

4. The responsibilities of the board

Recommendation 26

Efforts by private-sector institutes, organisations and associations to train directors should be encouraged. Such training should focus on both discharge of fiduciary duties and value-enhancing board activities. International technical-assistance organisations should facilitate these efforts as appropriate. (#275)

Background

The OECD Principles provide that “board members should act on a fully-informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.” Board members require experience, competence and knowledge in order to be “fully informed.” Several Asian organisations and associations have developed or are developing voluntary board member education programmes. Education and training should cover board members’ basic legal and governance duties, along with areas such as financial literacy, the monitoring of internal control systems, business strategy development, risk policies and budgets.

Summary

Most of the Asian jurisdictions surveyed reported having board member education and training programmes in place. These programmes have also either been recommended, or in some cases required, by various bodies. However, the voluntary nature of these programmes, coupled with the lack of board member awareness on the benefits of training and the quality of the programmes, serve as impediments to the effective implementation of this recommendation.

Developments

The majority of the respondents reported that **board member education and training programmes are offered** by various local and international organisations and institutions. The bodies offering such courses range from regulators and stock exchanges, to professional and corporate governance associations. The International Finance Corporation (IFC) is involved in initiatives in China, India and Viet Nam. The Singapore Institute of Directors intends to develop a diploma programme for board members, as well as engage other local and international institutes. The Pakistan Institute of Corporate Governance has launched the “Board Development Series” for certification of board members of listed companies, and the SECP has made it mandatory for listed companies to have at least one board member on the Board who is certified under the Board Development Series program starting in June 2011. Thereafter every year a minimum of one board member on the Board has to acquire the above mentioned certification.

Board member education and training programmes have also been either **recommended, or under specific circumstances, made mandatory** in a number of jurisdictions. Regulations in the Philippines for instance, require mandatory corporate

governance training for board members of certain types of entities. The Hong Kong, China Stock Exchange on the other hand, requires that company board members found in breach of its Listing Rules undergo training on compliance and corporate governance matters. Bursa Malaysia's Corporate Governance Guide, launched in 2009, contains recommendations pertaining to continuing education for board members. Indonesia's Central Bank requires the board members, senior managers and employees of entities under its supervision to undertake a risk management certification. In Thailand, the Corporate Governance Code also recommends that the board should encourage and facilitate corporate governance related training for all relevant parties.

In the case of Indonesia, a 2006 Bapepam-LK rule requires companies to disclose board member training in their annual reports, but does not require the actual training itself. Similarly, Thailand's SEC requires all listed companies to disclose board member training in their annual report.

Impediments

One of the main factors impeding the implementation of this recommendation is the **lack of awareness amongst board members** on the importance and benefits of continuous training. Respondents from Indonesia and Thailand for instance, stated that the non-mandatory nature of these training programmes do not motivate board members to participate in them. In addition, both the Chinese and Korean respondents highlighted the need for training schedules to be made more flexible in order to accommodate board members' needs.

The **quality and scope of programmes** offered was also observed to be an issue. Most programmes in China were reported to be insufficient to meet company needs, while the respondents from Pakistan and Singapore cited high monetary costs of the programmes resulting in limited outreach. The lack of local case studies and data was reported to pose challenges to developing "responsive and relevant" programmes in the Philippines.

A respondent from Indonesia highlighted that the **necessity of board member training** itself was still under debate. Malaysia's Securities Commission also reports that there had been similar debates on whether or not to reinstate continuous education programmes as a mandatory requirement. It was decided, however, that the imposition of such requirements was not necessarily the best way to address related shortcomings.

Recommendation

All respondents stated that this recommendation should be maintained.

Recommendation 27

Voluntary or “comply or explain” codes of conduct for directors should be developed and disseminated by private-sector organisations, with appropriate support from international technical-assistance providers. (#283)

Background

Codes of conduct can improve board member performance by publicly articulating the minimum procedures and effort that constitute “due diligence and care.” While most Asian jurisdictions have promulgated codes, further refinement and adoption of codes of conduct should be encouraged, with support from international technical-assistance providers when appropriate. All companies at the very least should issue annual corporate governance reports which provide details on items such as related-party transactions and the involvement of independent board members. In order to ensure credibility of the system, it is also essential that both shareholders and regulators must have means of verifying compliance and disclosure.

