

MINORITY SHAREHOLDERS WATCH GROUP

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Greater emphasis on board appointments in revised corporate governance code

By SUPRIYA SURENDRAN

The Securities Commission Malaysia's (SC) latest update of the Malaysian Code on Corporate Governance (MCCG) places greater emphasis on good corporate governance and board leadership, especially as companies navigate a prolonged post-pandemic recovery period.

For one, the MCCG addresses issues relating to the reappointment of long-serving independent directors, which remain a concern. As at March 31, 434 independent directors serving on boards of Malaysian public-listed companies (PLCs) had tenures of more than 12 years, out of which 49 had served on the same board for more than 20 years.

The updated MCCG calls for a two-tier voting process to be implemented for the re-appointment of independent directors with tenures of more than nine years. Two-tier voting, which happens during the shareholders' meeting, is a process whereby large shareholders — defined as those who hold not less than 33% of the voting shares of the company — cast their votes in Tier 1, while the remaining shareholders cast their votes under Tier 2. Whether a resolution is passed is determined based on the votes of Tier 1 and a simple majority of Tier 2.

Following this review of the MCCG — the fourth by the SC and released last Wednesday — Bursa Malaysia will introduce a 12-year tenure limit without further extension for independent directors in the Listing Requirements, with targeted issuance in the fourth quarter of this year.

The 12-year cap is a welcome, timely and important change when it comes to tenure of independent directors, says Minority Shareholders Watch Group CEO Devanesan Evanson.

"It is good that this would be a Listing Requirement, a rule which must be complied with as failure to comply may result in sanctions; there is more bite. If any company feels that the independent director who has served more than 12 years can still contribute to the board, by all means keep that independent director on board, but designate that director as a non-independent non-executive director," he tells *The Edge*. Devanesan says the long tenure of independent directors has been a continuing sore point for minority shareholders. "There is at least one instance where an independent director has served for over 40 years; this is mind-boggling.

"Time acts as an attrition on independence; it chisels away the veneers of independence. Independent directors, over time, will tend to become less and less independent and finally become dependent as they become overly familiar with management. At this point, they are unable to exercise independent judgment and unable to view issues objectively — such as expected independent directors cannot be expected to act in the best interest of minority shareholders or the company," he explains.

Appointment of politicians to PLCs discouraged

In order to promote the exercise of objective and independent judgment in line with global best practices, the MCCG 2021 discourages the appointment of active politicians on the boards of listed companies.

Malaysian Institute of Corporate Governance (MICG) president Datuk Yusli Mo-



SHAHN WAHVA/THE EDGE

Devanesan: Listed companies are encouraged to table separate resolutions on the approval of the fees of each non-executive director

named Yusoff says MICG takes the view that the appointment of active politicians on the boards of companies introduces the possibility of business decisions becoming based on considerations other than the best interests of the company and its stakeholders at large.

"MICG does not encourage such appointments. Moreover, we believe PLCs should disclose any donations or contributions in cash or in kind to a political party, a politician, or a private foundation or charity," he tells *The Edge*.

The Employees Provident Fund, he adds, plans to include the mandate on non-appointment of politicians to PLCs as part of its investment criteria. This is already the case with Bank Negara Malaysia when it comes to financial institutions.

Eliminating self-review risks

The MCCG 2021 also recommends that the chairman of the board should not be a member of the Audit Committee, Nomination Committee or Remuneration Committee, as this may lead to the risk of self-review and may impair the objectivity of the chairman and the board when deliberating on the observations and recommendations put forth by the board committees.

"Typically, the chairman of a sub-committee will report to the chairman of the board for the board's onward deliberation. Thus, having the same person assume [both chairman positions] gives rise to the situation where the chairman of the sub-committee will be reporting to himself or herself; there will be no check and balance," says MSWG's Devanesan.

"Given the persuasive and influential role of the chairman, such common chairmanship will create an undesirable and untenable position littered with potential for conflicts of interest. If a company finds itself in such a position of having to have common chairmen, there may be a need to examine the board size; maybe there are not enough directors to go around."

