

Companies And Corporate Governance - In - Depth Analysis

Ahmed Hamad

a.hamad@tamimi.com

A board of directors of a public company is composed of 3 to 15 board members and is appointed for a period of not more than 3 years. Article 96 of the Commercial Companies Law (“the Companies Law”) states that appointment of board of directors is made by the annual general assembly of the company.

The board of directors’ mandate expires at least once every three years and the annual general assembly of the company must then reelect and appoint a board of directors to succeed the board with the expired mandate.

Upon the lapse of the mandate of the board of directors, the meeting agenda of the annual general assembly following the expiry of the mandate of the board of directors must include as an item of business electing the board of directors.

Further, when the board must be elected not only does the meeting agenda of the annual general assembly change but the timings and procedures of holding the meeting will change.

Under articles 119 and 123 of the Companies Law, the invitation for an annual general assembly meeting which does not provide for election of the board would be published at least 21 days prior to the meeting date. However, and as stated earlier above, when nominating and electing the board of directors the timings and procedures are different. These differences are highlighted below.

Nomination of the Board of Directors

Before inviting the annual general assembly meeting, a nomination process for the members of the board of directors must be initiated. Article 12 (5) of ministerial decree no. 518 of 2009, (“the Decree”) states:

“A company shall open nomination to membership of the board of directors by announcement in two daily newspapers, of which at least one newspaper is issued in Arabic. Such announcement shall clarify that the company will publish names of the candidates along with their relevant details at the sign board in the company, on its website or by any other means acceptable to the Authority at least two weeks of the in advance of the general assembly meeting and provide the Authority with a list of names of the candidates. The nomination to the membership of the board shall be kept opened for at least one month from the date of the announcement and any shareholder that meets nomination criteria pursuant to the Law and the company’s articles of association may stand for election to the membership of the board of directors by virtue of an application filed together with his/her biography and information on the capacity in which he/she is willing to stand for election”.

According to the Decree, the process of electing the members of the board of directors is split into two separate parts namely nomination and election.

Nomination

The nomination process applying to members of the board of directors must be initiated ahead of the general assembly meeting is set out below:

- Announcing the opening of the nomination process for the board of directors’ membership in daily newspapers, one of which is published in the Arabic language.

- The nomination process should be open for a period of not less than one month;
 - The company must obtain the Securities and Commodities Authority (“SCA”) approval of the text of the announcement to be published in respect of opening the nomination process; and
 - Any shareholder complying with the conditions for nomination under with Companies Law and the Articles of Association of the company may apply for the board membership by submitting an application enclosing a brief resume.
- Once the period of nomination is closed, the company must publish the names of the candidates on its website or announcement board not less than two weeks before the date of the annual general assembly.
 - The published list of candidates must be communicated to the SCA and the financial market on which the company’s securities are listed;

Election

Whilst the process of nomination is in progress, the company may take the necessary steps to hold the general assembly meeting. The company may proceed with publishing the meeting invitation on the third week from opening the nomination process so that once the nomination process is complete the list can be published not less than two weeks before the date set for holding the annual general assembly meeting.

The agenda of the annual general assembly meeting at which the board is to be elected must incorporate a specific item concerning the election of the board.

According to article 96 of the Companies Law, the election of the board of directors shall be by secret ballot. Article 12 (2)C of the Decree mandates “cumulative voting” for the election of board members.

In defining “cumulative voting”, the Decree provides “each shareholder shall have a number of votes that is equal to the number of shares he/she holds, to be applied towards voting for only one nominee to the membership of the board of directors or distributed to selected nominees; provided, however, that the number of votes given to selected nominees should not exceed the number of held votes”

In practice, each shareholder is given a voting card including names of the candidates to the board membership. Each shareholder is requested to cast the votes attaching to his shares for the candidate(s) of his preference, provided that the number of votes he grants to candidate(s) does not exceed the number of shares the voting shareholder holds or represents at the annual general assembly.

A shareholder cannot cast his votes for a number of candidates exceeding the number required to fill the board; for example, if the board is to be constituted of 12 members and there are 20 candidates, each shareholder shall be required to choose not more than 12 members amongst whom the shareholder distribute his votes.

Following completion of the voting process by the shareholder, the candidates shall be arranged in descending order according to the votes cast by shareholders. Selection of successful candidates is not purely according to the votes cast by the shareholders but is driven in part by legal requirement impose by Article 3 (2) of the Decree that at least one-third of the board shall constitute independent board members.

In the Law Update December issue:

Companies and Corporate Governance – In-Depth Analysis
 “Part Three –Board of Directors – Board Committees”