Summary

The jurisdictions surveyed, with the exception of Viet Nam, each report having various codes and guidelines in place. Companies in certain jurisdictions are either able or expected to draft their own codes and guidelines. One of the impediments highlighted was the fact that the voluntary nature of compliance with the codes does not incentivise their application and implementation.

Developments

All respondent jurisdictions, with the exception of Viet Nam, report having **codes or guidelines** in place, promulgated by either private sector organisations or regulatory bodies. These codes and guidelines include corporate governance codes, codes of ethics as well as guidelines for the conduct of boards. The bodies issuing these codes and guidelines range from stock exchanges and securities commissions to professional associations and corporate governance institutes.

A respondent from India on the other hand illustrates a system whereby **individual companies are in charge of issuing and disclosing their own codes of conduct**. Companies in Chinese Taipei, Indonesia, Pakistan, the Philippines, Korea and Thailand are also allowed to develop their own codes. In Pakistan and India, compliance statements with these codes have to be presented in a company’s annual report.

A key issue currently under debate in India considers two **opposing views on the issuance of codes**. One view suggests that SEBI should frame a standardised code, while the other opposing view asserts that market regulators “should not get into micro-management.”

Impediments

With the exception of Bangladesh, China, Indonesia and the Philippines, none of the jurisdictions explicitly highlighted any impediments pertaining to this recommendation. The respondent from Bangladesh stated that the **application of the codes** can be an obstacle, while poor enforcement was cited as an impediment by a respondent from the Philippines. Respondents from China and Indonesia state that compliance is impeded by the non-mandatory nature of codes, which in Indonesia’s case lacks even “comply-or-explain” requirements.

Recommendation

All respondents stated that this recommendation should be maintained.

Recommendation 28

Attribution rules should impose fiduciary duties and liabilities on “shadow” directors as a way to discourage their existence. (#290)

Background

In Asia, board appointees can frequently include persons who clearly lack the experience or capacity to be fully informed, such as lower-level employees or inexperienced relatives of controlling shareholders who serve as a cover-up for the “shadow board members”. These shadow board members do not occupy board positions themselves, but are the real decision makers behind their appointed “representatives.” In order to curb this practice, it has been recommended that board members’ qualifications, as well as relationships with managers and shareholders be disclosed. Alongside this, companies should also disclose the process employed for the nomination and selection of board members.

Summary

Several jurisdictions report having developed legislation imposing liabilities on shadow board members, as well as introduced guidelines on the appointment of qualified board members. However, there still remain jurisdictions that do not recognise the concept of shadow board members. Obstacles involving transparency and the burden of proof were also reported.

Developments

The respondents from Korea, Chinese Taipei, Thailand, Malaysia and Pakistan reported having introduced **provisions imposing liabilities on shadow board members** into their legal framework. These provisions have been introduced into securities and company laws, as well as the Commercial Act in the case of Korea. Other respondent jurisdictions, such as Indonesia, China and Bangladesh reported having guidelines issued

by regulatory bodies and stock exchanges, detailing provisions related to the appropriate conduct of board members.

Several jurisdictions, including China, Hong Kong, China, and Chinese Taipei have codes, guidelines and/or regulations in place, outlining **procedures for the appointment of qualified board members**. Amendments made to the Malaysia's Corporate Governance Code in 2007 further clarified appropriate nomination processes for company board members.

Impediments

A number of **impediments in the legal process** were highlighted in relation to imposing liabilities on shadow board members. The concept of shadow board members is not recognised within the legal frameworks of China, Viet Nam and Bangladesh, while respondents from Korea, Malaysia and Thailand reveal that obtaining proof and identifying the controlling person can be an obstacle to complying with this recommendation.

One of the respondents from Indonesia stated that the **lack of regulation and disclosure of nomination processes** allows the shadow board member system to function. A respondent from Pakistan also cites the lack of disclosure as a setback, alongside insufficient shareholder will as an obstacle in enforcing this recommendation.

