Corporate Governance

Contributing editor
Holly J Gregory

2018

GETTING THE DEAL THROUGH

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Corporate Governance 2018

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Corporate Governance 2018

Seventeenth edition

Getting the Deal Through is delighted to publish the seventeenth edition of *Corporate Governance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Bermuda, Hungary, Kenya, Malaysia, Mexico, Norway, Spain and Thailand.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Holly Gregory, of Sidley Austin LLP, for her continued assistance with this volume.

GETTING THE DEAL THROUGH

London
May 2018

Bermuda

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BeesMont Law Limited

Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

Bermuda does not have a formal general corporate governance code of conduct. The primary sources of law, regulation and practice in Bermuda are provided by specific legislation and common law. At the legislative level, all companies in Bermuda are subject to the Companies Act 1981, as amended (the Companies Act). The Companies Act applies to all bodies corporate in Bermuda and sets out the corporate governance rules in general, with special provisions for the governance of mutual funds. The BSX Listing Rules regulate the corporate governance of companies that are listed on the Bermuda Stock Exchange (BSX) and require mandatory compliance. There are several industry-specific codes of conduct (Industry Codes) as well including the Insurance Code of Conduct, the Corporate Governance Policy for Trust (Regulation of Trust Business) Act 2001, Investment Business Act 2003 and Investment Funds Act 2006, and the Corporate Governance Policy for Banks and Deposit Companies Act 1999.

2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder groups or proxy advisory firms whose views are often considered?

The Bermuda Registrar of Companies (ROC) is the main government agency that focuses on the corporate governance of companies in Bermuda, which is similar to Companies House in England. The ROC, similarly to Companies House in England, enforces many of the rules and obligations found in the Companies Act, maintains a register of companies in Bermuda and a register of charges. Additionally, the ROC is the location in which all incorporation applications must be submitted.

Although the ROC enforces the Companies Act, it is the Bermuda Monetary Authority (BMA) that regulates companies that offer financial services and enforces many industry specific corporate governance regulations (see question 1). The BMA's risk-based supervisory and enforcement powers apply to financial institutions and other reguated entities, for example entities regulated for anti money laundering purposes and corporate service providers.

While there are no specific shareholder groups or proxy advisory firms in Bermuda whose views are considered, Bermuda's regulatory bodies work closely with government and industry stakeholders.

The rights and equitable treatment of shareholders

3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

Generally, the by-laws of a company deal with the appointment and removal of directors.

The directors of a company are appointed at the first general meeting of a company, subject to the by-laws of the company, and thereafter directors are elected or appointed at each annual general meeting (section 90 of the Companies Act).

The by-laws of a company will normally set out the circumstances in which a director may be removed, although the Companies Act also provides certain protections and procedural requirements for the removal of directors. Shareholders of a company may remove a director by requesting a special general meeting be convened and holding a vote to remove any such director.

4 Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

The Companies Act provides that shareholders retain control over any change in the name of a company, appointment of directors (subject to any restrictions in the company's by-laws), a change to the memorandum of association or by-laws, and any increase or decrease in the authorised share capital of the company.

The shareholders also retain the right to waive the requirement to have an annual audit or annual general meeting either for a fixed period of time or until such time as the shareholders request one (indefinitely), and approve any amalgamation or merger. Shareholders are also required to approve any loan by the company to any director of the company.

5 Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

Subject to question 4 above, shareholder voting rights may be restricted by way of a shareholders' agreement.

6 Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

Generally, only those shareholders who have voting rights attached to their shares are given notice of a general meeting and allowed to attend; however, this is subject to the by-laws of the company or any shareholders' agreement that may exist. Any shareholder may appoint a proxy to vote on their behalf at a general meeting.

No physical presence by a shareholder, or (in the case of a corporate shareholder) their representative, is required at a general meeting to be considered present and participating. Section 75A of the Companies Act provides that unless the by-laws of a company otherwise provide, a meeting of members may be held by means of telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously, and participation in such a meeting will constitute presence in person at the meeting.

In the absence of a meeting of the shareholders, the shareholders may resolve to approve actions of the company by way of a unanimous written resolution, which requires approval by all shareholders of the company.

