

An Overview of the New Governance Rules in the UAE: Part IV

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The Chairman of the Securities and Commodities Authority of the United Arab Emirates ('SCA') issued, on 28 April 2016, the Resolution on Corporate Discipline and Governance Standards of Public Joint Stock Companies (Resolution No. 7 R.M. of 2016) ('New Governance Rules') in order to:

- list a set of new corporate governance rules in accordance with, and to adhere to, the Commercial Companies Law (Federal Law No. 2 of 2015) ('CCL'); and
- repeal the UAE Ministerial Resolution on Governance Rules and Corporate Discipline Standards (Ministerial Resolution No. 518 of 2009) ('Repealed Governance Rules').

The purpose of this article is to compare the New and Repealed Governance Rules and highlight some of the provisions that are related to 'Shareholders Rights', 'General Assembly Meetings', 'Auditors', 'Code of Professional Conduct' and 'Penalties for Violating the New Governance Rules' that we consider would benefit from clarification from SCA.

It is worth mentioning that any capitalised terms used in this article have the same meaning to those mentioned in the New Governance Rules or the CCL if such definition does not exist under the New Governance Rules, unless provided otherwise in this article.

Shareholders Rights

The wording of Article 32 of the New Governance Rules is unclear but appears to give shareholders the right to access the Company's reports, financial statements, books and documents without any prior permission from the Board of Directors or the General Assembly. Article 221(1)(b) of the CCL does not help that much either as it can be read in one of two ways:

- Shareholders shall have the right to access the Company's books, records and documents including documents related to Deals with a Related Party only after obtaining the prior permission of the Board of Directors or the General Assembly; or
- Shareholders shall have the right to access the Company's books, records and documents at anytime without the need of any prior permission while documents related to Deals with Related Parties require the prior permission of the Board of Directors or the General Assembly.

Also neither Article 221(1)(b) of the CCL nor Article 32 of the New Governance Rules provides for a minimum shareholding threshold that a shareholder needs to have the access right, i.e. it could be understood that a shareholder who owns one share has the right to access all of the Company's books, records and documents. Article 19 of the New Governance Rules on the other hand gives the right to access any documents related to a Deal with a Related Party only to shareholders holding at least 5% of the Company's share capital and have obtained the approval to access such documents either from the Board of Directors or the General Assembly and therefore contradicting with Article 221(1)(b) of the CCL and Article 32 of the New Governance Rules.

The main risk here for the Company is that some documents are of a confidential nature for the purposes of the Company's operation and it can damage these operations if the documents are in

the public domain. All Companies have the right to measures that serve its best interests and do not affect its operations. On the other hand, a shareholder should have the right to access the Company's books, records and documents to ensure that the Company is not violating any of the shareholder's rights.

Accordingly, we believe that Article 221(1)(b) of the CCL should be interpreted as explained in paragraph (i) above. As for Articles 19 and 32 of the New Governance Rules, we believe that they should be interpreted to give any shareholder (irrelevant of the number of shares such shareholder holds) the right to access the Company's books, records and documents (including those related to Deals with Related Parties) subject to obtaining the prior permission of the Board of Directors, the General Assembly or a court. The Company in such case may also insist that the shareholder (and any of his/her affiliates, agents, officers, employees and advisors) granted the right of access will sign a confidentiality undertaking to keep the documents provided confidential.

In any event, such right of access should not be unlimited in terms of time and/or documents. Right of access is usually given to comfort the shareholder on a certain aspect of the Company's operations and financials. For example, a shareholder might be given documents relating to a 6 months period relating to a certain transaction or operation. Unlimited right of access should only be given by way of a court order.

Other than that, both rules provide for the other shareholder's rights as prescribed in Article 221(1)(a) of the CCL, such as receiving dividends, attending and voting at General Assembly meetings, right to sell the shares and receiving part of the distributions pro rata to the shareholding at time of liquidation. Such rights are subject to the provisions of the Company's articles of association provided that such articles of association avoid any restrictions on the free trading of the Company's shares in the Market or that may cause the prevention of a shareholder's voting right.

General Assembly Meetings

While the Repealed Governance Rules did not provide for any provisions in relation to General Assembly meetings, Articles 23 to 30 of the New Governance Rules sets the governance rules applicable to such meetings, in accordance with Articles 171 to 192 of the CCL, in relation to the following:

Convening A General Assembly Meeting

The General Assembly shall meet in the venue set in the Company's articles of association. Every shareholder shall have the right to attend the General Assembly meeting and shall be entitled to a number of votes equal to the shares he holds. A shareholder having the right to attend the General Assembly meeting may delegate another Board Member by virtue of a power of attorney. A representative of a shareholder may not hold, in such capacity, more than 5% of the Company's issued share capital. Those lacking legal capacity shall be represented by their legal representatives.