Recommendation

All respondents stated that this recommendation should be maintained.

Recommendation 29

Sanctions for violations of fiduciary duty should be sufficiently severe and likely to deter wrongdoing. (#294)

Background

Board members are obliged by good faith to honour the substance and form of their duties. Asian legal systems provide for various degrees of liability for board members' misdeeds, on both a collective and individual basis. Liabilities should take into account the severity of the offence as well as the extent that a company should be held accountable for the misdeeds of its board members.

Summary

Developments reported include both the imposition of sanctions and enhancements to the regulatory and oversight framework. Impediments include shortcomings in the legal and enforcement system, such as slow judicial processes, difficulties in obtaining proof, and in some cases, inadequate sanctions.

Developments

Jurisdictions reported several legal developments in terms of **enhanced criminal, civil and administrative sanctions**. Detailed criminal sanctions for instance, were introduced by recent amendments to the legal frameworks of China and Malaysia, which in the case of China, now provide criminal liabilities for insider trading. The Philippines provides criminal sanctions, fines, and imprisonment and Thailand also imposes administrative sanctions for insider trading. Thailand’s Ministry of Finance was also reported to be in the process of reviewing the final draft civil penalties law. Similarly, the respondent from India states that pending amendments to the company law will introduce provisions addressing this recommendation.

Viet Nam’s State Securities Commission (SSC) in 2007 established a Supervisory Department to enhance the oversight capacity of the SSC and **deter violation of directors’ duties**. Indonesia’s 2008 Bapepam-LK Rules require issuers to establish internal audit units and disclose affiliated transactions. Bangladesh’s SEC now imposes penalties on board members for certain violations to securities laws, while an amendment to Korea’s Commercial Act introduced the executive office system, which establishes a corporate governance system that “meets global standards.”

Impediments

Multiple respondents highlighted the shortcomings in the **enforcement of their legal framework** to be a significant obstacle in complying with this recommendation. Slow judicial processes were cited as an impediment in Bangladesh and Thailand. Thailand’s SEC, however, suggests that civil, as opposed to criminal penalties, could be less time consuming to enforce. In Malaysia, there appears to be some reluctance on the part of courts to impose reasonable custodial sentences for corporate governance type of offences. Indonesia’s Bapepam-LK and Pakistan’s SEC highlight that the process of gaining evidence for proving fiduciary violations can be problematic. Hong Kong, China is also presented with inadequacies in its enforcement framework since a substantial portion of its listed companies are incorporated outside the jurisdiction.

Other respondents reported having **weaknesses in their legislative frameworks**. The laws in China and Pakistan were reported to not provide for adequate penal sanctions, while respondents from Pakistan, Viet Nam and the Philippines emphasise that the concept of directors’ duties is not sufficiently defined within their respective legal frameworks.

Recommendation

All respondents stated that this recommendation should be maintained. The respondent from China suggested that revisions to the recommendation should detail “sufficient sanctions,” and the Indonesian respondent stated that efficient executive sanctions and more stringent penalties should be stressed.

Recommendation 30

Boards should put in place procedures that will regularise and professionalise the performance of board functions and clarify decision-making. Such procedures should include evaluation of individual director performance based on criteria established at the beginning of the evaluation period. (#301)

Background

The OECD Principles identify key functions of the board. Proper board functioning should provide for the human dimension of interaction between the board and management. This is important in order to be able to strike the right balance between the boards' oversight role and its role in collaborating with management. Effective practices should also establish appropriate ex-ante measures for evaluating board members

Summary

Several legal and regulatory developments related to the roles and responsibilities of the board were reported. Codes and guidelines were released in a number of jurisdictions, outlining various aspects of risk management practices. On the other hand, a number of jurisdictions reported the lack of rules or procedures for boards, and that enforcement remains an issue.

Developments

The jurisdictions surveyed reported both legal and regulatory developments pertaining to this recommendation. Provisions and amendments within the legal frameworks of China, Chinese Taipei, Malaysia and Indonesia were reported to, amongst other things; **define the scope of the authority of the board**. The Corporate Governance Codes in Singapore, Thailand, Viet Nam and Korea were reported to contain provisions that provide guidance on a boards' conduct. Korea's Federation of Banks in 2010 issued a code of practice specifically for independent board members, covering areas including the functions, responsibilities and appointment of independent board members.

