear that the board can exercise its supervisory and oversight responsibilities through board committees and can act on appropriately detailed reporting from senior bank management. In addition, the Committee should clarify that flexibility in the roles of the board and management in identification and selection of board members, including for boards of subsidiaries within a group, may be appropriate under national law and practice.

ABA appreciates the Committee's careful consideration of this extremely important topic and the contribution those efforts make to the improvement of national standards of institutional governance. We are grateful for the opportunity to comment on the Consultative Document and participate in this development process. Should you have any questions, we are available to discuss any of these issues in detail.

Please contact Hu Benton at +001 (202) 663-5042 or hbenton@aba.com if you have any questions.

Respectfully submitted,

A handwritten signature in blue ink, reading "Hu A. Benton". The signature is fluid and cursive, with the first name "Hu" and last name "Benton" clearly legible.

Hu A. Benton
Vice President, Banking Policy
Office of Regulatory Policy