7 Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

The Companies Act provides that any shareholders may request that the directors of a company convene a special general meeting, provided that the shareholders requesting the special general meeting at the time of the deposit of the request hold not less than one-tenth of the paid-up capital of the company and carry the right to vote at a general meeting of the company (Requisition). Any such Requisition by a shareholder must state the purpose of the meeting, be signed by the requisitionists and deposited at the registered office of the company.

The Companies Act also includes the power for shareholders to requisition a company to give to members of the company notice of any resolution that may properly be moved and is intended to be moved at a general meeting and to circulate to members any statement of not more than 1,000 words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting.

8 Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

In Bermuda there is no express code of conduct for shareholders. In practice, a company's by-laws, together with the Companies Act and any shareholders' agreement (as applicable), provide restrictions and directions as to the powers and discretion of any shareholder. However, there are generally not any fiduciary duties owed by controlling shareholders beyond voting in good faith.

9 Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

A company limited by shares has separate legal personality from that of its shareholders. The liability of a shareholder for the company's liabilities is generally limited to the amount, if any, that remains unpaid on that shareholder's shares.

Corporate control

10 Anti-takeover devices

Are anti-takeover devices permitted?

There is no legislation specifically regulating takeovers. However, the Companies Act 1981 applies to all companies registered in Bermuda and allows for both mergers and amalgamations, and a court sanctioned scheme of arrangement. There are no statutory merger control and takeover tests. The Bermuda Stock Exchange separately regulates all companies listed on it.

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Directors, subject to a company's by-laws or other governing documents, may issue new shares without shareholder approval. Pre-emptive rights may be contained in a company's by-laws or a shareholders' agreement; however, it is not a requirement under Bermuda law.

12 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Shares are generally freely transferable, subject to the company's governing documents. Private companies can impose restrictions on the transfer of shares and these restrictions often provide that shares must be offered to existing shareholders before being transferred to any third parties. A private company's by-laws may also provide that the directors can refuse to register the transfer of shares to persons that they do not approve. In addition, by-laws may set out pre-emption rights. Typically, a company's by-laws will provide that no share is to be issued or transferred to any infant, bankrupt or person of unsound mind.

It is not unusual for by-laws to contain a provision that the board of a company may in its absolute discretion and without assigning any reason refuse to register the transfer of a share. It is worth noting that anyone wishing to carry on business in or from within Bermuda through any type of corporate structure is subject to vetting by both the local service provider and the BMA. Transfers of shares by non-Bermudians are also subject to review or control and companies must seek consent to carry on business in certain designated areas (Companies Act 1981).

13 Compulsory repurchase rules

Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

The Companies Act allows for a company limited by shares, or other company having a share capital, to purchase its own shares, if authorised to do so by its memorandum or by-laws. The principle of the preservation of capital of a company requires that certain tests be met if a company is to repurchase its shares, including establishing that the company is and will be solvent after effecting the repurchase. Unless the by-laws of the company otherwise require, or unless the company's constitution does not provide for it, the repurchase of shares by a company does not require shareholder consent.

14 Dissenters' rights

Do shareholders have appraisal rights?

There are various shareholder appraisal rights as set out in the Companies Act.

Merger or amalgamation (section 106)

The directors of each amalgamating or merging company must submit the amalgamation agreement or merger agreement for approval by the shareholders. A notice of a meeting of the shareholders must be sent to each shareholder of each amalgamating or merging company and include (or be accompanied by) a summary or copy of the agreement, state the fair value of shares and state that a dissenting shareholder is entitled to be paid the fair value of his or her shares.

Unless the by-laws otherwise provide, the resolution of the shareholders approving the amalgamation or merger must be approved by a majority vote of 75 per cent of those voting at the meeting and the quorum necessary for that meeting is two persons holding (or representing by proxy) more than one-third of the issued shares.

Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that they have been offered fair value for their shares can apply to the court to appraise the fair value of their shares within one month of the issuance of the notice (of the shareholders' meeting).