The Corporate Governance Codes and Guidelines of Singapore, Malaysia, India, the Philippines, Thailand and Chinese Taipei, were reported to contain **provisions detailing certain aspects of risk management** and the role of the board. Singapore's and Thailand's Code of Corporate Governance for example states that management should maintain a sound system of internal controls, while Malaysia's Corporate Governance Guide sets out how effective risk management frameworks can be embedded into a company's culture, processes and structures.

Impediments

In relation to **appropriate board conduct and practices**, Chinese Taipei's respondent stated that board practices should be improved through the implementation of voluntary standards, in addition to laws and regulations. The lack of awareness, capacity and experience of board members were cited as obstacles in Bangladesh and Viet Nam.

Even when a legal framework is in place, it is critical that **internal structures and corporate culture** evolve. India’s SEBI placed emphasis on the efficiency of internal controls, suggesting the need for parameters that allow the comparison of such mechanisms between entities. A respondent from Malaysia states that listed companies needed to move beyond “mere compliance with rules” and “go deeper into embracing the spirit of such rules and regulations” in order to enable smooth implementation of processes and functions. The respondent from Indonesia for instance, reports that despite the mandatory provisions in the Company Law and Bapepam-LK Rules, reporting of board meeting attendance, as well as meeting attendance itself, remains low.

Recommendation

All respondents state that this recommendation should be maintained. The Chinese respondent added that revisions to this recommendation should include procedures for, as well as effective risk management mechanisms. A respondent from the Philippines suggested focusing on the role of the Chairman in improving board functions, while Viet Nam’s SSC suggested placing emphasis on board member and management training.

Recommendation 31

Directors should enjoy direct access to company employees and to professionals advising the company in accordance with procedures established by the board or its committees. (#308)

Background

Board members should ensure that company employees are aware of their duties to the company and that they have the means for reporting suspected wrongdoings by supervisors and peers. There should also be direct board member access to employees at all levels as an independent check on the information reported by senior management. In the case of employing professional advisers, boards should have direct access to these professionals, as well as be aware of any restrictions, considerations and judgments underpinning their presented conclusions.

Summary

Many of the jurisdictions surveyed reported having provisions pertaining to this recommendation encoded within local legislation and/or their respective Corporate Governance Codes. These laws and rules contain provisions detailing procedures for employees or their representative bodies who express concerns about illegal or unethical company practices. Still, several jurisdictions noted that awareness of this concept and the lack of legal protection available to employees became an impediment.

Developments

Bangladesh’s Corporate Governance Guidelines, enacted in 2006, state that an audit committee has **access to company employees** and is legally empowered to report to the board of directors, any conflict of interest, suspected fraud or infringement of laws.

Failure to act on the board's part should result in the report being forwarded to the SEC. Singapore's Code of Corporate Governance states that the board should have procedures in place for **employing independent advice** in the promulgation of their duties.

With regard to local developments addressing the protection of whistleblowers, please see Recommendation 11.

Impediments

Regarding the ability for employees to report wrongdoings, respondents from Bangladesh, China, Indonesia and Viet Nam highlight impediments related to the **lack of awareness** on the concept of "whistle blowing", as well as the **lack of legal protection** for whistleblowers. Both the Philippines and Korea also reported that employees can be reluctant to report suspected wrongdoings for **fear of reprisal** or creating a negative perception amongst fellow co-workers.

Respondent jurisdictions provided no explicit response directly addressing impediments related to outside professionals being enabled to report major non-compliance issues to the board of directors.

Recommendation

All jurisdictions surveyed stated that this recommendation should be maintained. Viet Nam's SSC suggests that revisions should focus on board member training and sanctions for failing to comply with directors' duties.

Recommendation 32

Boards should be of a size that permits effective deliberation and collaboration and have adequate resources to perform their work. Directors should devote sufficient time and energy to their duties. (#313)

Background

Board members' contracts should detail minimum commitments, taking into account thorough preparation for committee and full-board meetings, along with interaction with employees and professionals involved with monitoring systems. In addition to this, board members should also have allowances for, or access to support staff in order to make the most of their time.

