The conundrum around directors remuneration for banks in Bahrain

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Recently, Law No. 21 of 2001 promulgating the Commercial Companies Law was amended by Law No. 28 of 2020 ("**Companies Law**"). One of the amendments pertained to Article 188, which deals with directors' remuneration. The Central Bank of Bahrain ("**CBB**") rulebook ("**CBB Rulebook**") contains provisions that deal with directors' remuneration. This led to commercial banks in the Kingdom of Bahrain ("**Bahrain**") questioning the implications of the amendments to the Companies Law on the banks. This article will analyse this question.

The CBB rulemaking power and instruments

The CBB is the sole regulator of the financial services sector in Bahrain. The CBB was established pursuant to Law No. 64 of 2006 with respect to promulgating the CBB and Financial Institutions Law, as amended ("**CBB Law**"). The CBB Law stipulates, amongst other things, the powers of the CBB, which includes, amongst other things, the power to regulate, develop and license regulated banking and financial services, exercise regulatory control over institutions that provide such services and issue regulations and directives.

The CBB issues regulatory instruments that licensees and other specified persons are legally obliged to comply with. These regulatory instruments are contained in the CBB Rulebook that is issued pursuant to the CBB Law. The contents of the CBB Rulebook have the formal status either of rules or guidance. Rules have a binding effect and breaches of rules constitute breaches of the CBB Law. If a licensee breaches a rule to which it is subject, it is liable to enforcement action by CBB and, in certain cases, criminal proceedings by the Office of the Public Prosecutor.

All CBB Rulebook content has the formal status of at least a directive. Some CBB Rulebook content may also have the status of regulations. Rulebook content that is categorised as a rule is therefore legally mandatory and must be complied with by those to whom the content is addressed.

CBB Law and the CBB Rulebook

Article 3 of Decree No. 64 of 2004 with respect to promulgating the CBB Law ("**2006 Decree**") provides that the provisions of the Companies Law shall apply to all matters that are not stipulated in the CBB Law.

According to Rule HC- 5.1.1 of Volume 1 and Volume 2 of the CBB Rulebook, both Islamic and conventional bank licensees must remunerate "**Approved Persons**" (defined in the CBB Rulebook as individuals holding certain specified positions in CBB licensees; who must be approved by the CBB prior to taking on those positions and must demonstrate that they are fit and proper. The list of positions subject to the CBB's Approved Persons regime vary according to the CBB license category, but generally cover directors and senior management, as well as certain other positions) and "**Material Risk Takes**" (defined in the CBB Rulebook as heads of significant business lines and any individuals within their control who have a material impact of the bank's risk profile including fixed income, foreign exchange, commodities, securitisation, sales areas, investment banking, commercial banking, equities, structured finance, lending and trading areas), fairly and responsibly.

Rule HC- 5.5.2 of the High Level Controls Module of Volume 1 and Volume 2 of the CBB Rulebook provides that the board of directors' remuneration must be capped so that total remuneration is in line with Article 188 of the Companies Law, in any financial year and has been approved by the shareholders.

Both Islamic and conventional banks are required to submit to the CBB and the Ministry of Industry, Commerce and Tourism ("**MOICT**") their annual audited financial statements within 3 months from the financial year end. Banks are required to make certain disclosures in its annual report or as appendices or in the notes to the audited financial statements at the discretion of the concerned bank pursuant to the

Public Disclosure Module of the CBB Rulebook.

One such disclosure is required under Rule PD-1.3.8(cc) of the Public Disclosure Module of Volume 1 and Volume 2 of the CBB Rulebook which provides that the aggregate remuneration paid to board members must be disclosed in the bank's annual report.

The Companies Law

Article 188 of the Companies Law provides that "*The Company's Article of Association shall specify the manner of determining the remuneration of the chairman and the members of the board, the total of which shall not exceed 10% of the net profits after deducting the legal reserves and distributing a profit of not less than 5% of the company's paid up capital. The general assembly may decide to pay an annual remuneration to the chairman and members of the board in the years in which the company has not achieved profits or the years in which no dividends are paid to the shareholders, provided that the minister concerned with trade affairs approves such payment.* ***The board of directors' report to the general assembly*** *shall include a comprehensive account of all payments that the chairman and members of the board of directors' obtained, each separately during the financial year, including salaries, profit shares, representation allowances, attendance allowances and expenses and the like. The report shall also include an account of the amounts paid to the members of the board in their capacities as employees and administrators and what they have received for technical, administrative or consulting services or any other business. The aforementioned report shall also include the remuneration of the executive management members, each separately including any salaries, privileges, benefits and shares*."

Analysis

Article 188 of the Companies Law provides, amongst other things, that the board of directors' report to the general assembly shall include a breakdown of the remuneration paid to each director. This requirement would apply to both CBB licensed and non-CBB licensed entities. In relation to publicly listed companies, the notice of the general assembly meeting, the agenda and the minutes of the meeting are required to be published and disclosed. The Companies Law and the CBB Rulebook does not contain mandatory provisions in relation to how directors' remuneration is disclosed in these documents. Generally, the agenda of the meeting would contain approval of the directors' remuneration for a particular year as an item to be discussed and approved in the general assembly without any details of such remuneration.

In relation to CBB licensed entities, according to the Public Disclosure Module of Volume 1 and Volume 2 of the CBB Rulebook, the aggregate remuneration paid to board members must be disclosed in the bank's annual report. However, in relation to non-CBB licensed entities, the Companies Law is silent in relation to how remuneration should be disclosed in its annual report. This is subject to any requirements under the relevant accounting standards adopted by the company.

Conclusion

Article 188 of the Companies Law requires that the board of directors' report to the general assembly shall include a breakdown of the remuneration paid to each director, whereas previously the requirement was to only set out the aggregate amount. For CBB licensed entities, according to the Public Disclosure Module of Volume 1 and Volume 2 of the CBB Rulebook, the aggregate remuneration paid to board members must be disclosed in the bank's annual report.

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