

Corporate Governance 2021

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Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Corporate Governance*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 a new chapter on Australia.

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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.

Lexology 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 J Gregory, for her continued assistance with this volume.



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Malaysia

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SKRINE

SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

- 1 | 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?

The corporate governance framework in Malaysia comprises laws, requirements and guidelines issued by the authorities to cover all listed and unlisted companies, with a particular focus on encouraging listed companies to adopt recommended corporate governance practices by using a 'comply or explain' approach. The primary sources are as follows.

Companies Act 2016

As Malaysia is a common law jurisdiction with its origins of law based on English common law, laws relating to the good governance of companies, such as directors' duties, the rights of shareholders and accountability to shareholders and other stakeholders, can be found in case law and are also codified in the Companies Act 2016. This Act came into force on 31 January 2017 and repealed the Companies Act 1965. It regulates the management, duties and accountability of directors, the rights of shareholders and the reporting and disclosure requirements for private, public and listed companies and corporations, including foreign companies and limited liability partnerships. Failing to comply with the Companies Act 2016 amounts to an offence, and the company may be imposed fines and the company's directors and officers may be fined or imprisoned. The directors and officers of the company may also incur personal liability for breaching certain provisions of the Companies Act 2016.

Financial Services Act 2013 and Islamic Financial Services Act 2013

Considering that strong and good corporate governance of financial institutions is integral to a sound and stable financial system, the Financial Services Act sets out the governance controls, duties and obligations to be observed by financial institutions and insurance and other businesses within the financial sector, such as money broking and payment systems. The Financial Services Act also provides for the powers of Bank Negara Malaysia (also known as the Central Bank of Malaysia) regarding the regulation and supervision of financial institutions and financial sector businesses and the oversight of the money market and foreign exchange market. The Islamic Financial Services Act 2013 contains similar powers to those the Financial Services Act grants to the Bank Negara Malaysia for regulation and supervision, but regarding Islamic financial institutions, *takaful* insurance and other businesses within the Islamic banking sector, and the oversight of the Islamic money market and Islamic foreign exchange.

Capital Markets and Services Act 2007

Also central to the stable and strong capital market of Malaysia is its strong and good governance. The Capital Markets and Services Act 2007 contains provisions that regulate the activities of the markets and intermediaries in the Malaysian capital markets and regulates activities that are not consistent with investor and shareholder protection, such as prohibitions on insider trading, as well as rules on takeovers, mergers and acquisitions of listed and unlisted public companies.

Whistle-blower Protection Act 2010

To ensure that there is a mechanism for reporting activities that are inconsistent with the good governance of companies and businesses, the Whistle-blower Protection Act 2010 was enacted to encourage and give protection to persons making disclosures of improper conduct in the public and private sector.

Malaysian Anti-Corruption Commission Act 2009

The Malaysian Anti-Corruption Commission Act 2009 provides for the establishment of the Malaysian Anti-Corruption Commission and sets out the liability for companies and individuals who provide or attempt to provide 'gratification' or engage in corrupt practices. 'Gratification' includes money, donation, gift, employment or any service or favour of any description including protection from any penalty.

A corporate liability provision was introduced to the Act by way of a new section 17A which came into force on 1 June 2020. Section 17A(1) states that a commercial organisation commits an offence if a person associated with the organisation corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with the intent to obtain or retain business for the commercial organisation or to obtain or retain an advantage in the conduct of business for the commercial organisation.

If a company is found guilty of an offence under this new section, the senior management, being any director, controller, officer or another person who is concerned in the management of its affairs at the time of the commission of the offence, will be deemed to have committed the offence (section 17A(3)) unless they succeed in establishing the 'due diligence' defence (ie, that the offence was committed without his or her consent or connivance, and that he or she exercised due diligence to prevent the commission of the offence as he or she ought to have exercised having regard to the nature of his or her function and circumstances). Therefore, the director, controller, officer or another person concerned in management must prove that it had in place 'adequate procedures' designed to prevent persons associated with the company from undertaking such corrupt conduct.

The Guidelines on Adequate Procedures issued by the Prime Minister's Department on what adequate procedures should be implemented by commercial organisations include top management involvement, periodic risk assessments and putting in place appropriate

due diligence, screening, policies and procedures which are reviewed and assessed periodically, together with audit investigations.

Main Market Listing Requirements issued by Bursa Malaysia Securities Berhad

The Main Market Listing Requirements issued by Bursa Malaysia Securities Berhad (Bursa Malaysia) (the Listing Requirements) apply to public listed companies on the Main Market and must be complied with in addition to the requirements under the Companies Act 2016. The Listing Requirements make it mandatory for public listed companies to set out in their annual reports, on a comply or explain basis, the extent of their adherence to the Malaysian Corporate Governance Code issued by the Securities Commission of Malaysia. Failure to comply with any of the Listing Requirements will amount to a breach, and actions may be taken against the listed issuer or penalties may be imposed, or both.

