

UNITED ARAB EMIRATES

*Osama Audi and Yousef Farsakh*¹

I OVERVIEW OF GOVERNANCE REGIME

The Securities and Commodities Authority of the United Arab Emirates (UAE) is the UAE federal regulator responsible for regulating companies listed on the Dubai Financial Market exchange and the Abu Dhabi Securities Exchange. On 28 April 2016, the UAE Securities and Commodities Authority issued Decree No. 7 R M of 2016 which set out UAE corporate governance rules, and came into force on 1 May 2016, repealing the old governance rules issued under Decree No. 518 of 2009. This new set of UAE corporate governance rules applies to public joint stock companies that are listed on the Dubai Financial Market or Abu Dhabi Securities Exchange.

The new rules compliment the UAE Commercial Companies Law No. 2 of 2015. Together, the UAE Commercial Companies Law and the UAE corporate governance rules aim to increase the sophistication of the corporate governance landscape in the UAE, further protect shareholders, and promote corporate social responsibility.

The UAE governance rules include revisions to the listed company's general assembly requirements, notice periods, statutorily mandated registers, related-party transaction restrictions and board meeting communications, among others.

II CORPORATE LEADERSHIP

i Board membership

The articles of association of the listed company shall decide on the method of formation, number of members and tenure of membership of the board of directors.

Members of the board of directors are elected through secret, cumulative voting by the members of the general assembly of the listed company.

The chairperson and a majority of the members of the board of directors must be UAE nationals.

At least one-third of the members of the board must be independent, and a majority must be non-executive board members (a board member will lack independence if such board member or any of his or her relatives work or has worked in the senior executive management of the listed company or any of its subsidiaries during the two years preceding the date of becoming a board member candidate).

¹ Osama Audi is a partner and Yousef Farsakh an associate at King & Spalding LLP.

A minimum of 20 per cent of the members of the board of directors must be female. If a listed joint stock company is unable to meet this requirement, it must disclose the reason why to the UAE Securities and Commodities Authority.

The chairperson may not hold the position of manager, executive manager or any other executive function in the listed company.

If a government owns 5 per cent or more of a listed company's shares, the said government may then appoint a representative in the listed company's board of directors *pro rata* to its shareholding or at least one board member if the shareholding percentage required to elect such member is less than the shareholding of the said government.

ii Board meetings and votes

Resolutions of the board of directors are passed by the majority of votes of those members and representatives present at the meeting. In the case of a tie, the chairperson shall have a casting vote.

Only a majority of directors are required to hold board meetings in person.

Board meetings may be held using electronic communication methods, such as video conferencing, subject to the articles of association of the listed company.

iii Board member candidacy and responsibilities

Candidates for board membership must not have been dismissed from their position on the board of directors of another publicly listed joint stock company in the 12 months prior to the date of nomination.

Candidates for board membership must not be board members in more than five companies or be chairperson or vice chairperson in more than two companies or be the managing director of more than one company.

Board members must: (1) not have been convicted of a crime of 'honour' or honesty unless pardoned; (2) have at least five years' experience in the activity carried out by the listed company; (3) hold a clean record before the UAE Securities and Commodities Authority with no disciplinary action having been taken against him or her, no court order issued to dismiss or remove him or her from his or her position as a board member and no outstanding proceedings before the public prosecution office in relation to honesty and integrity; (4) preserve the listed company's rights and act as a prudent person; (5) act with honesty and integrity and in accordance with the applicable laws and regulations and the listed company's articles of association; (6) disclose being a chairman, board member or a member of the senior executive management of any other company; and (7) dedicate sufficient time for his or her duties and obligations toward the listed company.

iv Board remuneration

Under the UAE governance rules, if the listed company generates net profits for a given year, the board members' remuneration is not subject to the distribution of a minimum percentage of dividends (i.e., even if no dividends are distributed to shareholders, the general assembly of a listed company may resolve to pay board members' remuneration for such financial year).

If a board member contributes to the listed company beyond his or her ordinary duties (e.g., through serving on special committees, performing special works, etc.), the listed company may compensate such board member for relevant fees and expenses, or pay a monthly salary to such board member, to the extent determined appropriate by the board of directors.

If, owing to the negligence of the board of directors, the listed company is fined for violating the listed company's articles of association or applicable laws, such fine amounts shall be deducted from the board of directors' remuneration.

III DISCLOSURE

A relevant topic relating to corporate disclosure in the UAE is the restriction on related-party transactions for public joint stock companies. The UAE corporate governance rules contain a broad definition of 'related party'. When deciding if a counterparty to a transaction is a related party, consideration must be given to whether the counterparty is: (1) a director, chair, board member, employee or senior executive of the listed company (each a 'related person'); or (2) any company in which any related person has a 30 per cent (or greater) interest, and any affiliate, subsidiary or parent of any such company (each a 'related company', together with each related person, a 'related party'). Listed companies are required to maintain up-to-date lists of related companies and details of any transactions with related parties. The UAE corporate governance rules are silent as to whether the 30 per cent share ownership threshold applies to indirect, or only direct, ownership.