Summary

There has been a clear trend in Asia towards smaller company boards, with some jurisdictions establishing caps on the number of directorships any one person can hold. Restrictions on board sizes vary slightly across jurisdictions, with the required minimum number of members ranging from 2 to 5 and the maximum number ranging from 10 to an unrestricted size. Guidelines and codes have also been issued in several jurisdictions with the intention of ensuring sufficient material commitment from board members to their duties. Obstacles identified with regard to compliance with this recommendation, include the issue of concentrated ownership and the lack of awareness as to the role of the board.

Developments

With regard to **adequate and effective board size**, China's 2005 Companies Law stipulates that the boards of publicly listed companies should have a minimum of 5 members and a maximum of 19. Bangladesh's 2006 Corporate Governance Guidelines similarly states a minimum of 5 and a maximum of 20 members of publicly listed company boards. Indonesia's 2007 Companies Law, however, sets a minimum of 2 members, with no upper bound on the possible number of board members. Malaysia's Company Law adheres to the same upper and lower limits as Indonesia's. A 2008 study conducted by the Securities Commission found that 89% of publicly listed companies' boards in Malaysia comprised of 9 members or less.

Several requirements for **ensuring board members devoting sufficient time and energy to their duties** have been introduced. Thailand's Corporate Governance Code, Malaysia's Listing Requirements of the Main Market and Chinese Taipei's Regulations Governing Appointment of Independent Directors and Compliance Matters for Public Companies for example, set limits on the number of directorship positions that can be held by a given individual. Respondents also stated that issues such as a minimum number of meetings per year are covered by various laws, regulations and guidelines.

Impediments

Some of the impediments to **board members' effective deliberation and collaboration** cited by respondents include the lack of awareness, reluctance to ensure compliance, concentrated ownership as well as the lack of qualified board members. Viet Nam's CIEM in particular highlighted that there was an inaccurate perception prevalent on the role of the board, as board members tended to focus on managerial roles rather than their governance functions. The Philippine Stock Exchange identified a general lack of desire to improve set and entrenched practices, while Chinese Taipei's SFB reported a lack of standardised guidelines, which it attributes to the differing internal conditions between companies. The respondent from Indonesia for instance, reports that despite the enforcement of the mandatory provisions in the Company Law and Bapepam-LK Rules, reporting of meeting attendance, as well as meeting attendance itself, remains low.

A respondent from China highlighted that board members who take "excessive positions" outside the company and when their attendance rate is too low, as **impediments to the devotion of sufficient time and energy** to their board member duties. The respondent from Korea also reported inadequate support provided to the operations of board members. Malaysia's SC stated that shareholders should not hesitate to use their statutory rights in ensuring board members do not neglect their duties.

Recommendation

All respondent jurisdictions stated that this recommendation should be maintained.

Recommendation 33

Asian countries should continue to refine the norms and practices of “independent” directors. (#318)

Background

While many Asian corporate governance frameworks already provide for the appointment of independent board members, the objectivity and actual independence of these board members can be undermined by the fact that controlling shareholders often nominate entire boards. The fact that no legal norm for independence will ever be perfect should not deter continuous efforts to obtain better and more precise definitions of independence, as well as better disclosure of relationships.

Summary

Most respondents report that the term “independent board member” has been defined in their respective jurisdictions by laws, codes or guidelines. Several jurisdictions also report having provisions on disclosing board member relationships with controlling shareholders and imposing liabilities on board members. Despite this, impediments still exist in developing mechanisms to verify and ensure the actual independence of board members. The roles of controlling shareholders, and the general shortage of qualified candidates, were identified as the main obstacles.

