

Sir David Walker,
Walker Review Team
c/- Secretariat Office
H. M. Treasury

SENT BY EMAIL: feedback@walkerreview.org

1st October, 2009

Dear Sir,

Review of Corporate Governance in UK Banks and other Financial Industry entities

This letter is sent on behalf of the Corporate Governance Committee of the Commerce & Industry Group, recognised by the Law Society. Please note that the opinions expressed in this letter are not necessarily the views of the C&I Group, the C&I Group central committee or the organisations by whom members of the Corporate Governance Committee are employed.

I am writing to you on behalf of the Corporate Governance Committee of the C&I Group in response to your request, published on 16th July, 2009, for views on the Review of Corporate Governance in UK Banks and other Financial Industry entities (BOFIs).

The Corporate Governance Committee provides a forum for in-house lawyers to consider issues in relation to corporate governance, and lobbies on corporate governance matters that affect the in-house legal community. The Corporate Governance Committee has published three documents which elaborate on some of the ideas discussed in this letter:

- “A fine line - Further guidance to In-House Lawyers in England and Wales on ensuring good corporate governance in your organisations” dated 24th July 2006;
- “Blowing the Whistle – Guidance to In-house Lawyers in England and Wales on Whistleblowing and Corporate Governance” dated 20th April 2007; and
- “Suitably Sheltered? Indemnities and insurance for directors and officers”, dated 16th April 2009.

These publications are available on www.cigroup.org.uk/Regions_corp_gov.asp.

The Committee welcomes the Walker Review of Corporate Governance in UK Banks and other Financial Industry entities (the Review) and notes the Review’s objective of improving corporate governance within BOFIs. The Committee would like to contribute some insights based on the views of its members, who are in-house lawyers (IHLs). IHLs play a key role in ensuring good corporate

governance within organisations and help to ensure that boards and senior management are informed of and manage legal risks associated with the activity. IHLs are trained and experienced in ensuring that contracts and property rights are valid and enforceable, in managing regulatory risk and advising on a wide range of “non-financial” risks such as corporate fraud, unexpected failure of business partners, business ethics and corruption.

1. Effectiveness of BOFI boards

According to the Review: “...*In broad terms, the role of the NED, under the leadership of the chairman, is: to ensure that there is an effective executive team in place; to participate actively in the decision-taking process of the board; and to exercise appropriate oversight over execution of the agreed strategy by the executive team.*”

We agree with these comments but also believe that the NED must ensure that the executive team has put in place appropriate policies and procedures, and has established relevant corporate governance structures throughout the organisation, to identify, monitor, control and, where necessary, escalate decisions on risk and strategy. In our view, good corporate governance refers to the systems and processes by which BOFIs are controlled. Without comprehensive systems and processes below the board level, neither the executive directors nor the NEDs will be able to mitigate or avoid serious risks facing the business.

There is little publicly-available information as to decisions which were taken by BOFI boards which contributed to the financial crisis. However, it seems probable that much of the assumption of risk occurred lower down the organisations, and was not sufficiently aggregated, raised to, or appreciated by, the boards. Therefore, we believe that good corporate governance within BOFIs must also encompass:

- clear policies and guidelines on the board’s appetite for risk, with such policies and guidelines disseminated throughout the organisation
- systems and processes within the organisation for identifying and monitoring risk and taking steps to address such risks
- a broad review of risk encompassing financial, commercial, legal, political and reputational risk
- procedures ensuring escalation of risk decisions to appropriate levels and
- positive encouragement (rather than mere protection) of whistleblowers.

These measures can ensure that NEDs are given the information necessary to effectively challenge the executive and test proposals on strategy.

2. Governance of Risk

We believe that an omission from the Review, and the Combined Code, is the absence of recognition of the need of boards to seek and receive advice on legal risk (both regulatory and enforcement) associated with the organisation’s activities.

The Review recommends the creation of the role of Chief Risk Officer (CRO) who “... *should have clear enterprise-wide authority and independence, with tenure and remuneration determined by the board*”.

However, we submit that how this role sits with other control functions within BOFIs who also advise on risk, needs to be clarified. We would be concerned if, in suggesting that it is the CRO who reports to the Board Risk Committee on risk, this would somehow “demote” the status of other advisers, such as General Counsel.

We understand that the role of the CRO is to ensure a wide-ranging and more holistic approach is taken to identifying and dealing with the risks facing the organisations today. However, we do feel that there should be express reference to the key role played by General Counsel and the Company Secretary in advising boards and senior management on both legal and ethical issues. We strongly believe that BOFI boards should have direct access to, and advice from, the BOFI's General Counsel and that the importance for boards and in particular NEDs in receiving timely and appropriate legal advice should not be overshadowed or reduced by the new role of CRO.

Recommendation 26 states:

“In respect of a proposed strategic transaction involving acquisition or disposal, it should as a matter of good practice be for the board risk committee to oversee a due diligence appraisal of the proposition, drawing on external advice where appropriate and available, before the board takes a decision whether to proceed.”

We would expect that the General Counsel of a BOFI would have a central role in such strategic transactions, albeit alongside the CRO.

We trust that the above comments are helpful. If you would like to discuss any of our comments, please feel free to call me on 07770 754 594.

Yours sincerely



Nina Barakzai
Acting Chair
On behalf of the Corporate Governance Committee