Malaysia Corporate Governance Code 2017 issued by the SC

The Malaysia Corporate Governance Code (as revised on 28 April 2021) sets out 48 requirements (known as 'practices') to be complied with by public listed companies on good corporate governance practices, including the requirement for boards of public listed companies to comprise a majority of independent directors of whom at least 30 per cent are female, for members of the boards of public listed companies to have a maximum tenure of nine years to be an independent director on the same board and that the composition of the audit, nomination and remuneration committees must comprise a majority of independent directors. The Malaysian Code on Corporate Governance also addresses the need for companies to manage Environmental, Social and Governance (ESG) risks and opportunities, with the introduction of new best practices that emphasise the need for collective action by boards and senior management.

A listed issuer must provide an overview of the application of the principles of the Malaysia Corporate Governance Code in its annual report. In addition, listed issuers must disclose the application of each practice set out in the Malaysia Corporate Governance Code during the financial year to Bursa Malaysia in the form of a corporate governance report and announce it together with the annual report. When there is a departure from the Malaysia Corporate Governance Code, a listed issuer is required to explain the departure and the alternative approach adopted. There are certain practices that are only applicable to large companies, which are companies on the FTSE Bursa Malaysia Top 100 Index or companies with a market capitalisation of 2 billion ringgit or above at the start of their financial year, although mid-cap and small-cap companies are encouraged to adopt them. Where applicable, a listed issuer should advocate the adoption of the Malaysian Code on Corporate Governance practices by its subsidiaries in order to promote a holistic adoption within the group.

Guidelines on Conduct of Directors of Listed Corporations and their subsidiaries

On 30 July 2020, the Securities Commission of Malaysia issued the Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries which requires, among other things, directors to exercise their powers for a proper purpose, in good faith and in the best interest of the corporation, and sets out requirements for the conduct of directors, dealing with conflicts of interest and group governance. The Guidelines took effect on issuance, save for chapter 5 on group governance which came into effect on 1 January 2021.

Corporate Governance Policy Document issued by the Central Bank of Malaysia

The Corporate Governance Policy Document issued by the Central Bank of Malaysia (the BNM CG Guidelines) sets out the minimum corporate governance standards expected to be implemented by

financial institutions, such as licensed banks, licensed investment banks, licensed Islamic banks, licensed insurers, licensed *takaful* operators and financial holding companies. These include requirements for the posts of the chair of the board and the chief executive to be held by different individuals and for the carrying out of annual board evaluations. Non-compliance with the BNM CG Guidelines amounts to an offence under either the Financial Services Act or the Islamic Financial Services Act (where applicable).

Responsible entities

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

Companies Commission of Malaysia

The Companies Commission of Malaysia was established pursuant to the Companies Commission Act 2001 and is responsible for the administration and enforcement of the Companies Act 2016. The Commission serves as an agency to incorporate companies and register businesses as well as to provide company and business information to the public.

Central Bank of Malaysia or Bank Negara of Malaysia

The Bank Negara of Malaysia is a corporate body established pursuant to the Central Bank of Malaysia Act 2009. The principal objective of the BNM is to promote monetary and financial stability conducive to the sustainable growth of the Malaysian economy. The BNM regulates financial institutions and has the power to issue guidelines, by-laws, circulars, standards or notices.

Securities Commission of Malaysia

The Securities Commission was established pursuant to the Securities Commission Act 1993. It has the responsibility to regulate and develop the capital market in Malaysia. The Securities Commission has direct responsibility for rule-making, enforcing regulations pertaining to the capital market, supervising capital market activities and institutions and regulating all entities and persons licensed under the Capital Markets and Services Act 2007.

Bursa Malaysia Securities Berhad

Bursa Malaysia is a wholly-owned subsidiary of Bursa Malaysia Berhad, which is the stock exchange of Malaysia. Bursa Malaysia is the main regulator of listed issuers in Malaysia with the primary responsibility of overseeing compliance by listed issuers with the Listing Requirements.

Malaysian Anti-Corruption Commission

The Malaysian Anti-Corruption Commission (MACC) was established pursuant to the MACC Act 2009. Its function is to detect and investigate offences committed, suspected offences, suspected attempts to commit any offence or suspected conspiracies to commit any offence under the MACC Act.

Malaysian Minority Shareholders Watchdog Group

The Malaysian Minority Shareholders Watchdog Group (MSWG) was established as a government initiative in 2000 to protect the interests of minority shareholders through shareholder activism. Among the objectives of the MSWG is to monitor for breaches and non-compliance in corporate governance practices by listed issuers. The MSWG has been very active in this regard and regularly sends representatives to attend annual general meetings of public listed companies and pose questions prior to the meetings on certain issues related to the corporate governance of the companies.

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

- 3 | 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?

Shareholders are conferred under the Companies Act 2016 with the power to appoint and remove a director before the expiration of the director's term of office by way of an ordinary resolution passed by a simple majority of more than half of these members. The constitution of the company may set out stricter requirements in relation to the appointment or removal of a director, for example, requiring the unanimous vote of members for the removal of directors. However, pursuant to section 206(2) of the Companies Act 2016, a director may only be removed by an ordinary resolution, and special notice of the intention to move it must be provided to the company at least 28 days before the meeting to which it is to be moved. A copy of the special notice is also required to be sent to the director concerned. This director has an entrenched right to be heard and to oppose the proposed removal.