Court-approved scheme of arrangement (section 99)
A section 99 scheme of arrangement (compromise or arrangement) must be approved by a majority in number representing 75 per cent in value of the shareholders (or class of shareholders) present and voting either in person or by proxy at the requisite general meeting to approve the scheme. Following shareholder approval, the scheme must be sanctioned by the court and if it is sanctioned then it is binding on all the shareholders (or classes of shareholders). While the Companies Act does not provide express dissenting shareholder or appraisal rights, those affected by the scheme are entitled to appear and raise objections at the hearing of the petition for the court order that the court takes into account.

Section 102 compulsory acquisition/squeeze-out (10 per cent)
Under section 102 of the Companies Act, if an offer to acquire shares (or any class of shares) of a company is approved by the holders of 90 per cent in value of the shares (which are the subject of the offer) within four months of the offer then the acquirer can, within two months of the date of the approval, compulsorily acquire the shares of dissenting shareholders by giving notice to those shareholders of the compulsory acquisition of their shares. A 'dissenting shareholder' in the context of a squeeze-out includes a shareholder who has not assented to the scheme or contract for acquisition of shares or any shareholder who has failed or refused to transfer his or her shares to the transferee company in accordance with any such scheme or contract.

A dissenting shareholder has one month from the date on which the compulsory acquisition notice was given in order to make an application to the court, which has power to make such orders as it thinks fit, to order to the contrary. Dissenting shareholders do not have express appraisal rights under section 102.

Section 103 alternative squeeze-out (5 per cent)
Section 103 of the Companies Act allows for the holders of not less than 95 per cent of the shares (or any class of shares) in a company to give notice of the intention to acquire their shares to the remaining shareholders (or class of shareholders), on the terms set out in the notice. The purchaser must offer the same terms to all shareholders in respect of shares to be acquired.

Any shareholder who receives an offer notice under section 103 has the right to apply to the court to appraise the value of their shares within one month of receiving the offer. Within one month of the court's appraisal, the purchaser is entitled to either acquire all the shares involved at the price fixed by the court or choose to cancel the offer. There is no appeal process available in relation to the court's appraisal decision.

The responsibilities of the board (supervisory)

15 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The predominat board structure for listed companies is best categorised as one-tier or unitary. Management of the company, both listed and private, is typically the responsibility of the directors. In some cases, usually dictated by the size of the company, the directors may delegate day-to-day mamangement to individuals who are not on the board but who hold executive positions (eg, chief operating officer, chief financial officer, chief technical officer). The board of directors may consist of those involved in executive management of the company and non-executive directors.

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

Bermuda law does not impose an all-embracing code of conduct on directors. In practice, a company's memorandum of association and by-laws comprise its constitution and, together with the Companies Act, prescribe the ambit of the directors' powers and responsibilities. Accordingly, if the directors act ultra vires the company's constitution, they are answerable to the company. The function of the substantive law is to supplement the internal constitutional checks on a director's powers and to deal with areas where the company's constitution may be silent.

Many of the duties and obligations of a director are statutory; others are found only in common law. The Companies Act contains numerous provisions relating to the duties of directors and prescribes penalties for breach of such duties. The Companies Act makes no distinction between executive and non-executive directors; non-executive directors are directors for all purposes of the Companies Act.

Directors are responsible to the company, not to the shareholders. The courts tend to recognise the difficulty of identifying the interests of such an artificial abstraction and in practice regard the interests of the company as identical with those of the shareholders as constituted from time to time therefore avoiding identification of the company's interests with specific members or encouraging short-termism to the detriment of the company as a going concern. There are, however, some circumstances, such as calling meetings, preparing financial statements, recommendations to shareholders, etc, where the directors may owe duties to shareholders.

Directors may be liable for any of the following:

- not acting honestly or in good faith with a view for the best interests of the company;
- using their power for the benefit of a third party or him or herself;
- not disclosing to the company their own interests in a contract or other action being taken by the company;
- making a personal profit as a result of their position as directors (particularly where no disclosure was made to the company prior to the profit being made);
- failing to uphold their duty of care, skill and diligence that a reasonably prudent person would exercise in their position; and
- allowing the company to enter a transaction or agree to something that was beyond their power or ability to perform.