In relation to any transactions, contracts or agreements entered into between a public joint stock company and a related party that: (1) does not fall under the main activity of such listed company; or (2) includes preferential terms not typically granted by the listed company to its clients, must be approved by the listed company's: (1) board of directors if the value of the transaction, contract or agreement is 5 per cent or less than the listed company's capital; and (2) general assembly, if the value of the transaction, contract or agreement is more than 5 per cent of the listed company's capital.

Furthermore, if a transaction, contract or agreement exceeds 5 per cent of the listed company's capital, such transaction must be evaluated by a valuator accredited by the UAE Securities and Commodities Authority before obtaining the approval of the listed company's general assembly, in order for such transaction to be concluded.

Details of any transaction between the listed company and a related party must be disclosed to the listed company's board of directors and general assembly, irrespective of the size or value of the transaction. Additionally, any transaction between the listed company and a related party must be disclosed to the UAE Securities and Commodities Authority by the listed company's chairman. Such disclosure must include details of the transaction, including details of the: (1) transaction value and nature; (2) related party; and (3) nature and benefit of the involvement of the related party. Such disclosure must also contain a written confirmation that the terms of the transaction are fair, reasonable, and in favour of the listed company's shareholders.

The board of directors must set up a committee of non-executive board members responsible for reviewing issues that may result in a conflict of interest for board members including verifying financials and the review of transactions concluded with stakeholders. In addition, there are no squeeze-out or compulsory acquisition provisions on the two main UAE exchanges.

A member of the board of directors must inform the board of directors of any conflict or joint interest and must not participate in the voting in respect of such matter. In addition, if the director fails to inform the publicly listed company of his or her conflict, the listed company can move before the competent court to invalidate the contract or to order the

director who acted in contravention of the corporate governance rules to account to the listed company for any profit or benefit obtained as a result of entering into the conflicted transaction.

One additional disclosure consideration to take into account is that if a party reaches an ownership interest of 5 per cent or more of the shares of a listed company or 10 per cent or more of the shares of a parent company or subsidiary to the listed company, the relevant party must inform the market on which the relevant public company is listed. In addition, the relevant party must commit to declare to the UAE Securities and Commodities Authority every additional 1 per cent interest that he or she acquires in the listed target and in accordance with the above.

IV CORPORATE RESPONSIBILITY

A member of the board of directors of a listed company is specifically charged with the responsibility to: (1) preserve the listed company's rights and act as a prudent person; (2) dedicate sufficient time for his or her duties and obligations toward the listed company; and (3) act with honesty and integrity in accordance with the applicable laws and regulations and the listed company's articles of association.

Integrity and ethical behaviour in the corporate context would generally qualify as a public policy concern, and companies, directors, executives, and others are expected to behave ethically when transacting in the UAE. Listed companies are also required to maintain registers of insiders, conflicts of interest and related party matters (as detailed above). Transparency and the duty of care to the shareholders of public companies require companies to maintain such registers in order to ensure effective compliance.

Companies are required to appoint a compliance officer who shall oversee the listed company and its employees' compliance with the listed company's articles of association, applicable laws and regulations, and the resolutions of the general assembly and board of directors of the listed company. The listed company's compliance officer may also be the director the listed company's internal control department simultaneously. The board must establish a strict internal control system to implement the UAE corporate governance code, regulate risk management, ensure compliance with local laws and regulations, ensure compliance with internal policies and procedures, and to review financial information used in drafting financial statements.

V SHAREHOLDERS

i General assembly

In the UAE, the corporate governance rules allow shareholders who own 10 per cent of the issued share capital of a listed company to call for an urgent general assembly meeting to discuss urgent matters. The UAE corporate governance rules also allow shareholders who own five per cent of the issued share capital to submit a written request to the UAE Securities and Commodities Authority to include an additional item on the agenda of a shareholders' meeting, even if the invitation to the meeting has already been published.

A board of directors of a public company may also call a general assembly with less than 30 days' notice only if approved by 95 per cent of the shareholders. The notice convening the general assembly meeting must: (1) contain full details of the purpose and agenda of the general assembly meeting; (2) be published on the relevant public company's website; and

(3) be disclosed to the market on the relevant market's regulatory news service. The rationale behind these requirements is to assist shareholders with access and participation rights in relation to the public company. The UAE Securities and Commodities Authority is required to approve a listed company's general assembly meeting, but the shareholders, through these rules, may maximise their participation in the public company's decision-making process.