Shareholder decisions

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

The following are some of the matters reserved to shareholders under the Companies Act 2016:

- alteration or amendment of the company's constitution;
- approval for issuing and allotting shares, granting rights to subscribe for shares, converting any security into shares or allotting shares under an agreement or option or offer;
- reduction of the share capital of the company; and
- the annual approval of fees and benefits payable to directors.

In addition to the above, the constitution of the company or the shareholders' agreement may further specify matters reserved to the shareholders that the directors will not be able to carry out without first obtaining the affirmative vote of the shareholders.

The Companies Act 2016 does not set out matters that are subject to a non-binding shareholder vote. However, under the Companies Act 2016, there is a new provision giving powers to the shareholders to make recommendations to the board on matters affecting the management of the company, known as the 'management review'. This recommendation is not binding on the board unless the recommendation is in the best interest of the company, and it is subject to either the right of the management review being provided in the constitution or the recommendation being passed as a special resolution (ie, an affirmative vote by shareholders holding 75 per cent of the voting rights in the company).

Disproportionate voting rights

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

The Companies Act 2016 allows for disproportionate voting rights and for limits to be placed on the voting rights of the shareholders. A company may issue different classes of shares and attach different voting rights to the shares in each class. Pursuant to section 90(1), a company with different classes of shares must state in its constitution prominently that the company's share capital is divided into different classes of shares and the voting rights attached to the shares in each class.

The company may also issue shares that do not allow the holders to vote on resolutions or give them any right to participate beyond a specified amount in any distribution, whether by way of dividend, on redemption or in a winding up or otherwise. These are known as 'preference shares' or 'non-voting' shares. The descriptive title of non-voting shares shall include the words 'non-voting shares', and those words must appear legibly on any share certificate, prospectus or directors' report issued by the company (section 90(1), Companies Act 2016).

Shareholders' meetings and voting

- 6 | 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, a shareholder (other than a holder of preference shares) has the right to attend, participate and speak at a meeting and to vote by way of a show of hands on every resolution of the company, as well as the right to one vote for each share by way of a poll.

Under the Companies Act 2016, a shareholder may appoint a proxy, and the proxy shall be entitled to vote on a show of hands provided that he or she is the only proxy appointed by the shareholder. If the shareholder appointed more than one proxy, the proxies shall only be entitled to vote by way of a poll, and the appointment of the proxies shall not be valid unless the shareholder has specified the proportions of the shareholder's holdings to be represented by each proxy.

For private companies, the use of written resolutions without the need to hold a members' meeting is allowed except for in the case of the removal of a director or auditor before the expiration of his or her term (section 297, Companies Act 2016).

The passing of written resolutions is no longer provided in the Companies Act 2016 for public companies, and resolutions of members can only be passed at general meetings.

Virtual meetings of shareholders are permitted by the Companies Act 2016 unless the company's constitution provides otherwise. These virtual meetings may be convened at more than one venue using any technology or method that enables the shareholders to participate and to exercise their rights to speak and vote at the meeting. The Malaysian Code on Corporate Governance provides that the board must ensure that the conduct of a virtual general meeting (whether held in a fully virtual or a hybrid form) support meaningful engagement between the board, senior management and shareholders. Further, it provides that listed companies should leverage technology to facilitate voting including voting in absentia and remote shareholders' participation in general meetings.

Shareholders and the board

- 7 | 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?

Shareholders have the power under the Companies Act 2016 to require the directors of the company to convene a shareholders' meeting. Pursuant to section 310, directors are obliged to call for a meeting of shareholders on receipt of a request to do so from:

- any shareholder holding at least 10 per cent of the paid-up capital with the right of voting at members' meetings of the company, excluding any paid-up capital held as treasury shares; or
- if the company has no share capital, members who represent at least 5 per cent of the total voting rights of all members with a right of voting at members' meetings.

If the directors do not give notice of the convention of the meeting within 14 days from the date of the request and do not proceed to hold the meeting within 28 days after the date of this notice, the members who requested the meeting, or any of the members representing more than half of the total voting rights of all the members who requested the meeting, may call for a members' meeting.

There is no requirement under the law for the board of directors to circulate statements by dissident shareholders.

Controlling shareholders' duties

8 | 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?

Controlling shareholders do not owe a statutory duty to the company or to non-controlling shareholders of the company.

However, non-controlling shareholders have the right to bring an action in court for minority oppression on the following grounds:

- that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the shareholders including himself or herself or in disregard of his or her interests as shareholders of the company; or
- that an act of the company has been or is threatened to be committed, or that a resolution of the shareholders has been passed, or is proposed, that unfairly discriminates against or is otherwise prejudicial to one or more of the shareholders, including the shareholder himself or herself.

A statutory derivative action may also be brought by a shareholder on behalf of the company to remedy a wrong done against the company by its own board of directors or controlling shareholders. The derivative action provided under section 347 of the Companies Act 2016 allows a shareholder, with leave of the court, to initiate, intervene in or defend a proceeding on behalf of the company.

