

1 September 2021

Regulatory Policy & Advisory
Bursa Malaysia Securities Berhad
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By email: rpa@bursamalaysia.com

To Whom it May Concern,

**Proposed Amendments to Listing Requirements in Relation to
Director Appointment and Independence**

The Asian Corporate Governance Association (ACGA) is a non-profit membership association founded in Hong Kong in 1999. We conduct independent research on corporate governance and ESG, and advocate at the regulatory and corporate level across Asia-Pacific to improve standards and practices. ACGA is entirely funded by a network of 112 member firms, of which 80% are institutional investors with more than US\$36 trillion in assets under management globally.

We welcome the opportunity to respond to Bursa Malaysia's consultation paper on the "Proposed Amendments to Listing Requirements in relation to Director Appointment and Independence" and appreciate the six-week window to prepare a submission.

The introduction to the paper states that various improvements have been made in recent years to the listing rules on the definition of "independent director" and to the Malaysian Code on Corporate Governance (MCCG) on improved board policies and practices, such as:

- Recommending that the board chairman should not be a member of the audit, nomination, or remuneration committees;
- Recommending that any reappointment of an independent director beyond nine years be subject to shareholder approval through a two-tier vote; and
- Discouraging issuers from appointing active politicians to their boards.

The current paper seeks to enhance board effectiveness and quality further through encouraging greater board renewal, independence, and the adoption of a "fit and proper" policy for the selection and appointment of directors.

The paper is, more specifically, a response to the prevalence in the market of long-serving independent directors—despite a major amendment to MCCG in 2017 to try to limit this

practice. As of 30 June 2021, for example, 463 independent directors have served for more than 12 years, while 91 of them have served more than 20 years. Not surprisingly, Bursa has received feedback from market stakeholders concerned about both this phenomenon and the lack of clarity around the criteria for the competence and character of directors in the listing rules.

Please find our detailed comments below.

PROPOSAL 1

Question 1: Do you agree that the computation of 12 years should take into account the service as an ID in the related corporations of applicant/listed issuer?

We **agree**, with certain caveats.

We agree with the regulator's view that serving on the board of an issuer or any related corporation for a prolonged period could affect an independent director's objectivity. We therefore support the proposal to include service on the boards of related entities, such as the issuer's parent, subsidiary, or a subsidiary of the parent, in the total calculation of an independent director's tenure with the same family of companies.

We question, however, whether a cumulative 12-year period is appropriate. Not only does this conflict with the spirit of the current CG code, but it is likely to be viewed by many institutional investors as overly generous. A nine-year limit for testing director independence is becoming the best-practice threshold in other developed markets, while the latest revision of MCCG (April 2021) recommends that companies adopt an annual two-tier voting process for independent directors once they have served nine years (down from 12 years previously).¹ The proposed changes to the Bursa listing rules would allow independent directors to serve for another three years before they had to leave a board. The danger is that issuers will view 12 years—not nine years—as the new norm.

While the consultation paper seeks to encourage greater board renewal, this long tenure period could create a situation where many companies feel little sense of urgency to build a strong pipeline of new independent director candidates. Arguably the best defence against a stagnant board is an active nomination committee that regularly refreshes board composition.

¹ The previous MCCG (2017) recommended that independent-director tenure should not exceed nine years and that companies should seek annual shareholder approval if they wanted to retain a director beyond this timeframe. However, the two-tier voting concept, which calls for separate votes by "large" (ie, controlling) shareholders and then all other shareholders, did not kick in until 12 years had passed. Malaysia was ahead of the curve regionally in introducing this concept.

In fact, ACGA recommends that the two-tier voting system start at a much earlier stage of the independent-director election process—from the first year of appointment. This would likely raise the quality of candidates nominated, since issuers would have to make a compelling case for each new nominee, and this in turn would strengthen the legitimacy of the firm's governance processes.

Question 2: Do you agree that a cooling off period of 3 years is appropriate for a long-serving ID before such person can be re-appointed as an ID? If not, what is your recommended cooling-off period?

