E
day last month, Bank Negara Malaysia mandated that boards of banks have a majority of independent directors who should not serve for more than nine years.
At last count, only five of the 10 listed banking groups have a majority of independent directors, and there are equal numbers of independent and non-independent ones. Of the 83 directors, 43 or 52% were independent.

So how do listed banking companies balance the banking groups? Research by FocusM shows that 52 of the boards of the 10 listed banking companies have a majority of independent directors, and only 18 with more non-independent ones.
Overall, 50%, or 37 of the 74 directors, are independent. Broadly, 51 (18%) are executive directors, mostly CEOs and other senior officers, and 223 (84%) are non-executive directors who are either independent or non-independent.

Anaxim Group Bhd and Cairn Malaysia Bhd boast the highest percentage of independent directors with 75% and 67%. Axiata Group Bhd and Genting Malaysia Bhd also have substantial numbers of independent and non-independent ones. Of the 83 independent directors, 38 or 46% are non-executive directors who are either independent or non-independent.

There has been some praiseworthy movement towards boards of companies to be more independent. The statistics appear to show that the 10-line shoe market pan with "Shoe cul-
low the integrity of individuals who take on the role of independent directors to ensure they maintain clear separation and independent minds when performing their duties as directors."

In his view, an effective board comprises a group of people with an appropriate skill set, knowledge and experience that fit into the organisation’s objectives and strategic goals.

"(An independent director) is bound to protect the interest of the company, and at the same time exercise independent judgment on issues which may lead to competing interests. When faced with issues where the interests of the management or promoters are in conflict with those of minority shareholders, an independent director’s decision is sought to reach a judgment without fear or favour."

"So what’s next in the battle for independence? That’s what the companies have to do to ensure that independent directors take on the role of independent directors."

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"What makes an effective independent director?"

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FOR ALL INDEPENDENT DIRECTORS TO BE EFFECTIVE, certain elements are important, says Malaysian Institute of Directors Executive Director Datuk Abdul Aziz Abu Bakar. They are:

- Perception about independence of directors among the promoters, including family-owned businesses, public sector corporations and multi-national companies;
- The importance of understanding the concept of true independence and what it entails;
- Always seek means to diversify the pool of IDs rather than set non-independent ones.

"One should develop the ability to proactively assign management to make the right decisions;
- Ensure that ID’s remuneration and compensation through ongoing training and education;
- Avoid conflict of interests which may affect their own reputation and standing, for example;"
Define clearly criteria and attributes of candidates

- From previous page he cautions. "In light of the above, it is equally important to have a strong and competent company secretary to serve as the conscience of the board.”

Salleh feels it is therefore crucial to decide only after careful consideration of facts and views that are followed by robust deliberation. “Everyone in position of leadership and decision-making will always be in a difficult predicament,” he says. “In fact, every decision could turn out to be good or bad.”

In the past, Bursa had taken action against independent directors for failing to discharge their duties. For instance, it fined Golden Plus Holdings Bhd RM3.25 mil this year for numerous financial reporting breaches and other breaches of the exchange's listing rules. Among others, the company failed to issue its financial statements for the financial years ended Dec 31, 2010 to 2014 and quarterly reports for financial years 2011 to 2014, within the stipulated timeframes.

Universiti Malaysia Pahang’s Post-graduate Studies Institute dean Prof Datuk Nasnah Haron calls on every board to formulate its own set of ethical standards and system of compliance centred on the company’s code of conduct.

“These ethical standards must be endorsed by the board. Independent directors must ensure compliance by issuing a reminder at the beginning of each meeting that all decisions must comply with such ethical standards.”

Selecting right board members

To preserve board independence and safeguard independent directors from “the Sword of Damocles that hangs above their heads,” Minda’s Abdul Aziz proposes that independent directors be provided with liability insurance which indemnifies them from losses resulting from claims made against them in the course of discharging their duties on behalf of companies.