Shareholder responsibility

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

Generally, the legal position is that a company is a separate legal entity, and the shareholders of a company are not liable for acts or omissions of the company except regarding an unpaid amount of shares in the case of a winding-up of the company in accordance with section 435 of the Companies Act 2016.

However, in certain circumstances, the court may order a lifting of the corporate veil whereby persons who are responsible may be held personally liable for the acts or purported acts of the company. A court may grant this relief where there is actual fraud or unconscionable or inequitable conduct amounting to fraud in equity, as set out in the Federal Court of Malaya decision on 25 March 2021 in the case of *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 1 LNS 301.

Employees

10 | What role do employees have in corporate governance?

Financial institutions are required to establish a whistle-blowing policy that sets out avenues for employees to come forward to raise legitimate concerns on any illegal, unethical or questionable practices in relation to the governance of the company. The Malaysia Corporate Governance Code 2017 also recommends that employees be encouraged by the board to report genuine concerns regarding the company.

The Whistle-blower Protection Act 2010 provides protection to whistle-blowers who voluntarily come forward to report or reveal wrongdoings. The identity of the whistle-blower and the information provided are required by the Act to be kept confidential. Whistle-blowers are also given immunity from any civil, criminal or disciplinary action and are given protection against detrimental action owing to revealing wrongdoings.

CORPORATE CONTROL

Anti-takeover devices

11 | Are anti-takeover devices permitted?

Under the Rules on Takeovers, Mergers and Compulsory Acquisitions issued by the Securities Commission, the target's board cannot take any action or make any decision (other than in the ordinary course of business) to frustrate an offer during the offer period or if it has reason to believe that a bona fide takeover offer is imminent unless an ordinary resolution is passed in a shareholders' meeting.

In a hostile bid, the target's board may recommend that the shareholders reject the bid provided that the recommendation is based on the evaluation and recommendations by an independent adviser on the 'fairness and reasonableness' of the offer. The board may also seek an alternative person to make a takeover offer.

Issuance of new shares

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

Generally, the board is required to obtain shareholder approval by way of resolution to issue and allot new shares in the company, unless the exceptions under section 75(2) of the Companies Act 2016 apply.

The Companies Act 2016 provides for shareholders' pre-emptive rights to acquire newly issued shares. When new shares are to be issued by a company that ranks equally with existing shares as to voting or distribution rights, holders of existing shares must first be offered these new shares in proportion to their existing shareholding in the company in a way that would (if the offer was accepted) maintain the relative voting and distribution rights of those existing shareholders, unless the company's constitution states otherwise.

Restrictions on the transfer of fully paid shares

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

Private companies limited by shares are legally required by the Companies Act 2016 to restrict the transfer of shares in the company. Section 106 confers the power to the directors to pass a resolution to refuse or delay the registration of a transfer of shares within 30 days of the receipt of the instrument of transfer, but the reasons for refusing or delaying the registration must be set out in the resolution.

Compulsory repurchase rules

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

Share repurchases by the company of its issued and paid-up capital (also known as share buy-back) are permitted under the Companies Act 2016, subject to passing the solvency test and obtaining the approval of shareholders (for listed issuers). However, these repurchases are not mandatory.

In the context of a takeover, a bidder can compulsorily acquire the shares of the remaining minority shareholders who do not accept a takeover offer if the bidder has successfully acquired 90 per cent of the nominal value of the shares of that class for which the offer has been made within four months of making that offer. This excludes any shares already held by the bidder and its persons acting in concert at the date of the takeover offer.

Dissenters' rights

15 | Do shareholders have appraisal rights?

Shareholders do not have any rights under the Companies Act 2016 or under law to sell their shares to the company if the shareholders disagree with a merger or other share transaction.

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

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

The board structure for listed companies is one-tier. The board may delegate any of their powers to a board committee established by the board.

Board's legal responsibilities

17 | What are the board's primary legal responsibilities?

The board's primary legal responsibility is to manage the business and affairs of the company and to act in the best interest of the company. The board is also required to:

- approve the financial statements of the company, prepare the directors' report and circulate it to members of the company;
- ensure the accounting and other records are kept to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets to be prepared; and
- hold annual general meetings (public companies).

Board obligees

18 | Whom does the board represent and to whom do directors owe legal duties?

Directors owe a legal duty towards the company to act in its best interests. In the case of a non-independent director, in the event of any conflict between his or her duty to the company and the nominator, section 217 of the Companies Act 2016 and the Guidelines on Conduct of Directors of Listed Corporations and their subsidiaries issued by the Securities Commission of Malaysia make it clear that it is the director's duty to act in the best interest of the company that prevails.

Enforcement action against directors

19 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgement rule?

A company can take legal action against its directors for breaches of any of the directors' duties owed towards the company (eg, the duty to act in the best interest of the company or the duty to not to secretly profit through their position). In addition, the Registrar of Companies may also take enforcement action against the director of a company where there is a breach of his or her statutory duties.