We **strongly disagree**.

From our research over the past two decades we have seen little evidence that short cooling-off periods work in this region. Appointment to the boards of Asian family firms and state enterprises is still largely based on loyalty and personal connections. We have no objection to connected individuals being appointed to boards as executive or non-executive directors, but not as independent non-executive directors.

We also believe that letting a long-serving independent director to return to a board after a break of three years allows an issuer to take the easy option. It will also call into question the robustness of the firm's nomination process and its commitment to board diversity. Companies need to be encouraged to look further afield and expand the pool of potential independent-director candidates.

Question 3: Do you agree that a grace period of 12 months is sufficient for a listed issuer to comply with the proposed enhancements as set out in paragraph 10 of this Consultation Paper? If not, what is your recommended grace period?

We **agree** that 12 months is sufficient for compliance.

PROPOSAL 2:

Question 4: Do you agree with the proposal in paragraph 19 of this Consultation Paper which requires a listed issuer to do the following:

- a) Put in place a fit and proper policy for the appointment and re-appointment of directors of the listed issuer and its subsidiaries;***
- b) Ensure the policy addresses board quality and integrity;***
- c) Make available the policy on its website; and***
- d) Disclose the application of the fit and proper policy in the NC Statement?***

We largely **agree** but have certain concerns.

We share the Exchange's observation that while current listing rules require issuers to appoint directors with sufficient "character, experience, integrity, competence and time to effectively discharge their respective roles", in practice the definition of these terms is opaque. The consultation paper also states that disclosures relating to board election and assessment in the nomination committee statement tend to be "process-centric" rather than descriptive of the steps actually taken.

To address these problems, the Exchange proposes to require issuers to develop and publicly disclose a "fit and proper policy" for the appointment of directors. While the Exchange is reluctant to prescribe how each board should do this, it intends to provide further practical guidance in the CG Guide on the content of such policies.

Our key concern with this proposal is the danger of formulaic policies emerging: issuers may simply copy and paste whatever guidance is provided in the CG Guide and call it their own. It is also not clear how the proposed amendments will ensure that disclosure in future is less "process-centric".

We would make the following suggestions:

- Issuers should be required to explain the extent to which they have taken the "fit and proper policy" in the CG Guide and adapted it to the specific circumstances and needs of their business.
- Nomination committees should be required to report to shareholders annually on work undertaken during the year to implement the policy. This would include, but not be limited to, communications with shareholders and other stakeholders about board composition; use of outside experts to find a more diverse range of director candidates; and so on. Generic disclosures repeated from year to year would not be acceptable.

Question 5: Do you agree that a listed issuer should be given the flexibility to formulate the fit and proper policy, guided by the proposed aspects in paragraph 21 of this Consultation Paper which will be set out in the CG Guide?

We **agree** that issuers should have a degree of flexibility in drafting their own policies and making them relevant to their own businesses, but this can only work if each issuer takes the exercise seriously and does not simply copy whatever guidance is provided in the CG Guide. The Exchange will need to monitor the content of policies and query formulaic responses.

Question 6: Do you agree with the proposed aspects of fit and properness of directors in paragraph 21 of this Consultation Paper which will be set out in the CG Guide? Do you have any other recommended aspects for fit and properness of directors?

We **agree** that the list of high-level criteria provided is reasonable, but note that some of the terms remain vague and will likely be open to debate and disagreement (eg, “probity”, “personal integrity”). We suggest greater clarity could be added to “experience and competence”, such as a director’s understanding of CG, ESG and sustainability issues. Under “track record”, we recommend including previous experience as a director of a company or organisation. And under “time and commitment”, we believe that any positions held on non-profit or charity boards and/or organisations should be included as these are often quite time-consuming.

We would be pleased to discuss any of the points in our letter further with you.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JA Allen', is placed above the printed name.

Jamie Allen
Secretary General

*Neesha Wolf, ACGA Research Director, Taiwan & Malaysia, contributed to this letter.