



Requirements for Directors and Board Committees under the New UAE Corporate Governance Code

By: Nick Nadal, Director,
Hawkamah Institute for Corporate Governance

Directors have an important role to play within a company since the shareholders entrust them with the responsibility of strategically steering the company towards achieving its goals in the most efficient and profitable manner. The Directors must balance the interests of the shareholders, employees, suppliers, and customers of the company.

The Directors duties are generally defined in the company's bylaws in addition to certain binding provisions laid down in the country's company law. In addition, the Directors' duties and liabilities are also covered in the corporate governance codes, rules and regulations that are issued by various jurisdictions.

The bar for Corporate Governance is rising across the world in the wake of the global financial crises. The two recently issued codes are the Bahrain Corporate Governance code for operating joint stock companies and the Ministerial Resolution No. (518) of 2009 issued by the UAE Ministry of Economy Concerning Governance Rules and Corporate Discipline Standards (the SCA Code).

The Securities and Commodities Authority (SCA) is charged with the supervision, control and verification of compliance by Companies with these rules.

This Resolution applies to all companies and institutions whose securities are listed on a securities' market in the country and to their board members except:

- Companies and institutions that are wholly owned by the Federal Government or a local government;
- Banks, finance companies, financial investment companies, money exchange companies, monetary brokerage companies that are under the supervision of the Central Bank; and
- The foreign companies that are listed in any of financial markets.

There are specific requirements for Directors in the SCA Code including the provision that:

- At least one-third of members shall be independent members and a majority of members shall be non-executive.
- The board of directors shall meet at least once every two months.
- The board of directors shall develop procedural rules for corporate governance, supervise and control the application of the same, and shall be liable for the application thereof in accordance herewith.

The SCA Code also has provisions on the Board Committees. It requires that the board of directors shall form standing committees namely the audit committee and the nomination and remuneration committee. The committees shall consist of at least three (3) non-executive board members, of whom at least two (2) members shall be independent members and shall be chaired by either independent member. The chairman of the board of directors may not be a member of any such committees.

Special Edition:

Clyde and Co in conjunction with Hawkamah held a complimentary breakfast seminar on 15 March 2010 in Dubai, to discuss the latest corporate governance developments in the MENA Region and Directors' and Senior Management Liabilities and how individuals can protect themselves against the risks of corporate litigation and regulatory investigations.

Directors and Senior Managements' Liabilities

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The Remuneration and Nomination Committee shall be mainly charged with verification of ongoing independence of independent board members. The board of directors shall follow up the operations of these committees to verify their adherence to the commissioned operations.

The SCA Code specifies that the remunerations of board members shall be a percentage of net profit. The Company may pay ancillary expenses or fees or a monthly salary to any member who undertakes additional duties for the Company. In all cases, the remunerations of board members may not exceed ten percent (10%) of net profits. ➤

Directors and Officers Liability - Insurance Protection for your business, peace of mind for you

By: Sophie DI MEGLIO, Underwriting Manager – Management Liability, Zurich Insurance Company Ltd

Media reports a month ago stated that a South Korean court ordered a company's Chairman to pay almost USD 60 million in damages to his company for loss-making deals conducted under his authority. In this economic climate, Directors' are left particularly exposed to such proceedings as their actions are put under increasing scrutiny.

The cover

Directors and Officers (D&Os) Liability Insurance helps to mitigate the risk of legal action against executives and senior leaders; it indemnifies the individual directors and officers for the personal liability they may incur in the management of the company. Typically, a D&O policy provides 3 insurance covers:

1. **A-side coverage - Direct Coverage for Directors and Officers.**

This is the traditional cover which protects D&Os against claims arising from actions and decisions taken under official capacities. This cover offers financial support and before damages, provides defense costs to assist financially in defending allegations made against the individual. This protects the individual's personal assets and safeguards their family's future.

2. **B-side coverage - Company Reimbursement Cover**

This indirectly covers D&Os by covering the company for claims it pays on their behalf.

3. **C-side coverage - Company Cover for Securities Claims**

This is designed to protect publicly listed companies and their balance sheets against lawsuits by shareholders.

Customer considerations

When reviewing a D&O policy, it is important to pay particular attention to:

- The severability language of your policy. The policy covers numerous individuals for both past and ongoing actions. It is vital that the misconduct of one individual does not jeopardize the cover for the other insured persons under the same insurance. This is achieved by including **severability clauses** into the contract. Severability should also apply to the conduct exclusions and the proposal form which forms the basis of the contract; any non-disclosure or

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Why you should be concerned – An Insurance Advisors perspective

By: Richard Wynn, Executive Director, Howden Insurance Brokers LLC, Dubai

What protection should you be looking to purchase?