Under the business judgement rule under section 214 of the Companies Act 2016, a director is deemed to fulfil his or her duty to

exercise reasonable care, skill and diligence if he or she exercises the knowledge, skill and experience that may reasonably be expected of a director with the same responsibilities and any additional knowledge, skills and experience the director has, if he or she fulfils the following requirements:

- he or she made the business decision for a proper purpose and in good faith;
- he or she does not have a material personal interest in the subject matter of the business decision;
- he or she was informed about the subject matter of the business decision to the extent the director reasonably believed to be appropriate under the circumstances; and
- he or she reasonably believed that the business decision was in the best interest of the company.

Care and prudence

20 | Do the duties of directors include a care or prudence element?

The duties of directors include the duty to:

- act in good faith in the best interests of the company;
- exercise reasonable care, skill and diligence;
- exercise their powers for a proper purpose;
- exercise sound and independent judgement (business judgement rule);
- not make secret profits; and
- not allow any conflict between their duties as directors and their personal interests.

Board member duties

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

Section 213 of the Companies Act 2016 requires directors to perform their duties with a standard of knowledge, skill and experience that may reasonably be expected of another director with the same responsibilities, along with any additional knowledge, skill and experience that the director has. This is encapsulated as part of the business judgement rule.

Delegation of board responsibilities

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

Generally, under the Companies Act 2016, the board has the power to delegate its powers to any committee of the board and any director, officer, employee, expert or other person. This power may, however, be limited by the constitution of the company or by a resolution of the board of directors or members of the company. Where the board has delegated any power, the board remains responsible for the exercise of the power by the person it has been delegated to as if the power had been exercised by the directors themselves. The directors would not be responsible for acts of a person with delegated powers and would have a defence if the directors have reasonable grounds to believe that the person exercised the power in conformity with the duties imposed on the directors under the Companies Act 2016 and the constitution of the company.

Non-executive and independent directors

23 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?

The Main Market Listing Requirements issued by Bursa Malaysia Securities Berhad (Bursa Malaysia) (the Listing Requirements) requires the board of a listed entity to have at least two independent directors or for independent directors to comprise one-third of the board of directors, whichever is higher. An independent director is defined as a director who is independent of management and free from any business or other relationship that could interfere with exercising independent judgement or the ability to act in the best interests of an applicant or a listed issuer.

The Bank Negara Malaysia Corporate Governance Guidelines require the boards of financial institutions to have a majority of independent directors at all times. In addition, the Guidelines provide that unless Bank Negara Malaysia approves it in writing, a board of a financial institution must not have more than one executive director.

The Malaysia Corporate Governance Code (as revised on 28 April 2021) recommends that at least half of the board of public companies comprises independent directors. The Code further recommends that the tenure of an independent director not exceed a cumulative term limit of nine years. Upon completion of the nine years, an independent director may continue to serve on the board as a non-independent director, subject to the approval of the annual shareholders' meeting granted by a two-tier voting process.

There is no differentiation between the duties of executive and non-executive directors. All directors owe the same fiduciary duties to the company.

The Main Market Listing Requirements and the ACE Market Listing Requirements, collectively the 'Listing Requirements', were amended by Bursa Securities Malaysia Berhad on 13 August 2020 to include an amendment to the definition of 'independent director' such that the cooling-off period before a non-independent director or an existing or former officer (other than an independent director) of the listed issuer or any of its related corporations (collectively 'listed corporation') is eligible to be appointed as an independent director of a listed issuer has been extended from two years to three years. The revised criteria set out above will apply to any person who is appointed as an independent director on or after 1 October 2020.

Board size and composition

24 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?

The law does not prescribe limitations on the size of the board of a company, provided that there is at all times at least one director who is a local resident in the case of a private company and a minimum of two local resident directors in the case of a public company. The Companies Act 2016 requires directors to be natural persons who are at least 18 years of age. Directors of financial institutions must not be active politicians and must fulfil the 'fit and proper' requirements set by Bank Negara Malaysia (BNM).

In addition to the above, a person cannot be a director of a company where the person:

- is an undischarged bankrupt person, whether within Malaysia or elsewhere;
- has been convicted of an offence relating to the promotion, formation or management of a corporation, whether within Malaysia or elsewhere; or
- has been convicted of an offence involving bribery, fraud or dishonesty, whether within Malaysia or elsewhere.

The office of a director is vacated on the occurrence of any of the above events. Generally, the board will have the power to appoint a person as a director to fill any casual vacancy pending the next annual general meeting or until such time as provided in the constitution of the company.

The BNM requires financial institutions to make corporate governance disclosures on board compositions, and listed issuers are also required to disclose their policies on board composition in the annual report.

Board leadership

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

For financial institutions, the Bank Negara Malaysia Corporate Governance Guidelines (the BNM CG Guidelines) requires that the chair of the board not be an executive director and must not have served as a chief executive of the financial institution in the past five years.

In the Malaysia Corporate Governance Code, it is stated that the positions of chair and CEO are to be held by different individuals. The division of the responsibilities of the chair and the CEO should be clearly defined in the board charter.

Board committees

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

Financial institutions are required by the BNM CG Guidelines to establish the following board committees:

- nominations committee;
- remuneration committee;
- risk management committee; and
- audit committee.

