

The Emphasis on Personal Responsibility of Directors and Management for their financial institution under the Financial Services Act 2013 (FSA)

(Part 1 of 2)

**By Gopal Sundaram
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1. A key implicit principle of the FSA is that financial institutions should be managed and led by men and women of high moral fibre! While the FSA places great importance on structure and organisation in respect of the governance of a financial institution, it places equal if not greater emphasis on the "fit and proper" requirements for the chairman, directors and management of the financial institution. The underlying and recurring theme of the FSA that manifests itself in many of the provisions is that only men and women of high and proven moral fibre, not crooks and charlatans, should manage and lead financial institutions authorised under the FSA. **The micro-prudential regime of the FSA is therefore heavily weighted on the individual and personal responsibility of the chairman, the directors and the senior management for the performance and integrity of the financial institutions they lead and manage.**

2. In the scheme of things in the regulatory regime under the FSA, the structural aspects of governance, for example, the corporate governance framework, checks and balances, compliance systems and other internal controls are essential means to ensure the integrity and ethics of financial institutions. But the personal values, track record, talent and quality of the leadership, human resources and talents managing and operating the financial institution ensure that their business is conducted with integrity, expertise, efficiency and a customer service orientation; while profitability and sustainability of the financial institution remains a priority.

Fit and proper person criteria

3. Bank Negara Malaysia, the regulator, is empowered under the FSA to specify fit and proper requirements which have to be complied with by the chairman, directors, chief executive officer or other senior officer of the financial institution. The requirements may include minimum criteria relating to:

- (a) probity, personal integrity and reputation;
- (b) competency and capability; and
- (c) financial integrity.

The regulator has full competence and discretion to determine whether a chairman, director, the chief executive officer or a senior officer has complied with the fit and proper requirements specified in any particular case.

Gate-keeping provisions relating to directors and senior management

4. Section 59¹ of the FSA disqualifies certain persons from being chairman, director or senior management of financial institutions. Such disqualifications include personal insolvency, convictions for criminal offences involving dishonesty or fraud, being subject to an order of court prohibiting being a director of a company or being subject to a detention order or bond of restriction or supervision.

Cessation from office

5. A chairman, director, chief executive officer or senior officer of a financial institution who becomes disqualified to hold office or who does not comply with the fit and proper requirements is immediately required to cease to hold office or act in such capacity. The financial institution should also either terminate the appointment of the chairman, director, chief executive officer or senior officer who is subject to any disqualification set out in the FSA. The financial institution is also required to immediately remove from office any person who does not comply with the fit and proper requirements. Any cessation of office of the chairman, a director, chief executive officer or senior officer has to be notified by the financial institution to the regulator.

¹ The section states:

(1) A person is disqualified from being appointed or elected, reappointed or re-elected, accepting any appointment or election, or holding office, as a chairman, director, chief executive officer or senior officer of an [financial] institution if—

(a) he is an undischarged bankrupt, has suspended payments or has compounded with his creditors whether in or outside Malaysia;

(b) a charge for a criminal offence relating to dishonesty or fraud under any written law or the law of any country, territory or place outside Malaysia, has been proven against him;

(c) he is prohibited from being a director of a company or in any way, whether directly or indirectly, be concerned or take part in the management of a company in Malaysia pursuant to a court order made under section 130A of the Companies Act 1965 and has not obtained any leave of the court under the same section; or

(d) under any law relating to prevention of crime, drug trafficking or immigration—

(i) an order of detention, supervision, or deportation has been made against that person; or

(ii) any form of restriction or supervision by bond or otherwise, has been imposed on him.

(2) Where any criminal proceeding is pending in any court for any offence referred to in paragraph (1)(b) against a chairman, director, chief executive officer or senior officer of an institution, such person shall not—

(a) act in such capacity, hold any other office or act in any other capacity, in that institution; or

(b) be concerned with, take part or engage in any manner, whether directly or indirectly, in any activity, affairs or business of, or in relation to, that institution,

except as may be permitted by the board of directors of the institution subject to such conditions as may be specified by the Bank.

(3) For the purposes of subsection (2), “criminal proceedings” shall be deemed to be pending from the date that the accused person is first charged in court for the offence until the date of the final conclusion of the proceedings, whether in the court of original jurisdiction or, in the event of any appeal by any party, in the court of final appellate jurisdiction.

Article Written By:



GOPAL SUNDARAM

LL. B. (Hons.)(Mal)

Partner

ABDULLAH CHAN & CO

E: gopal@abdullahchan.my

T: +603 2035 6881

Gopal began his highly distinguished career in Bank Negara Malaysia (BNM) in 1982, pursuant to

graduating from University of Malaya on a Bank Negara scholarship. He was appointed as Assistant Governor in 2006. As Assistant Governor he was responsible for the Legal Department, Finance Department and the IT Services (Computer) Department as well the Money Museum and the Art Gallery. During his tenure, he was a member of various committees chaired by the Governor, inter alia, the Management Committee, the Monetary Policy Committee, the Financial Stability Committee, the Budget Committee, the Risk Management/ Committee and in attendance at the Malaysia International Islamic Financial Centre Executive Committee (MIFC), a multi-agency committee appointed by the Prime Minister.

Upon his retirement in 2011, he was appointed as Project Advisor to BNM to advise and supervise the drafting of an omnibus legislation for banking, insurance, payments systems and exchange control as well as an omnibus Islamic legislation for Islamic banking, takaful, payment systems and exchange control proposed to be tabled in Parliament later this year.

Gopal is the only member of the International Monetary Law Committee of the International Law Association (MOCOMILA) from Malaysia. He is also in the Executive Committee of the Malaysian Chapter of ASIL (Asian Society for International Law). Gopal sits on the Board of Directors of Kuwait Finance House (Malaysia) Berhad, the Board of Management of Methodist College Kuala Lumpur, the Council of Education, Methodist Church in Malaysia and the Judicial Council, Methodist Church in Malaysia.

He is a leading adviser on the new Financial Services Act (FSA) and Islamic Financial Services Act (IFSA).

Practice Areas:

- Legislative drafting
- Islamic finance
- Central banking law
- Regulatory law, especially banking, Islamic banking, insurance and takaful

Experience

- Legislative Drafting
 - Islamic Financial Services Act 2013 (drafted in 2012)
 - Financial Services Act 2013 (drafted in 2012)
 - Consequential amendments to the Central Bank of Malaysia Act 2009 (2012)
 - International Islamic Liquidity Management Corporation Act 2011
 - Credit Reporting Agencies Act 2010
 - Personal Data Protection Act 2010
 - Central Bank of Malaysia Act 2009
 - Cooperatives Commission of Malaysia Act 2007
 - Malaysia Deposit Insurance Corporation Act 2005 (repealed)
 - Payment Systems Act 2003 (repealed)
 - Development Financial Institutions Act 2002
 - Islamic Financial Services Board Act 2002
 - Anti-Money Laundering and Anti-Terrorism Financing Act 2001
- Resolution of ailing financial institutions
- International technical assistance in banking and central banking legal matters
- Domestic and international institution building
- Financial crises management