Developments

Bangladesh, Indonesia, Malaysia, Pakistan, the Philippines, Singapore, Thailand and Chinese Taipei are amongst the jurisdictions reported to have developed provisions in their corporate governance codes and listing rules that provide for **the definition of “independent board member.”** These provisions outline the criteria for when a board member qualifies as independent, as well as provide for “tests” of independence. Malaysia’s Listing Requirements for instance, stipulate that board members fulfill a “subjective” and “objective” test of independence. The subjective test takes into consideration a board member’s “judgment and ability” in acting in the best interests of the company, while the objective test considers more material characteristics such as shareholdings and family ties to controlling shareholders and other board members. In the case of Thailand, its AGM best practice guidelines recommend that the listed company should outline its own definition of “independent board member”, which should be stricter than the minimum requirements imposed by the SEC.

A number of respondents also reported developments in provisions concerning the **disclosure of a board member's relationships.** According to the respondent from Thailand’s SEC, in the event of an election of independent board members, it is recommended that a company disclose candidate relationships that hold potential conflicts of interest. Similarly, Malaysia’s Listing Rules require company annual reports to disclose familial relationships between board members and controlling shareholders. Several respondents also reported requirements for independent board members to submit statements declaring their independence. India’s 2009 Companies Bill for instance, which

has been placed before the Indian Parliament, will impose this requirement on independent board members at the time of appointment.

In imposing of **liabilities on board members**, respondents from both Bangladesh and Malaysia state that no distinction is made between independent and non-independent board members. A respondent from India states that while imposing liabilities on independent board members has been difficult, intense scrutiny from the media has helped disincentivise deviant behavior.

Impediments

Verifying and ensuring the independence of board members was identified to be a predominant impediment. The respondent from Malaysia’s Securities Commission cites being able to truly ensure the independence of independent board members, “in mind and spirit, character and judgment,” as a major challenge. Respondents from Chinese Taipei, Thailand and Viet Nam also highlight implementation of the concept of independent board members to be an issue, referring to the rather general problem that the absolute independence of board members is never guaranteed, regardless of definitions put forward.

Of course, the **role of controlling shareholders in nominating independent board members** is of particular importance and it was noted to be a significant obstacle by respondents from Indonesia, India and China. Indonesia’s respondent details the potential for abuse in its system, as Bapepam-LK Rules do not require the disclosure of relationships between independent board members and controlling shareholders.

In contrast to the legal and systemic obstacles raised above, finding qualified candidates to fill the position of independent board member is a more practical problem. A number of respondents raise as an obstacle the **insufficient number of qualified and competent candidates** to serve as independent board members. The answers from the Securities and Exchange Commission of Bangladesh cited poor fee structure as one of the reasons for this shortage, while the answer from the Korean respondent pointed to a lack of understanding of the role of independent board member.

Recommendation

All respondent jurisdictions stated that this recommendation should be maintained. According to the Malaysian SC, this recommendation “brings to mind the need to constantly review the definition of independent board members.”

Recommendation 34

Independent directors should control matters likely to involve conflicts of interest. Committees are a common mechanism for delegating such control. (#322)

Background

The OECD Principles state that the board should be able to exercise objective independent judgment on corporate affairs. Effective practices in this area include the

creation of special committees of the board for matters where management or controlling shareholder groups are likely to have conflicts of interest (i.e. audit, remuneration and board-nomination).

Summary

All respondents, with the exception of the two from Viet Nam, reported the existence of codes or legal provisions addressing the formation of special committees, with varying composition of independent board members. Still, in order to meet this recommendation, clearer and more refined rules and regulations, as well as mechanisms ensuring the true independence of board members are needed to overcome reported obstacles.

Developments

With the exception of Viet Nam, all respondents surveyed reported having provisions in their codes, listing rules or legislation, stipulating the **formation of special committees**. Requirements concerning the number of independent board members on the **audit committees** differ slightly from jurisdiction to jurisdiction. Respondents from Hong Kong, China, Indonesia, Malaysia and Korea report having requirements stating that audit committees of listed companies have to consist of at least a majority of independent board members. Respondents from Thailand and Chinese Taipei on the other hand, state that an audit committee is required to comprise at least three independent board members.