Each shareholder has the right to attend the meetings of the general assembly of a listed company and shall have the votes equal to the number of shares in his or her possession.

ii Dividends

Following a general assembly meeting of a public joint stock company where a distribution of dividends has been approved, the listed company is mandated to deposit the cash dividends to the shareholders within 10 days of the general assembly meeting. If a delay is experienced for any reason, the delay may not extend past 30 days from the listed company's general assembly meeting. This rule is meant to enhance shareholder economic protections.

iii Lock-up periods

In relation to joint stock companies listed on the Dubai Financial Market or Abu Dhabi Securities Exchange, following the statutory two-year lock-up period, founding shareholders would be permitted to sell-down their interest in the listed company through a secondary offering. There are limitations to this approach as companies that are listed on the Dubai Financial Market or Abu Dhabi Securities Exchange are only permitted to sell-down up to 30 per cent of the total share capital through a secondary offering. A workaround to this limitation is to first list on an overseas exchange, which permits a sell-down greater than 30 per cent and to, thereafter, list on the Dubai Financial Market or Abu Dhabi Securities Exchange. Also worth exploring is the possibility of an indirect sell-down of shares in the entity listed on the Dubai Financial Market or Abu Dhabi Securities Exchange.

iv Share capital increase

In order to issue new shares in a listed company, the approval of the listed company's shareholders is required, in addition to the approval of the UAE Securities and Commodities Authority. In applicable cases, companies subject to the supervision of the UAE Central Bank must also obtain its approval as well. The issuance of new shares is also subject to the requirements of the UAE Commercial Companies Law.

v Additional shareholder rights

Shareholders generally have the right to review the listed company's financial statements and reports, records, and documents, and also have the right to obtain their specific share of the listed company's assets upon liquidation.

The corporate governance report which must be submitted in order to apply for convening the annual general assembly meeting of a listed company must be made available to the shareholders of the listed company prior to submission.

vi Proxy battles and hostile takeovers

Proxy battles and hostile takeovers are rare in the UAE.

VI OUTLOOK

The UAE continues to develop its corporate governance regime, and the latest updates in the law provide a more comforting landscape for investor confidence. It is likely that the UAE Securities and Commodities Exchange will continue to evolve and introduce further rules to safeguard the growth of corporate activity in the UAE.

OSAMA AUDI

King & Spalding LLP

Osama Audi specialises in mergers and acquisitions, joint ventures, complex corporate structuring, and corporate finance. As a partner in our award-winning Islamic finance and investment practice, Osama works with clients doing business in the Middle East and Africa, with a particular focus on the countries of the Gulf Cooperation Council, including Saudi Arabia and the United Arab Emirates.

With region-specific expertise in mergers, acquisitions, joint ventures and corporate finance, Osama represents clients in private equity, real estate and alternative investment funds, and in closely held businesses. He also counsels large and mid-tier multinationals in sectors such as consumer goods and retail, oil and gas, technology and e-commerce, healthcare, education, real estate, hospitality and leisure.

Osama is a member of our food & beverage team, which brings together leaders who work on transactional, regulatory, trade, IP and disputes in the sector across offices.

Prior to joining our firm, Osama worked in the Dubai office of Clifford Chance and, for approximately two-and-a-half years prior to that, was seconded to Clifford Chance's partner-firm in Riyadh, Saudi Arabia, Al Jadaan & Partners Law Firm, where he focused his practice on mergers and acquisitions transactions, and the establishment and successful operation of joint ventures.

Previously, Osama worked with Istithmar, the private equity arm of the Dubai World sovereign wealth fund. There, he was a member of the international acquisitions group, focusing on real estate, hospitality and leisure acquisitions, and joint ventures.

Osama is fluent in Arabic and English.

YUSEF FARSAKH

King & Spalding

Yusef Farsakh is a corporate lawyer with King & Spalding, and is currently resident with the Middle East offices, based in Dubai. Yusef has also spent significant time working with King & Spalding's New York office and affiliated office in Riyadh, Saudi Arabia. He specialises in cross-border mergers and acquisitions and private equity, in various sectors including technology, venture capital, healthcare, real estate, hospitality and food and beverage. Yusef has substantial previous experience in finance, including conventional and Islamic financing, secured and syndicated financing, and debt capital markets. Prior to joining King & Spalding, Yusef was a transactional lawyer with a US law firm in Los Angeles.

Yusef previously clerked for a number of business and political organisations in the US, Europe, and the Middle East. Yusef worked for The Carter Center during periods of transition in key Middle Eastern nations. He also externed at the California Supreme Court for the Honorable Justice Ming W Chin. Over the course of his academic career, Yusef served as the Senior Managing Editor of the law school's Science and Technology Law Journal, and chair of the International and Comparative Law Society. He was a member of the Pro Bono Society and earned The University of California, Hastings' highest recognition, the Outstanding Achievement in Pro Bono distinction. In 2012, the Board of Governors of the State Bar of California selected Yusef as the year's recipient of the Wiley W Manuel Certificate for Pro Bono Legal Services. Yusef is also a Tony Patiño Fellow.

KING & SPALDING LLP

Al Fattan Currency House
Tower 2, Level 24
PO Box 506547
Dubai International Financial Centre
Dubai
United Arab Emirates
Tel: +971 4 377 9900
Fax: +971 4 377 9955
oaudi@kslaw.com
yfarsakh@kslaw.com
www.kslaw.com