“Faced with heavier responsibilities and stringent regulatory requirements, they need the assurance of cover to help protect them against the financial burden of litigation, damage to their reputation and loss of personal assets,” he says. “It is recommended that independent directors seek to be provided with this assurance prior to agreeing to serve – or continuing to serve – on the board.”

While some organisations offer their qualified independent director candidates to public-listed companies (PLCs), the latter must do their due diligence based on their industries’ unique requirements, says MACD’s Chan.

“It is critically important the nomination committee (NomCom) of the board has an effective due process to source and evaluate potential candidates to join the board,” stresses Chan. “Quite commonly, potential candidates are referred through informal networks of corporate, professional, civil service, family or friendly connections.”

While some PLCs adopt the process of mapping out the skill set matrix of their boards to assess gaps to be filled, others may engage search firms and their boards to assess gaps to be filled, of mapping out the skill set matrix of their industries’ unique requirements, says MACD’s Chan.

“While some PLCs adopt the process of mapping out the skill set matrix of their boards to assess gaps to be filled, others may engage search firms and their methodologies of selection, including psychometric assessments.

“That said, the NomCom is still responsible to clearly define the criteria and desirable attributes of potential candidates and justifies its recommendations to the board,” Chan points out.

MCCG’s Yusli says every company and candidate must answer two vital questions: the ability to fit in and how to add value. “Good companies value independence and its evidence on independent non-executive directors, among others.

The Whistleblower Protection Act 2010 (WPA 2010) is another legislation

\[ \text{Time to step down} \]

IT’s common to hear about underperforming employees being counselled out of companies, but how does one approach the more delicate situation involving a director?

“A study by KPMG’s Audit Committee Institute entitled Non-Executive Directors 2013: Profile of and Pay suggests a director could be considered underperforming when he:

- Has overcommitted himself to other directorships, his personal affairs and business, or both (thus, he is unable to devote the time required to serve effectively on the board and usually turns up for board meetings unprepared);
- Cannot or does not want to keep up with current issues confronting the company; and
- Is painfully unaware of his roles, duties, rights and obligations; and/or is literally a silent attendee at board meetings.

While some companies impose term limits to ease directors out of office, there are two disadvantages – this can either be an extremely slow way to remove directors or increase the likelihood of removing high-performing ones.

Hence, boards may want to consider the following options:

- Agree on minimum performance standards required of each director (namely, roles and responsibilities which could be written in the director’s appointment letter/service contract);
- Agree on a process to handle situations when a director may be required to leave on the basis of non-performance; and
- Have a succession plan in place not only for chairman and committee chairmen, but also for all directors (this would signal that a director’s position is not permanent).

Salleh says decisions must be based on careful consideration followed by robust deliberation.

The disclosure relates, and even when the [str}mport conduct has occurred before the commencement of the WPA 2010,” explains Putra Business School’s Dr Ahmed Razman.

Additionally, the proposed Corporate Liability Act – when passed – will pile more responsibilities on boards to include ensuring, among others, appropriate systems and processes are in place to check and deter unethical practices of corruption and bribery across the boards and companies.

Salleh says decisions must be based on careful consideration followed by robust deliberation.

On the other hand, empirical evidence gleaned from interactions with high-performing NEDs over the years indicates that tenure isn’t necessarily the best indicator of an NED’s independence and behaviour. After all, an NED could not be non-performing from the first day of his appointment!

Heavy responsibilities

For now, the roles and responsibilities of independent directors are quite well defined in the regulatory frameworks of the Securities Commission, Bursa, Bank Negara and the Companies Commission Malaysia. The Malaysian Code on Corporate Governance 2012 (MCCG 2012) and the updates to MCCG 2016 is poised to enhance the code on independent non-executive directors, among others.

The Whistleblower Protection Act 2010 (WPA 2010) is another legislation that the boards of PLCs can incorporate into their corporate governance framework. Under the WPA 2010, a director must make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct, provided that such disclosure is not specifically prohibited by any written law. A failure of an improper conduct can also be made although the person making the disclosure is not able to identify a particular person to which