Some jurisdictions require or at least recommend that listed companies set up **nomination and remuneration committees** consisting of independent board members. Malaysia's and Thailand's Corporate Governance Code recommends that listed companies set up these committees, while Korea's Commercial Act requires listed companies worth more than KRW 2 trillion to set up nomination committees. Indonesia's central bank requires all banks to have nomination and remuneration committees, but there are no legal or regulatory provisions requiring the same of listed companies. India's Companies Bill requires the formation of an audit committee, remuneration committee and stakeholders' relationship committee.

Impediments

A number of **shortcomings in legal and regulatory provisions** were highlighted by multiple jurisdictions as an impediment. Pakistan reports that its Corporate Governance Code contains no specific provision on accountability. Bapepam-LK Rules in Indonesia do not require audit committees to oversee potential conflict of interest transactions, despite them being reportedly common in Indonesia. Companies in Indonesia are also not required to disclose their procedures for nominating audit committee members. A respondent from Viet Nam pointed out that the concept of independent board members should be strengthened via laws and codes, as it is still a relatively new concept in Viet Nam.

Several factors were raised regarding impediments to the **effective functioning of special committees**. Thailand's SEC pointed out that smaller companies tend to not have special committees. BAPEPAM- LK reiterates this observation with respect to the Indonesian market, attributing it to cost constraints. The Philippine Stock Exchange stated

that influences from controlling shareholders can be an obstruction to the activities of a special committee. Per the respondent from Chinese Taipei, some listed companies “do not know how” to set up special committees. In order to help overcome this impediment, the same respondent reported that the stock exchange has drafted guidelines on how to set up nomination committees, and is considering doing the same for other types of committees.

Recommendation

All respondents stated that this recommendation should be maintained. A respondent from China suggested revisions seeking to refine the procedures of the special committee as well as clarify the role of independent board members.

Recommendation 35

The process of electing directors should facilitate a board that represents the interests of all shareholders. The process for achieving such representation may include, inter alia, the ability of shareholders to requisition a vote for directors by way of cumulative voting. Where cumulative voting has been selected as the method for electing directors, staggered board terms, and other mechanisms that frustrate cumulative voting, should be prohibited. (#328)

Background

One of the accepted methods for achieving a balance of interests amongst board members is through cumulative voting. In order to be effective, cumulative voting requires that an adequate number of minority votes come together in favour of a candidate. This can be impaired by factors such as the uneven distribution of shareholdings and certain types of shareholder relations. Cumulative voting can also be further obstructed by restrictive nomination procedures, as well as staggered board terms, which reduce the number of board members to be elected at any one time.

Summary

Cumulative voting is reported to be practiced in varying degrees in some jurisdictions. While the practice has been made mandatory in some jurisdictions, it is either optional or entirely not recognised in others. Concentrated ownership structures and the lack of awareness of the importance of voting procedures, were highlighted as obstacles.

Developments

The **practice of cumulative voting** was reported to be mandatory in Pakistan and Viet Nam. Chinese Taipei’s Company Law will be undergoing amendments that will make it mandatory for all companies to adopt cumulative voting as a method for electing board members. The legal frameworks of China, India, Korea and Thailand also support cumulative voting, but do not enforce mandatory implementation. Hong Kong, China and Malaysia on the other hand, have not adopted the practice of cumulative voting.

Impediments

Concentrated ownership structures were reported to be an impediment to fulfil this recommendation in Indonesia, and elsewhere. The Philippine Stock Exchange also stated that ownership structures are still defined by controlling groups and individuals, making the protection of other shareholders' interests markedly more challenging.

A **lack of consensus on the benefits of cumulative voting** seems to persist across the region. The respondents from Bangladesh and Korea highlighted the need to create awareness on the importance of minority shareholders exercising their rights. Thailand's SEC stated that while its framework does allow for cumulative voting, it is not mandatory and remains a fairly unpopular option. Based on the two Malaysian respondents, the benefits of cumulative voting are still subject to debate. The respondent from Bursa Malaysia implied that some market participants might be of the view that cumulative voting goes against the one-share one-vote policy.

Recommendation

All respondent jurisdictions stated that this recommendation should be maintained. The respondent from China suggested that revisions should clarify how the board can better represent the interests of all shareholders.

