

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

(Part 2 of 2)

**By Gopal Sundaram
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What are boards of financial institutions required to do?

1. Generally, under the FSA and Malaysian corporation law, the business and other affairs of a financial institution have to be managed under the direction and supervision of its Board. The Board under the FSA hence is basically an oversight board, and despite heavy demands made on the personal commitment of directors to the financial institution, they do not have any executive responsibility. Such executive responsibility falls squarely on the chief executive officer and the management of the financial institution. The FSA details the duties of the Board as follows:

- (a) set and oversee the implementation of business and risk objectives and strategies and in doing so shall have regard to the long term viability of the financial institution and reasonable standards of fair dealing;
- (b) ensure and oversee the effective design and implementation of sound internal controls, compliance and risk management systems commensurate with the nature, scale and complexity of the business and structure of the financial institution;
- (c) oversee the performance of the senior management in managing the business and affairs of the financial institution;
- (d) ensure that there is a reliable and transparent financial reporting process within the financial institution; and
- (e) promote timely and effective communications between the financial institution and, Bank Negara Malaysia, the regulator, on matters affecting or that may affect the safety and soundness of the financial institution.

The FSA also states that in carrying out its corporate governance functions or duties, the Board shall have regard to the interests of depositors and, where the of the financial institution.

Duties of individual directors

2. Most recent corporation laws including the recent amendments to the Companies Act 1965 require a director to exercise reasonable care, skill and diligence not only commensurate with the knowledge, skill and experience of a director having similar responsibilities, but also with the additional knowledge and experience that the individual director in fact possesses. For example, certain professionals, such as accountants and lawyers, who are appointed directors to a board of a financial institution would, under the new banking and financial laws, have greater duties and accountabilities than, say, a high school teacher appointed to the same board. In other words, the standards expected of individual directors on a same board would not necessary be similar. Rather, such standards would depend upon each director's background, qualifications and experience. Section 57¹ of the FSA reiterates this point.

The usual duty of directors not to make secret profits is also imposed on directors of financial institutions under the FSA and a duty is placed on them to disclose interests in any material transaction or material arrangement.

¹ The section states:

(1) A director of an institution shall at all times—

(a) act in good faith in the best interests of the institution;

(b) exercise reasonable care, skill and diligence with—

(i) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(ii) any additional knowledge, skill and experience which the director has;

(c) only exercise powers conferred on him for the purposes for which such powers are conferred; and

(d) exercise sound and independent judgment.

(2) Subsection (1) has effect in addition to, and not in derogation of, any written law or rule of law relating to the duty or liability of a director.

(3) Any director who contravenes paragraph (1)(c) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding twenty-five million ringgit or to both.

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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
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