If a company is insolvent or is likely to become insolvent, there are further board of directors' responsibilities and potential liabilities, including:

- falsification of books or records and in connection with actions intended to defraud creditors of the company;
- knowingly carrying on the business of the company with the intent to defraud creditors of the company; and
- misapplying or retaining any money or property of the company, or being guilty of any misfeasance or breach of trust in relation to the company.

17 Board obligees

Whom does the board represent and to whom does it owe legal duties?

See question 16.

18 Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed?

Generally, shareholders are entitled to have the affairs of the company conducted in accordance with general law and specifically with the company's memorandum of association and by-laws. Any shareholder who feels they have been negatively impacted by a director who has not carried out his or her duties may take action either personally, via a representative, or via derivative action.

Any shareholder who has been prevented from exercising a voting right, or denied a right (such as the benefit of a pre-emption right) may bring a personal action against the company.

Where a number of shareholders have a shared interest in bringing an action against the directors of a company, the Rules of the Supreme Court provide that the action may be begun and continued by one or more of the shareholders as representing all the shareholders. Any subsequent judgment will typically bind all persons represented unless, for example, certain persons were not actually named as parties to the proceedings.

In certain circumstances, a shareholder may enforce a claim on behalf of the company. An individual shareholder may seek to enforce the company's rights by suing in representative form on behalf of him or herself and the other shareholders against the wrongdoer, as an exception to the rule in *Foss v Harbottle*. The principle is that an action can be brought on behalf of the company by the minority shareholders,

on the basis that they are representatives of the company, to obtain redress on the company's behalf.

19 Care and prudence

Do the board's duties include a care or prudence element?

The director's duty of care and skill involves positive obligations and is considered to have three aspects.

Degree of care, diligence and skill

A director need not exhibit in the performance of his or her duties a greater degree of skill than may reasonably be expected from a person of his or her knowledge and experience (a subjective test). Performance must be judged by the way the director applies any skills that he or she actually has. However, it has been suggested that directors have a duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors.

It was once thought that the obligations of non-executive directors were not very onerous. However, it has been suggested that there ought to be no difference between the skill demand of an executive and non-executive director, at least where the latter is professionally qualified.

In the case of a public company, a director who holds office as an executive shall exercise that degree of care, diligence and skill that a reasonably prudent and competent executive in his or her position would exercise.

Attention to the business

A director must diligently attend to the affairs of the company. Mere errors of judgement have been held not to breach the duty of skill and care. It has been held that a director is not bound to give continuous attention to the affairs of the company as his or her duties are of an intermittent nature.

Reliance on others

A director is entitled to rely on his or her fellow directors and the other officers of the company. They can delegate power to others where it is reasonable to do so provided that, in the case of a public company, this delegation shall not constitute an assignment of their office. Moreover, directors cannot absolve themselves entirely of their responsibility by delegation to others.

Non-executive directors would also seem to have certain duties of supervision that must be fulfilled before they can safely delegate responsibilities to others. For example, when appointing managers, the directors must be duly satisfied that the managers have the requisite skills to discharge the functions delegated to them. In addition, the directors must ensure that there is set up an adequate system of monitoring the managers. The directors must on a regular basis ensure that the managers have fulfilled their obligations. The directors should require a regular flow of information from the managers to ensure that they are carrying out their duties satisfactorily.

20 Board member duties

To what extent do the duties of individual members of the board differ?

See question 19.

21 Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

Provided that any delegation by a director is not in breach of their fiduciary duty to the company, and subject to the company's by-laws, there are no restrictions on directors' delegation of responsibilities. Generally, by-laws expressly provide that the directors can delegate their powers, discretion and authorities to other directors or a committee of directors.

22 Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

There is no requirement under the Companies Act 1981 for a standard company to have independent or non-executive directors.

Non-executive directors are generally subject to the same duties and liabilities as executive directors (see question 19). However, in regulating these duties, the more limited involvement of non-executive directors in the day-to-day conduct of the business of the company is recognised.