Recommendation 36

Local law should give directors power to obtain accurate, relevant and timely information from the company. (#336)

Background

Boards and members of board committees should have clear and broad authority to gather information believed to be relevant to their work. Internal procedures should ensure that such information is supplied well in advance of board committee meetings.

Summary

Laws and guidelines intended to facilitate a board member's access to information were reported to have been introduced in a number of jurisdictions. Despite these positive developments, inadequacies in existing provisions persist across the region and are compounded by the reluctance of certain parties, such as controlling shareholders, to allow easy access to information.

Developments

India, Pakistan, the Philippines, Thailand and Chinese Taipei highlighted developments related to newly enacted provisions in codes and guidelines pertaining to **board members' access to information**. The Philippines' revised Code of Corporate Governance for instance, stipulates the duties of management in providing information

and board members' access to it, as well as the different types of information that may be provided. Korea's Commercial Act and Viet Nam's Enterprises Law also provide for board members' access to information, with Korean law detailing the authority of the audit committee.

Impediments

Several shortcomings pertaining to this recommendation included issues raised with regard to the **legal and regulatory framework** of Bangladesh, China and Korea. The respondent from Bangladesh stated that obtaining legal redress can be a time consuming process. While China's Corporate Governance Code states that adequate information should be provided to board members, there are no specific provisions clarifying how a board can gain access to accurate, relevant and timely information. On a similar note, the Korean respondent highlighted the lack of a system facilitating an independent board member's access to company information.

Respondents from Bangladesh, Thailand, Viet Nam and the Philippines pointed out the **obstructive role of controlling shareholders** in impeding the flow of information to board members. The Philippines states that there can be hesitation to provide certain types of information without clearance from "controlling groups or individuals." The Stock Exchange of Thailand placed emphasis on ownership structures and control, stating the potential these factors had in preventing independent board members from carrying out their duties.

Recommendation

All respondents stated that this recommendation should be maintained.

Notes

1. See also: *OECD Policy Brief on Corporate Governance of State-Owned Enterprises in Asia* (2010)
2. In Recommendation 33, the answer from the Korean respondent indicates, however, that the available pool of independent board members is too small.
3. See also: *OECD Policy Brief on Corporate Governance of State-Owned Enterprises in Asia* (2010)
4. See also: *OECD Policy Brief on Corporate Governance of Banks in Asia* (2006)
5. Modarabas are a form of Islamic financing arrangement. Under tax law, they signify a business in which one person participates with his money and the other one with his efforts or skills or both. All mutual funds and unit trusts by whatever name are included in the definition of a modaraba.
6. The rule is considered a setback by one respondent since it reduces the number of conflict-of-interest transactions needing approval.
7. See also *OECD Guide to Fighting Abusive Related Party Transactions in Asia* (2009).
8. So far, there has been only one reported case where section 181A of the Companies Act of 1965 was used. In *Mohd Shuaib Ishak v. CELCOM*
9. The CSR Framework covers four areas, namely the environment, marketplace, community and workplace.
10. The Annual Report Award (ARA) is held by Bapepam-LK and six other institutions which are the Bank of Indonesia, Ministry of State Owned Enterprises, Tax Office, Indonesian Stock Exchange, National Committee on Governance and Indonesian Institute of Accountant.



From:
Corporate Governance in Asia 2011
Progress and Challenges

Access the complete publication at:
<https://doi.org/10.1787/9789264096790-en>

Please cite this chapter as:

OECD (2011), "The responsibilities of the board", in *Corporate Governance in Asia 2011: Progress and Challenges*, OECD Publishing, Paris.

DOI: <https://doi.org/10.1787/9789264096790-9-en>

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of OECD member countries.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

You can copy, download or print OECD content for your own use, and you can include excerpts from OECD publications, databases and multimedia products in your own documents, presentations, blogs, websites and teaching materials, provided that suitable acknowledgment of OECD as source and copyright owner is given. All requests for public or commercial use and translation rights should be submitted to rights@oecd.org. Requests for permission to photocopy portions of this material for public or commercial use shall be addressed directly to the Copyright Clearance Center (CCC) at info@copyright.com or the Centre français d'exploitation du droit de copie (CFC) at contact@cfcopies.com.