SWEDISH
CORPORATE
GOVERNANCE BOARD

Ju2014/7794/L1

Comments regarding the Ministry of Justice memorandum on companies' reporting regarding sustainability and diversity policy (Ds 2014:45)

The Swedish Corporate Governance Board ("the Board") was invited to submit comments to the Swedish Ministry of Justice on its memorandum entitled "Companies' Reporting on Sustainability and Diversity Policy", (Ds 2014:45). The memorandum concerns the introduction of European Parliament and Council Directive 2014/95/EU on changes to EU accounting directives (2013/34/EU) ("The Amending Directive"). The Amending Directive requires certain companies to produce a sustainability report and a diversity policy for the board. The views of the Board are as follows.

1 The companies required to produce a sustainability report?

The intention of the Amending Directive is that undertakings and groups that are large undertakings and also public-interest entities as defined in the Accounting Directive (2013/34/EU) produce a sustainability report. According to an amendment to the definition of a large undertaking in the Accounting Directive, however, the requirement regarding the average number of employees has been increased from 250 to 500, which means that only large undertakings with at least 500 employees, which are at the same time a public-interest entities, are covered by the Amending Directive's requirement to produce a sustainability report. Member States may however allow the requirement to apply to more companies.

SOU 2014:22 contains proposals for the implementation of the Accounting Directive. This report presents proposals for a definition of public interest entities as well as large undertakings and large groups in the Annual Accounts Act. In addition to the requirements listed in the Accounting Directive, this proposal includes unlisted public limited companies in the definition of public-interest entities.

Ds 2014:45 proposes that all large undertakings and parent undertakings in large groups (whether they are a public-interest entity or not), as well as all public-interest entities (irrespective of whether they are a large undertaking or the parent undertaking of a larger group or not), in both cases according to the definitions proposed in SOU 2014:22, are to be subject to the sustainability report requirement. One consequence of using the definitions in SOU 2014:22 is that all large undertakings and groups with an average number of employees of 250, as well as all public limited companies, whether listed or not, will be covered.

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The sustainability report requirement will therefore affect a large number of undertakings and groups of undertakings that are not covered by the Amending Directive minimum requirements, such as unlisted public limited companies, smaller credit institutions and insurance firms. According to Ds 2014:45, an estimated total of approximately 2000 companies are affected by the proposal, compared with the approximately 100 companies that would be affected if the proposal were based on the Amending Directive's minimum requirements.

The Board does not believe that the grounds for this major extension cited in Ds 2014:45 are convincing, as they are not supported by any detailed analysis, but rather characterized by opinions and hopes. Nor is the argument that it would be problematic to introduce a modified definition of the companies required to issue a sustainability report compelling, not least because such sub-definitions can be expected in future EU regulations. When this is weighed against the increased administrative burden and costs that the proposal would entail for the companies concerned, and the addition of another task that would be responsibility of the company board, together with the other drawbacks mentioned in the memorandum, the Board is of the opinion that the disadvantages for companies concerned are greater is considering. The Board is therefore unable support this part of the memorandum.

2 Information in the sustainability report regarding future developments and issues currently under negotiation

Under the Amending Directive, if members of the administrative, management or supervisory body can provide reasons why disclosure would seriously damage the company's market position, and if it does not hinder the understanding of the company's development, financial position, results and impacts of its activities, Member States may allow certain information to be omitted from the sustainability report. Ds 2014:45 proposes that this provision be introduced into Swedish law and that it is the board of directors that is allowed to specify these reasons. It does not specify where or to whom the board of directors is to specify the reasons. Rather, the provision must be understood as meaning that the board believes that such reasons, which, in the opinion of the Board should instead be set out in the legislation.

3 Date of publication of sustainability reports and corporate governance reports

According Ds 2014:45, the sustainability report may be issued as a separate report, without being part of the management report, and it may be published on the company website only. According to the proposal publication is then to take place within six months from the closing date for accounts and the management report is to state that the company has chosen this model. The corresponding rule for the date of publication is proposed to apply also to the corporate governance report, when it is published on the company's website only, but with reference made in the report. The information in the management report is to contain the address of the website where each report is available.

Under the proposal, companies need not publish either the sustainability report or the corporate governance report no later than the date of publication of the annual report, despite the fact that the management report is to include a reference to the site where these are available, and despite the auditor having to state whether these reports have been delivered within the same time period as the audit report, with the statements be appended to each report. It is the opinion of the Board that the corporate governance report at least, if it is published separately, is to be issued no later than simultaneously with the annual report

4 Diversity policy

Corporate governance reports for companies whose transferable securities are admitted to trading on a regulated market and constitute large undertakings are obliged under the Amending Directive to include information on the diversity policy which applies to the company's board of directors, (including aspects such as age, gender, education and professional background), as well as the objective of the diversity policy, how the policy has been applied during the financial year and its results. If the company does not apply a diversity policy, the reasons for this are to be stated in the corporate governance report. The Amending Directive stipulates that the requirement does not apply to small and medium-sized enterprises as defined in Article 3 of the Accounting Directive.

A requirement that companies is to have and implement diversity policies for their boards does not work in the Swedish corporate governance system, where it is the shareholders' meeting that appoints board members. The company, in the sense of the board and management, cannot develop a policy which is in any way binding for the shareholders' meeting or is to be applied by the meeting. It is not a task for the board and the CEO to develop a policy for the contents of the shareholders' decisions at the shareholders' meeting. The shareholders' meeting can, however, if a proposal is made by a shareholder, decide on a diversity policy, even if the policy is not binding for future meetings (or even the shareholders' meeting which has just voted to implement it), as long as the policy is not implemented in the company's articles of association.

As for who is to write a diversity policy or how it is to be applied, there are no provisions in the Amending Directive. Ds 2014: 45 states that this is an issue that lends itself to self-regulation.

In the opinion of the Board, the reporting requirement in the Amending Directive should be seen in the light of the contents of the Swedish Corporate Governance Code (the "Code"). Requirements concerning diversity on the board already exist in the Code. Under Rule 4.1 of the Code, the board of directors is to have an appropriate composition with regard to the company's operations, phase of development and conditions in general, exhibiting diversity and breadth in the elected members' competence, experience and background. Gender balance is to be sought. Under Code rule 2.6, in connection with the summons issued to the meeting where the election of

directors is to take place, the nomination committee is to issue a statement on the company's website regarding its proposals to the board with regard to what is stipulated concerning the composition of the board in rule 4.1. In particular, the nomination committee is to explain its proposal in light of the requirement in 4.1 that gender balance is to be sought.

In cases where the owners at the shareholders' meeting have not voted on a particular diversity policy, it is the view of the Board that Code rule 4.1 should be regarded as the kind of diversity policy that the Amending Directive requires. Companies are obliged to apply the Code's provisions under the comply or explain principle, i.e. either the company complies with the rule in question or it deviates from it and provides an explanation of the reasons for non-compliance and the solution adopted instead. The corporate governance report must contain a statement on whether the company's nomination committee complies with Code rule 4.1 or not, and the result of the application of the policy is the proposal to the board that the committee has submitted.

Stockholm, 31 March 2015

THE SWEDISH CORPORATE GOVERNANCE BOARD

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