Each committee must:

- have at least three directors;
- have a majority of independent directors;
- be chaired by an independent director;
- not permit the chair of the board to chair any of the board committees; and
- not have any executive director in its membership except for in the nominations committee.

Listed issuers are required by the Listing Requirements to establish a nominations committee and an audit committee. The Malaysia Corporate Governance Code also requires the establishment of a remuneration committee. These committees must exclusively comprise non-executive directors, a majority of whom must be independent.

The chair of the board should not be a member of the audit committee, nomination committee or remuneration committee.

Board meetings

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

There is no minimum number of board meetings per year prescribed by the law. Notwithstanding this, the Bursa Malaysia Corporate Governance Guide stipulates that 'whilst the minimum number of board meetings is not prescribed, it would be in the best interest of the company for the board to meet regularly (ie, at least five meetings if not more frequently as circumstances dictate)'.

The Listing Requirements provide that a director of a listed issuer must attend more than 50 per cent of the total board of directors' meetings held during the financial year, otherwise the office of a director shall become vacant.

For financial institutions, the BNM requires a director to attend at least 75 per cent of the board meetings held in each financial year.

Board practices

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

The Companies Act 2016 does not stipulate these requirements. Under chapters 9 and 15 of the Listing Requirements, a listed issuer is required to disclose the following, among other things, in its annual report:

- the total number of board meetings held;
- the number of board meetings attended by each director and the details of the membership of board committees; and
- the processes the nomination and audit committee undertake in respect of their functions.

Financial institutions must have a board charter that sets out the mandate, responsibilities and procedures of the board and the board committees, including matters reserved for the board's decision. This charter must be published on the company's website.

Board and director evaluations

29 | 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?

The Malaysia Corporate Governance Code (as revised on 28 April 2021) provides that the board of a listed issuer should undertake a formal and objective annual evaluation of its effectiveness, and the board of a large company (as defined under the Code) should engage independent experts at least every three years to facilitate the board's evaluations. The board should disclose how the assessment was carried out, its outcome, actions taken and how it has or will influence board composition. The Bank Negara of Malaysia Corporate Governance Guidelines state that boards of financial institutions are required to carry out annual board evaluations to objectively assess the performance and effectiveness of the board, board committees and individual directors, and that recommend that a board periodically engage external consultants or experts to assist in and lend objectivity to annual board evaluations.

REMUNERATION

Remuneration of directors

30 | 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 Main Market Listing Requirements (the Listing Requirements) require that the fee payable to a non-executive director is a fixed sum and not a commission on or percentage of the profits or turnover. Salaries payable to executive directors should also not include a commission on or percentage of turnover.

The Malaysia Corporate Governance Code (as revised on 28 April 2021) states that boards must have in place policies to determine the remuneration of directors, which takes into account the demands, complexities and performance of the company, as well as the skills and experience required. The remuneration package for directors shall be determined on the basis of the directors' merit, qualifications and competence, with regard to the company's operating results, and performance in managing material sustainability risk and opportunities, individual performance and comparable market statistics.

Generally, loans to directors under the Companies Act 2016 are prohibited. There are limited exceptions to this prohibition that include where the loan is granted to an executive director and the company has passed a resolution approving a scheme for granting loans to employees.

Remuneration of senior management

31 | 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?

The Malaysia Corporate Governance Code states that boards must have in place policies and procedures to determine the remuneration of senior management, which take into account the demands, complexities and performance of the company as well as the skills and experience required. The remuneration package should be determined on the basis of the senior management's merit, qualifications and competence, with regard to the company's operating results, and performance in managing material sustainability risk and opportunities, individual performance and comparable market statistics. Companies are encouraged by the Code to fully disclose the detailed remuneration of each member of the senior management on a named basis.

In accordance with the Bank Negara Malaysia Corporate Governance Guidelines (the BNM CG Guidelines), the board of a financial institution is required to oversee the remuneration of the chief executive, and the remuneration of senior management must be approved by the board annually. The BNM CG Guidelines provide that for senior management:

- a portion of the remuneration should consist of variable remuneration to be paid on the basis of individual, business-unit and institution-wide measures that adequately assess performance; and
- the variable portion of remuneration increases along with the individual's level of accountability.

Say-on-pay

32 | Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

The fees of the directors and any benefits payable to the directors, including any compensation for the loss of employment of a director or former director of a public company or of a listed company and its subsidiaries, is required by the Companies Act 2016 and the Listing Requirements to be approved by shareholders annually at a general meeting.

For private companies, section 230(2) of the Companies Act 2016 provides that the board may, subject to the constitution, approve the fees payable to directors (including any compensation for loss of employment of a director or former director). However, shareholders holding at least 10 per cent of the total voting rights and who consider that the payment was not fair to the company may require the company to pass a members' resolution to approve the payment. Unless the members' approval was obtained, the payment constitutes a debt due by the director to the company.

DIRECTOR PROTECTIONS

D&O liability insurance

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

Directors' and officers' liability insurance is permitted and is common practice in Malaysia. The Companies Act 2016 permits the company, subject to the approval of the board, to pay, whether directly or indirectly, the costs of the insurance permitted to be affected by the company in accordance with the Companies Act 2016 and the constitution of the company.