Director's & Officer's (D&O) Liability Insurance has not been widely purchased in the Middle East over recent years. With the exception of Oman where it is compulsory for publicly traded companies there has been no huge demand for the product. Private companies have considered themselves not at risk from litigation and even traded companies have been in denial that they are at risk. Some of the largest banks and Financial Institutions in the region have not bought D&O cover. All have significant liabilities which could be insured under a D&O policy.

Approximately 80% of D&O claims come from two sources; shareholder and employees. Shareholder claims tend to arise from mis-management, non-disclosure or poor performance. Employee claims revolve around wrongful dismissal and termination claims, or Employment Practices Liability claims as they are known. Following the downturn in the local and global economies these types of claims are becoming more common, especially in regulated sectors such as the Dubai International Financial Centre or for companies traded on local Stock Exchanges (Abu Dhabi Exchange, Nasdaq Dubai, etc.)

In recent weeks there have been front page headlines regarding cases for breaches of Corporate Governance involving allegations of fraud and corruption. Directors or senior managers could incur significant legal costs in proving their innocence, and this is where a D&O policy would provide protection to the personal assets of these Directors and managers.

So whilst CEO's and main board of Directors of private companies may feel that they are not at risk because they control the business, what about the senior managers who are on the next tier down? They could end up carrying the blame for any failures in the company should the senior board look downwards for someone to carry the can. Would you be comfortable accepting such a position without the protection of a D&O policy? You as a Co-Director, Non-Executive Director or senior manager could end up embroiled in an action due to the activities of other Directors. So what are the main points that should be examined when considering purchasing a D&O policy? Firstly, where is the company based and where is it traded? Does it have subsidiaries or listings in foreign countries?

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You must ensure that the D&O policy will deal with litigation in all of these territories. The size of limit purchased should also be a key consideration. If you are a director of a multi billion dirham company which goes bankrupt, then a limit of indemnity of AED2m is not going to go very far defending the litigation of angry shareholders who are holding you responsible for their loss of money.

It is important that coverage is provided for the costs incurred in defending regulatory investigations. Some policies only cover these costs if there has been an allegation of a wrongful act, which may not always be the case. It is also important that coverage is provided for innocent Directors. If one Director has been fraudulent but others have not, you do not want all the coverage under the D&O policy to be null and void due to the fraudulent activities of the one.

There are many other matters which are important, too many to discuss in one article. The fundamental points must be stated that no one is exempt from litigation and investigation, and as such companies and Directors should be looking to purchase a D&O policy in order to protect their personal assets and reputations. D&O policies should be purchased from specialist Insurance Brokers who understand the coverage's and can advise on the suitability of cover. [↗](#)

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misrepresentation could lead to rendering the policy void.

- The existence or not of **priority of payment clause** to prioritize claim payments to Insured Persons before Insured Company.
- The **past liabilities**. A D&O policy should continue to cover past directors and officers of the Company for wrongful acts occurred while such persons were D&Os of the insured company for as long as the D&O policy is purchased by the parent company. It provides peace of mind for those directors and officers who have retired or moved on from the insured company.
- **The funds to help defend against reputational damage and claims against the individual's assets**. It is important to receive financial protection against unexpected incidents outside of the individual's control and to ensure access to a good legal counsel without having to use personal assets.

Underwriting considerations

Main developments of D&O liability have appeared in connection with bankruptcy proceedings.

When conducting a risk analysis, underwriters should pay attention to the financial situation of the company and have access to the last consolidated financials. In the current climate, it is important to consider projected revenues and cash flow, and not solely rely on historical results.

M&A operations, lack of transparency vis a vis financial markets and shareholders, combined with strong market volatility have also led to claims. An underwriter should therefore carefully review the last acquisitions and divestments, the shareholding structure and pay particular attention to Board practices, transparency and willingness to share information.

Another key consideration is the existence or not of any US exposure. Historically, the majority of D&O claims has emerged in the USA and is associated with the Securities Exchange Commission and the class action principle. Lawsuits for securities violations may run into millions and the existence of an American Depository Program (ADR) has a major impact on pricing.