The legal entity may authorize one of its representatives or directors by virtue of a resolution issued by its board of directors or the body acting on its behalf to represent such legal entity in the Company General Assembly meetings. The authorized representative shall have the authorities prescribed in the authorisation resolution.

The holder of the share registered on the business day preceding the date of the General Assembly meeting shall be the person entitled to vote in the General Meeting of such Company.

Sending Invitations

The Board of Directors must call for the annual General Assembly meeting within the four months following the end of the fiscal year and for the General Assembly meeting whenever it deems appropriate.

SCA, the auditor or shareholders holding 20% or more of the Company's share capital (as per Article 174 of the CCL, the Company's articles of association may provide for a less percentage) may, for serious reasons, request the Board of Directors to convene the General Assembly meeting. In such a case, the Board of Directors should call for the General Assembly meeting within five days from the date of submission of the meeting request.

Article 24 of the New Governance Rules further provides that shareholders holding 10% of the Company's share capital shall have the right to call the General Assembly for an urgent meeting by submitting to the SCA a request calling for the General Assembly meeting to adopt a Special Resolution and attaching all the documents supporting such request. This provision is not stipulated under the CCL. Therefore, we believe that the SCA shall have the discretionary power whether or not to accept such request. In case the SCA rejects the request to convene the General Assembly meeting, then the shareholders may challenge the SCA's refusal before a competent court. If the court accepts the request then the SCA is then obliged in such case to call for such meeting.

Register of the Minutes

The Company must keep record of the minutes of the General Assembly meetings subject to the following:

the minutes of the General Assembly meeting must include the names of the attending or represented shareholders, the number of shares they hold for themselves or by proxy, number of votes to which they are entitled, the adopted resolution, number of votes in favour of or against such resolutions and a detailed conclusion of the discussions held in the meeting. The minutes shall be regularly taken after every meeting and shall be kept in a register to be signed by the chairman of the Meeting, the secretary, the vote collector and the auditor; and

- the minutes shall be free from any spaces, writing in the margins, deletion or addition.
- The following rules shall be followed in keeping the register of the minutes of the General Assembly meetings:
 - the register pages must be serially numbered; and
 - a register of the minutes of the General Assembly meetings shall be kept at the Company's headquarters.

Term of Authorisation Given to the Board of Directors By Way of a General Assembly Resolution

In case a Special Resolution is issued by the General Assembly for raising the Company's capital or the issuance of loan bonds or sukuk, the term of authorisation granted to the Board of Directors shall be one year from the date of issuance of such a Special Resolution in order for the Board of Director to take a decision regarding the times and mechanism of implementation of the said resolution through one or more issues or programs. The authorisation issued to the Board of Directors shall expire after the elapse of the one-year period after which the resolutions issued in this regard shall be deemed void.

Notwithstanding the above, the previous resolutions issued by shareholders holding at least 75% of the Company's share capital in the Company shareholders' meeting held before the enforcement of the CCL provisions regarding the issuance of bonds or sukuk shall be valid and effective as if they were adopted through a Special Resolution issued by the shareholders of the respective company after the enforcement of the CCL provisions and without need for the issuance of a new special

resolution or abiding by the terms prescribed above or in Article 230 of the CCL. This is provided, however, that the General Assembly has not cancelled the authorisation resolutions issued to the Board of Directors.

Arrangements for General Assembly Meeting

The appropriate arrangements and procedures should be followed to hold the General Assembly meeting including the selection of venue and time to help and encourage the attendance of the largest possible number of shareholders.

The invitation to the General Assembly meeting must indicate the venue and time and must be accompanied by the meeting agenda with the topics to be deliberated during such a meeting in a detailed and clear way in addition to any documents or attachments related to such topics. The time and venue of the meeting must be announced on the Company's website.

Inclusion of an Item in the Meeting Agenda Before the Meeting

The inclusion request must be submitted by a number of shareholders representing at least 10% of the Company's share capital. The new item must be clear and specific and must not be conflicting with the provisions of the CCL or the resolutions and regulations issued in implementation of it. The inclusion request should be written and signed by the applicant and submitted to the chairman of the General Assembly meeting before starting the discussion of the agenda. The meeting's chairman must approve the inclusion of the item. In case of refusal, the applicants may present the issue to the General Assembly and it shall be voted by the majority of shares represented in the meeting.

Inclusion of an Item in the Meeting Agenda During the Meeting

The shareholders holding at least 5% of the Company's share capital shall have the right to apply to the SCA to include additional items in the General Assembly meeting agenda within five business days from the date of the invitation to the General Assembly meeting.