The SC has also found a prolonged vacancy in the position of chairman in the boards of several listed companies, and for some, the chairperson of the board meeting is appointed at each meeting and the role is assumed by different directors, akin to a game of "musical chairs".



KENNY WAP/THE EDGE

Yusli: There should be no element of the remuneration for non-executive directors, especially independent directors, tied to the company's financial performance

"When a [chairman position] becomes vacant, a PLC should announce it immediately, describe the succession process, give a timeline for the appointment of a successor to be confirmed and report progress on a monthly basis. A deputy chairman (if one exists) can become the natural successor, at least on a temporary basis until confirmed to the post," says MICG's Yusli.

Devanesan points out that under the MCCG, at least 50% of the board members should be independent directors and, as such, there will be a pool from which an independent director can be appointed as chairman.

"Furthermore, nurturing a potential chairman is also a part of succession planning for the chairman's post. If there are no internal candidates who are suitable to assume the chairman's position, [then] an external candidate needs to be sought, [and] it should not take more than three months. There is a Listing Requirement that vacancies in a board are to be filled within three months, though Bursa Malaysia is known to have given extensions in deserving cases," he says.

Remuneration Committee should consist of only non-executive directors

As for remuneration packages for PLCs, the enhanced MCCG recommends that a committee be set up to assist the board in developing and administering a fair and transparent procedure for setting policy on remuneration of directors and senior management. This is important as it would ensure that remuneration packages are determined on the basis of the directors' and senior management's merit, qualification and competence, while having regard to the company's operating results, individual performance and comparable market statistics.

The SC recommends that the committee should consist only of non-executive directors, and a majority of them must be independent directors, drawing advice from experts if necessary. PLCs are also encouraged to table separate resolutions on the approval of the fees of each non-executive director.

"We agree with the SC's view that directors' and senior management's remuneration should be determined on the basis of their performance and the company's financial performance," he says.

eration should be recommended to the main board by a committee comprising non-executive directors, with the majority being independent," says Yusli.

"However, the MICG believes there should be no element of the remuneration for non-executive directors, especially independent directors, tied to the company's financial performance, as this could be regarded as compromising the independence of those directors."

Devanesan says what is deemed as fair remuneration for directors has always been a challenge as there are no objective metrics to arrive at the right figure. "But it is easy to identify excessive remuneration as it will stick out like a sore thumb. Excessive remuneration has always been a sore point with minority shareholders especially when the company is making losses, share prices are going down and there are no dividends, or minimal dividends, to shareholders.

"Long-term incentive plans are a positive development, [as] the staggered remuneration encourages executive directors and management to take a longer-term view. This coupled with claw-back provisions are an effective remuneration strategy that discourages perverse remuneration packages, a cause for many an evil financial disaster," he says.

He adds that the reason why the Remuneration Committee should only consist of non-executive directors — with a majority of them being independent directors — is because executive directors should not be involved in discussions to decide on their remuneration.

"The remuneration of non-executive [directors] is straightforward as they should be getting mostly fixed fees with some structured benefits in kind.

"Listed companies are encouraged to table separate resolutions on the approval of the fees of each non-executive director. This is important because there was a case where all the non-executive directors' remuneration were bundled together as one resolution. The shareholders did not want to approve one director's remuneration resolution but were prepared to approve the other directors' remuneration resolutions. Unfortunately, the shareholders were unable to do so due to the bundling effect; it was all or nothing. In that instance, the non-executive directors continued to serve the company without any remuneration for a period of time as the bundled remuneration resolution was not passed at the annual general meeting.

"Having separate resolutions for each director's remuneration will enable shareholders to vote on these remuneration resolutions individually; just like separate resolutions for directors' election," he says.

An encouraging adoption of the code

The MCCG was first introduced in 2000, and its last update was in 2017. The SC has observed encouraging adoption of the code by listed companies since then, with the majority of the best practices recording adoption levels of more than 70%.

The first batch of companies to begin reporting on the adoption of these practices recommended in MCCG 2021 will be those with financial years ending Dec 31, 2021. The two-tier voting process will be applicable for resolutions tabled at general meetings held on or after Jan 2, 2022. ■