Sector-specific requirements and policy should be considered depending on the nature of the business. For example, the Insurance Code of Conduct proposes that boards of insurers should have an appropriate number and mix of directors to ensure that there is an appropriate level of experience, knowledge, skills and expertise commensurate with the nature, scale and complexity of the insurer's business.

23 Board size and composition

How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

Bermuda companies must have a board of directors. The size of the board may be determined by the members at a general meeting of the company or in such other manner as may be provided in the by-laws. The Companies Act 1981 permits the appointment of a single director for a standard company (who can be an individual or any legal person) unless the shareholders determine otherwise. There is no maximum number of directors prescribed by the Companies Act but, typically, the shareholders may determine the maximum number of directors at a general meeting or as provided in a company's by-laws.

Ordinarily, the by-laws of a company will deal with matters relating to the appointment of directors as well as the power to fill vacancies. Subject to the Companies Act and any special provisions in the by-laws, the directors are elected or appointed by the members by resolution.

In respect of regulated entities, 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 fulfil their duties and responsibilities.

Generally, there are no age, gender, nationality or diversity criteria in respect of directors of Bermuda companies. However, the Companies Act does require companies to have certain officers or representatives who are resident in Bermuda.

24 Board leadership

Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

There is no specific legislation that requires the separation or joining of the functions of board chairman and CEO. Generally, flexibility on board leadership is allowed as long as the board is fulfilling its duties. The management structure adopted should be appropriate to the nature, scale and complexity of an individual institution. In a smaller, owner-managed institution, a single person may fulfil the roles of both chairman and CEO; however, the person holding both roles should remember that the responsibilities of chairman and chief executive are distinct, and should be viewed separately. In cases in which the role of chairman and CEO are vested in the same person in respect of a regulated entity, appropriate additional checks should be built into the board structure.

25 Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

There are no mandatory board committees. However, 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. There is no obligation to delegate unless the by-laws expressly provide for this, for example, to an audit committee. Any committee of the board will have to abide by any regulations that the board imposes, and if there are no regulations specifically for the committee, the by-laws of the company will regulate the committee as far as it is practicable.

26 Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

There is no minimum or set number of board meetings per year required by law. The company's by-laws will typically contain provisions relating to the convening and conducting of board meetings.

27 Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

There are no prescribed disclosures of board practices required by law, regulation or listing requirement.

28 Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

The Companies Act provides that the by-laws of a company may regulate the appointment, functions, duties, remuneration and removal of all agents, officers and servants of the company, and the security, if any, to be given by them to the company. The amount, if any, of directors' fees is typically determined by the company by a members' resolution. Executive directors may be paid a salary. A director may also hold any other office or place of profit with the company (except auditor) in conjunction with his or her office of director for any period and upon whatever terms the board may determine and may be paid extra remuneration for the additional office (whether by way of salary, commission, participation in profits or otherwise).

Generally, there is no obligation to disclose the remuneration paid to the directors. The Companies Act does not impose a limit on a director's term of appointment to the board.

The Companies Act prohibits loans (or the provision of any guarantee or security in connection with any loan) being made to directors without the consent of the members.

29 Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

See question 28. Subject to any restrictions expressly provided in the by-laws, the board is typically able to determine the remuneration of senior management.

Update and trends

The BMA recently issued a consultation paper in respect of implementing a regulatory regime for virtual currency businesses (VCB). This includes requirements on VCB corporate governance that would require the implementation of corporate governance policies and procedures as the BMA considers appropriate given the nature, size, complexity and risk profile of the VCB. It is intended that the VCB legislation will come into force in 2018 and will provide definitions for controllers, shareholder controllers and officers consistent with these definitions in the acts of the other financial sectors regulated by the BMA.

Public companies continue to see increased shareholder engagement including direct engagement with senior executives. The Bermuda law requisition procedure is also becoming increasingly popular in respect of shareholders of public companies who wish to effect changes, such as the removal of directors.

30 D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

A company can purchase and maintain insurance for its directors and officers, which is common practice.

31 Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

Bermuda law generally allows for directors to be indemnified by the company and indemnification and exculpation provisions are typically included in the by-laws.