Issuance of Special Resolutions

"Special Resolution" is defined under the CCL as the resolution issued by the shareholders that own no less than three quarters of the shares represented in a General Assembly meeting of the Company. This means 75% of the shares represented in a General Assembly meeting as long as they meet the minimum percentage of share capital required to convene such meeting. For example, if 51% of a Company's share capital is represented in a General Assembly meeting and the Company's articles of association requires more than 50% of the share capital to attend in order to consider the meeting as duly convened, a Special Resolution shall require the approval of 75% of that 51% of the Company's share attending such meeting and not 75% of the Company's total share capital.

As per the New Governance Rules, the following matters may only be approved by way of Special Resolution even if this is provided under the Company's articles of association:

- issuing bonds or sukuk;
- (making voluntary contributions for community service purposes;
- Company's dissolution or merger with another company;
- sale or disposal in any other way of the business for which the Company was incorporated;
- if the Company wishes to sell 51% or more of its assets, whether in one deal or through various deals within one year from the date of the first deal or transaction;
- extension of the Company's term;
- amendment of the Company's articles of association;

- accepting the partnership of a strategic partner;
- conversion of cash debts to shares in the Company's share capital;
- approving of the Company's employee shares incentive scheme or program;
- as and when required under the CCL.

It is worth mentioning that Article 31 of the New Governance Rules further provides that without prejudice to the provisions of the CCL, the Company must secure the approval of its shareholders for every issue of new shares (subject to the SCA's approval of the capital increase) and the approval of the Central Bank where there are companies under its control.

Implementation of General Assembly Resolutions

The Chairman must implement the General Assembly resolutions subject to the following regulations:

- disclosure of the results of the General Assembly meeting to the Market and on the Company's website;
- securing the approval of SCA and other competent authorities and supervisory bodies on the resolutions adopted by the General Assembly during the meeting; and
- implementation of the resolutions within fifteen days from the meeting date unless the nature of the adopted resolutions requires a longer period including without limitation the increase or decrease of the Company's share capital or issuance of bonds or sukuk.

Auditors

The following new provisions were introduced by the New Governance Rules:

- For the nomination of the auditor, and in accordance with Article 244 of the CCL, it is mandatory for auditors appointed to audit a publicly listed company to be registered in the SCA's register of auditors;
- no employee of the Company's auditor may be appointed in the Company's Senior Executive Management until the elapse of at least two years from the completion of auditing the Company's accounts by such auditor; and
- a new provision for the obligations of the auditor was included under the New Governance Rules which basically stipulates that the auditor shall:
 - carry out the works assigned to the auditor independently and without bias;
 - supervise the Company's operations, examine its administrative and financial systems and internal auditing systems, give an opinion as to the effectiveness of such systems, and ensure their appropriateness for smooth flow of the Company's operations and preservation of the Company's assets;
 - give an opinion concerning the validity of the Company's financial statements and demand amendment where necessary;
 - verify the Company's ownership of its assets and legality of its obligations;
 - attend the meetings of the General Assembly and recite the auditor's report to the shareholders and answer their questions and inquiries in relation to the latest financial statements; and
 - report to the SCA and the competent regulatory authorities of any material violations or obstructions.

Other than the above, there is no difference between the New and the Repealed Governance Rules including the prohibited acts to be carried out by the auditor and permitted consultations.

Code of Professional Conduct

Article 49 of the New Governance Rules provides that it is part of the duties of the audit committee to monitor the adherence of the Company with the code of professional conduct. In the Repealed Governance Rules it was the duty of the Company to adopt a professional conduct code.

Penalties for Violating the New Governance Rules

The New Governance Rules grant the SCA the right to refer any breach carried out by the Company or its Board Members or employees to the Public Prosecutor. This did exist under the Repealed Governance Rules. The New Governance Rules further refer to the application of SCA Board Resolution No. 42 of 2015, regarding the Regulations and Procedures of Reconciliation in the Offenses Related to Public Shareholding Companies (which also did not exist in the Repealed Governance Rules).

Conclusion

In light of the above and the previous three parts of this article, it is clear that the New Governance Rules introduce several improvements that have either rectified, or filled in gaps that used to exist under the Repealed Governance Rules. There are several major differences between the New and Repealed Governance Rules. The New Governance Rules introduce new provisions that did not exist before, and structure the corporate governance principles in a more organized manner.

It can be said that the New Governance Rules have strengthened the normative framework for public joint stock companies' corporate governance.

However, we still believe that there is room for additional improvements since several provisions of the New Governance Rules need to be put into practice, and the interpretation and clarification by the SCA of some provisions is needed.