In summary, the Middle East D&O market is in its infancy, possibly due to low litigation culture, and a legal environment which is slowly becoming more restrictive. However, it remains important to note that litigation culture is no longer an issue limited to the US; increasing your overseas activity only serves to increase your exposure. Not only will a D&O policy assist in the attraction and retention of high caliber D&Os, it will also serve to safeguard the balance sheet of the employer. [↗](#)

Directors and Senior Management Liabilities: lessons learned

By: Mark Beswetherick, Senior Associate, Clyde & Co. LLP

Directors and senior management have been forced to look more closely at their personal exposures following a surge in corporate litigation and regulatory investigations across the Middle East in the last twelve months. As a result, many directors and managers have found that they are being called to account not just for the company's decisions, but also for their personal actions, and face not just the risk of regulatory investigation, but also personal civil claims, or even criminal prosecution.

Increasingly, regulators are working in close cooperation with police investigation teams, and sharing information under the terms of various memorandums of understanding between State authorities. The risk of criminal investigations, the prospect of which many directors and managers are not aware, is growing.

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Investigations by regulatory authorities such as the Dubai Financial Services Authority (**DFSA**) are by no means any less intrusive or serious, albeit without the risk to personal liberty. Practically speaking, a DFSA investigation usually starts with the formal issuance of DFSA Notices, served on the directors and managers involved, and obliging them to cooperate subject to a strict regime of confidentiality. The DFSA may require access rights to an Authorised Firm's books and records, and summon directors and managers to compulsory interviews where the officers of the company will be required to provide information and answer questions. The DFSA has repeatedly proven itself to be a proactive and tough regulator that is serious about enforcing good corporate governance, and stamping out market abuse; for example with the Shuaa Capital (Shuaa) investigation into alleged market manipulation. The then unprecedented fine issued by the DFSA to Shuaa not only reflected the seriousness of the offence committed, but also penalised Shuaa for attempting to obstruct the DFSA's investigation.

Legal representation is permitted (and recommended) in respect of both civil and criminal investigations. Yet, aside from the practical disruption and potential reputational costs to a business, the time and financial cost of defending an investigation is something that directors and managers rarely consider until it is too late: both for the business, and themselves personally. This is of even greater significance where a sanction is imposed. For example, the DFSA has the power to impose restrictions, supervision or withdrawal of Authorised Individual status; administrative fines; enforceable undertakings, such as the banning of future activities in DIFC; payment of fines or compensation to clients; or the requirement to reimburse investigatory costs.

Increasingly, shareholders, creditors and counterparties of affected companies are also seeking to bring civil actions against companies and/or directors and officers personally, in an attempt to obtain financial redress for the alleged mismanagement or wrongful acts of directors and officers; for example the civil claims arising from the events surrounding the Saad and Al-gosaibi groups. This is a trend that we expect to see continuing in the months ahead.

The increasing number of corporate governance related regulatory and criminal investigations in the Middle East, only in part attributable to the prevailing economic climate, has demonstrated the vast range of potential causes of actions for claims and triggers for regulatory investigations, and that no business, director or manager is beyond risk. Businesses (and their directors and managers) need not only to ensure that compliance with corporate governance is (rightly) given due consideration and priority, but that sufficient thought is given to how any investigation might be properly defended and financed. In light of these recent developments, it is therefore unsurprising that D&O Insurance, which covers directors and managers in the event that they are accused of participating in misleading or wrongful acts whilst carrying out company business, is increasingly seen as a means of limiting such risks.

As the markets start to look beyond the current economic crisis, it is inevitable that the future will bring more regulation and not less, particularly as far as institutionalising the principles of good corporate governance is concerned. Directors and managers must firstly ensure compliance, and secondly make certain that the business (as well as themselves personally) is adequately protected in the event of any claim or investigation. ↗

Forthcoming Events**25 May 2010**

Mudara IOD Power Breakfast:
"Board Effectiveness compliance with Laws and Regulations"
Dubai, UAE

31 May 2010

Corporate Governance Workshop:
The Changing Landscape in the Insurance Industry
Dubai, UAE

02 June 2010

Company Secretary Workshop
Dubai, UAE

07 June 2010

Corporate Governance Workshop:
Transparency and Disclosure Workshop
Dubai, UAE

June 14 2010

Taskforce Meeting – Corporate Governance of Islamic Financial Institutions
Dubai, UAE (by invitation only)

June 16 2010

Workshop on Corporate Governance of Government Owned Entities under the Patronage of FAHR.
Dubai, UAE (by invitation only)

June 21 2010

Workshop on Efficient & Effective Legal & Regulatory Framework for Insolvency Practitioners in MENA
Dubai, UAE

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Hawkamah Institute for Corporate Governance

DIFC Gate Village 2, Level 1

P. O. Box 506767, Dubai, UAE

Tel : +9714 362 2551

Fax : +9714 362 2552

E: info@hawkamah.org