The Companies Act provides that company may in its by-laws or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempt such officer or person from, or indemnify him or her in respect of, any loss arising or liability attaching to him or her by virtue of any rule of law in respect of any negligence, default, breach of duty or breach of trust of which the officer or person may be guilty in relation to the company. However, generally, any provision exempting an officer or person from (or indemnifying him or her against any liability in respect of) any fraud or dishonesty of which he or she may be guilty in relation to the company will be void.

32 Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

See question 31.

33 Employees

What role do employees play in corporate governance?

Employees do not normally have a significant role in corporate governance. There is no specific legislation in respect of the rights of employees in relation to corporate governance for standard companies and employees are generally not entitled to board representation. However, a particular business may have as part of its corporate documents or internal policies a requirement to consult employees or certain employees may have such rights in their employment contracts.

34 Board and director evaluations

Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

There is no general legislation that requires evaluation of the board, its committees or individual directors for standard companies, although sector-specific requirements should be considered (see above). In any

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

Disclosure and transparency

35 Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

A company's certificate of incorporation and memorandum of association are available at the office of the ROC (see question 36), but the by-laws of standard companies are generally not publicly available.

36 Company information

What information must companies publicly disclose? How often must disclosure be made?

The ROC keeps the following documentation in relation to Bermuda incorporated companies, which is publicly available in Bermuda:

- the certificate of incorporation and memorandum of association;
- the address of the registered office;
- any prospectus or offer document that must be filed pursuant to the Companies Act 1981;
- any registered charges against the company;
- directors' information; and
- any other filings required pursuant to the Companies Act 1981.

The Registry of the Supreme Court maintains records of legal proceedings and judgments.

The BSX will have published accounts and auditors reports and any other relevant filings and announcements in respect of listed companies.

The registered office of the company will contain the following information:

- the register of directors and officers, setting out names and addresses; and
- the register of members, setting out the names and addresses of members, details of the number of shares held, the amount paid up on the shares and the date on which the person was entered in the register of members.

The timing of the various filings and disclosures depends on its nature and the specific law relating to such filing or disclosure, as applicable.

Hot topics

37 Say-on-pay

Do shareholders have an advisory or other vote regarding executive remuneration? How frequently may they vote?

There are no statutory shareholder rights or restrictions on whether shareholders can vote or advise on executive remuneration. However, the Companies Act provides that such remuneration may be covered in a company's by-laws (see above). The directors of a company may amend the by-laws but any such amendment shall be submitted to a general meeting of the company and that amendment will only become operative to the extent approved at the general meeting. Therefore, although there are not any statutory shareholder's rights to advise or vote on executive remuneration, if any such remuneration is covered in the by-laws, the shareholders may be able to prevent alterations to those remuneration provisions.

38 Shareholder-nominated directors

Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

Subject to a company's by-laws and provided the shareholder is nominating the directors as their proxy, or, where the shareholder is a company, nominating the director as its representative, there is no restriction on a director being a representative or proxy of a shareholder at a general meeting.

39 Shareholder engagement

Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

This entirely depends on the nature of the company, but typically shareholders are engaged on an annual basis in relation to the annual general meeting. Shareholders may also be engaged in respect of other general meetings to deal with matters arising between the annual general meetings, for example to amend the by-laws or revise the company's authorised share capital. Shareholder engagement will also occur if the company is the subject of a business combination or takeover. In the context of M&A, takeovers and squeeze-outs, there are certain procedural requirements that dictate timing as well as which parties are responsible for taking certain actions or making disclosures.

40 Sustainability disclosure

Are companies required to provide disclosure with respect to corporate social responsibility matters?

Subject to a company's by-laws and the business nature of the company (eg, fuel and petroleum product storage, processing and distribution), companies are not typically required to provide disclosure with respect

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to corporate social responsibility matters. However, increasingly companies are opting to do so from a marketing perspective.

41 CEO pay ratio disclosure

Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

Companies are not typically required to disclose CEO pay ratio under Bermuda law.

42 Gender pay gap disclosure

Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

Companies are not typically required to disclose gender pay gap information under Bermuda law.

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