Indemnification of directors and officers

34 | 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?

There are constraints set out in the Companies Act 2016 in respect of the indemnity that a company may provide to its directors and officers. For example, a company is not permitted to indemnify its directors and officers:

- against liability to pay a fine imposed in any criminal proceedings or to pay a penalty to a regulatory authority for non-compliance with any requirements of a regulatory nature (section 289(4)(b)(i)); or
- on costs incurred in defending or settling a claim or proceedings related to the defence of criminal proceedings brought against a director or officer in which the director or officer is convicted, or for the defence of civil proceedings brought against a director or officer by the company, or by an associated company, in which judgment is given against the director or officer (section 289(4)(b)(ii)).

Advancement of expenses to directors and officers

35 | To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

The Companies Act 2016 permits companies, with the approval of the board, to effect insurance for directors and officers covering the following:

- costs incurred by directors or officers in defending or settling any claim or proceeding relating to any such liability; or

- costs incurred by directors or officers in defending any proceedings that have been brought against them in relation to any act or omission in their capacity as directors or officers:
 - in which they are acquitted;
 - in which they are granted relief under the Companies Act 2016; or
 - where proceedings are discontinued or not pursued; and
- civil liability for any act or omission in their capacity as a directors or officers.

The above relates to costs that have already been incurred rather than advance payments to cover those costs. There are no specific provisions under the Companies Act 2016 on advance expenses to these directors or officers.

Exculpation of directors and officers

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

Under the Companies Act 2016, any provision (whether contained in the constitution or in any contract with a company or otherwise) for exempting any director from, or indemnifying him or her against, any liability that under the law would attach to him or her any negligence, default, breach of duty or breach of trust, of which he or she may be guilty of in relation to the company, shall be void.

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

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

The constitutions or by-laws of companies are publicly available in Malaysia and can be extracted from the Companies Commission of Malaysia upon payment of a small administrative fee.

The constitutions of listed issuers are published by Bursa Malaysia Securities Berhad (Bursa Malaysia) on its website as part of the listed issuer's announcements.

Company information

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

All companies are required to disclose by lodging statutory forms with the Competition Commission the following information as required under the Companies Act 2016:

- information on shares and shareholders, including information on the beneficial owners of shares, and any issue, allotment or transfer of shares;
- the appointment and removal of the directors, the company secretary and the auditor of the company; and
- information on the registration or release of charges created by the company over its property or any of its undertakings.

Listed issuers are required to comply strictly with the disclosure framework embedded in the Main Market Listing Requirements issued by Bursa Malaysia, which includes:

- related-party transactions involving the direct or indirect interests of a related party (director, major shareholder, person connected with this director or major shareholder of the listed issuer or related companies within the group of companies of the listed issuer);
- corporate transactions, such as the purchase or sale of shares or assets and entering into a joint-venture agreement; and

- other material information, such as information concerning the company's business, property, financial condition or prospects, any event that may affect the rights or interests of the listed company or any event that may affect the size of the public holdings of its securities.

The listed issuers' obligation to disclose this information is triggered depending on the type of disclosure and whether the appropriate threshold has been met (eg, the percentage ratio and materiality of an event).

HOT TOPICS

Shareholder-nominated directors

- 39 | 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?

Pursuant to the Main Market Listing Requirements issued by Bursa Malaysia Securities Berhad (Bursa Malaysia) (MMLR), a member intending to propose a person as a director shall, at least 11 full days before the general meeting, leave at the registered office of the listed issuer a notice of his or her intention to propose the person for election as a director. Under the Malaysia Corporate Governance Code (as revised on 28 April 2021), companies should disclose in their annual reports how candidates for non-executive director positions were sourced, including whether these candidates were recommended by major shareholders, existing board members or management. The MMLR requires the nominating committee of the listed company to set out a statement in the annual report on the election process of directors and the criteria used by the nominating committee in the board selection process.

Further, the Best Practice Guide on Annual General Meetings for Listed Issuers (the Guide) prepared by the Malaysian Institute of Chartered Secretaries and Administrators published on the Bursa Malaysia website stipulates that:

[The] board should note that shareholders are permitted to propose candidates to be appointed to the Board and in such instances, the nominating committee should also assess the proposed candidate and should respond to the shareholder with the result of such assessment.

The Guide is only a guidance document and is not binding on companies.

Shareholder engagement

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

Shareholder engagement by a company is very important and is usually carried out by the management of the company. This engagement occurs not only at the annual general meetings but also prior to and after them to provide clarifications on the directions in which the company is being steered.

A public company is required to hold an annual general meeting in addition to any other general meetings held during its calendar year. Shareholders may exercise their rights to ask questions, provide views and vote at general meetings and to better understand the company's business, governance and performance. The MCCG states that all directors should attend the general meetings.

Non-members, including outside counsel, may only attend a general meeting on the invitation of the company.

Sustainability disclosure

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

Listed issuers are required to issue a sustainability statement in respect of its management of economic, environmental and social risks and opportunities (including their governance structure) in their annual report. Bursa Malaysia also issued a Sustainability Reporting Guide to listed issuers in the preparation of the sustainability statement.

The Companies Act 2016 stipulates that companies may incorporate a business review report (which is voluntary) that will form part of the directors' report. The report may include information on the company's policies in relation to environmental, social and community issues, including the impact of the company's business on the environment, and the effectiveness of these policies.

CEO pay ratio disclosure

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

Currently, there is no such requirement under the law.

Gender pay gap disclosure

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

Currently, there is no such requirement under the law.

UPDATE AND TRENDS

Recent developments

- 44 | Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

The Securities Commission of Malaysia issued the Annual General Meeting Corporate Governance Checklist for Shareholders (AGM CG Checklist) on 5 February 2020, with the aim of promoting meaningful dialogue between shareholders and the board of directors at the annual general meetings of companies. The AGM CG Checklist was developed as one of the deliverables under the Securities Commission's Corporate Governance Strategic Priorities (2017–2020).

The Joint Committee on Climate Change (JC3), co-chaired by the Securities Commission and Bank Negara Malaysia, was formed in September 2019. The JC3 aims to look at and create greater synergy in the development of climate-related solutions for the capital and financial markets. It is expected that more green and specialised financial products and services will be on offer by financial institutions, such as custom products for female entrepreneurs and small and medium-sized businesses, green solutions that promote environmental sustainability, and innovative solutions that promote physical and mental well-being.

At its meeting on 24 February 2021, the JC3 reviewed the initiatives completed during 2020 against disclosure practices of selected financial institutions against recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD). The JC3's discussed priorities for 2021, including the development of risk management guidance documents, support of the voluntary implementation of climate-related disclosures aligned with TCFD recommendations, and the expansion of relevant stakeholders engagements on conditions for the structuring of green financial products and solutions. Technical

capacity building programmes with a spotlight on climate-related disclosures, climate scenario analysis and risk management will be some of its priorities in 2021.

Section 17A was introduced into the Malaysian Anti-Corruption Commission Act 2009 in May 2018, which provides for corporate criminal liability for corruption offences and for the personal liability of persons (eg, a director, controller or officer) involved in the management of a commercial organisation, unless it can be proven that the corporation has in place adequate procedures to prevent associated persons from committing corrupt acts. On 27 May 2020, the government issued a gazette notification appointing 1 June 2020 as the date on which section 17A came into force. In line with this, Bursa Malaysia Securities Berhad also amended the Main Market Listing Requirements to encapsulate anti-corruption measures that took effect on 1 June 2020 where listed issuers are required to ensure that policies and procedures on anti-corruption and whistle-blowing are established and maintained for the listed issuer and its subsidiaries.

The Companies Commission of Malaysia issued the Guidelines for the Reporting Framework for Beneficial Ownership of Legal Persons on 27 February 2020 (Guidelines), which requires companies to notify and submit beneficial ownership information to the Companies Commission. A 'beneficial owner' is defined as 'the ultimate owner of the shares and does not include a nominee of any description'. It refers to natural persons who ultimately own or control a legal entity or arrangement. On 17 December 2020, the Companies Commission issued a revised version of the Guidelines, and FAQs on the Extension of Time for the Transitional Period of the Guidelines to a date to be determined by the Registrar. These will come into force at a later date, to be determined by the Registrar, to coincide with the enforcement dates of the Companies (Amendment) Bill and the Limited Liability Partnerships (Amendment) Bill, which have been postponed from 31 December 2020.

Coronavirus

45 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Temporary Measures for Reducing the Impact of Coronavirus Disease (covid-19) Act 2020 was gazetted and came into force on 23 October 2020. Section 7 of the Act provides that the inability of any party or parties to perform any contractual obligations arising from any of the categories of contracts specified in the Act due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (PCID Act) to control or prevent the spread of covid-19 shall not give rise to the other party or parties exercising his or their rights under the contract. The Act will remain in operation for two years from the gazette date, subject to any extensions of the Act, or of certain provisions therein if circumstances warrant such extension.

On 27 January 2021, the CCM further extended the deadline for companies to hold their annual general meetings and circulate and lodge their financial statements and related reports by issuing a further revised Practice Directive No. 6/2020 issued on 22 October 2020.

On 17 February 2021, the Bursa Malaysia Berhad and the Securities Commission granted listed issuers an automatic one-month extension to issue their respective reports and a 12-month waiver of compliance with listing obligations for issuers with insignificant business operations.

Further, the Malaysian government introduced several economic stimulus packages to mitigate against the consequences of covid-19, the latest being Strategic Programme to Empower the People and Economy (Pemerksa), which was announced on 17 March 2021. It has waived

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listing-related fees for applicants seeking to list on the Main, ACE or Leap Market and issued annual-listing fee rebates for qualifying loss-making companies.

In addition, the prescribed amount of indebtedness of a company for the purposes of 'inability to pay debts' under section 466(1)(a) of the Companies Act 2016 was also raised to an amount in excess of 50,000 ringgit with effect from 1 April 2021, as additional protection for companies at risk of winding up.

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