ASIAN CORPORATE GOVERNANCE ASSOCIATION (ACGA)

Response to the "Corporate Governance Blueprint"

December 2011

This submission contains ACGA's response to the five-year "Corporate Governance Blueprint" published by the Securities Commission Malaysia in July 2011 as well as to the November 15 consultation on two specific issues from the Blueprint. We would be pleased to discuss any of these issues further with Commission.

We fully support the ideas behind the Blueprint that Tan Sri Zarinah Anwar mentioned in her message: moving beyond regulations and the regulator to include a broader range of stakeholders and the board in the process of good governance; and urging institutional investors to become more responsible shareholders. However, there are some recommendations that we believe need to be clarified, while the reasoning behind other recommendations could be reconsidered.

Chapter 1: Shareholder Rights

Recommendation
I. Facilitate voting through proxies and corporate representatives via amendments to the Listing Requirements

- Ensure listed companies do not impose qualitative restrictions on proxy appointment by shareholders and quantitative restrictions on the number of proxies appointed by shareholders. Consequently, the law may need to be amended to clarify that a body corporate can be appointed as a proxy and that more than one corporate representative can be appointed.

- Where more than one proxy has been appointed by a shareholder, (current law states that) the proxies must not be allowed to vote by a show of hands. The law may need to be amended to clarify this (ie, amend it).

ACGA: We are fully supportive of this recommendation. The definition of a proxy in the current Companies Act 1965 is, we believe, very restrictive and the SC makes a salient point that the Listing Requirements should be amended in order that companies do not impose any qualitative or quantitative restrictions on proxy appointment by shareholders. We also support the recommendation to amend the law to allow the registered shareholder to appoint multiple corporate representatives.

There seems to be a degree of confusion in the marketplace, however, on the function of the two-proxy rule as there is no standardised rule as to whose name—the beneficial owner or the trustee—should be on the shareholder register. It would make it much easier to deal with the two-proxy issue if the law was amended to state that it should be the name of the beneficial owner that appears on the shareholder register, as is the case in India. We understand that large institutional investors already agree to allow their names to be entered into the shareholder register as the beneficial owner.

© ACGA Ltd, 2011

On the issue of not allowing proxies to vote on a show of hands, the law currently states:

"Unless stated otherwise in the company's articles of association, a proxy can only vote by way of poll."[1]

We are in agreement with the SC that the law needs to be amended and constraints not be imposed on proxies. We also agree that proxies should be allowed to call for a poll and companies should honour this request.

Recommendation
II. Mandate poll voting via amendments to the Listing Requirements and CG Code

- Impose obligation for the chairman of the general meeting to inform shareholders of their right to demand a poll vote.

- Resolutions approving related-party transactions must be passed or obtained by poll vote. For other substantive resolutions, a phased approach will be taken in mandating poll voting and a public consultation will be undertaken for this.

ACGA: We are fully in agreement with the first bullet point that chairmen should inform shareholders in a general meeting of their right to demand a poll. Voting by poll is something that ACGA has been actively promoting throughout the region since 2006[2], which is why we are not supportive of the second bullet point. We believe that when voting by poll is conducted, it should be for all resolutions on the meeting agenda. Evidence from listed companies elsewhere in Asia indicates that there is no efficiency gain from voting by poll on only some resolutions. Once a poll is set up, it is not difficult to vote all resolutions in this way.

The arguments presented by the SC for mandating voting by poll on only "substantive" resolutions, such as related-party transactions, as opposed to resolutions that were "administrative or procedural in nature"[3], do not address the fact that companies and shareholders may disagree on what constitutes an administrative resolution and what is a substantive one. As has been seen over the past few years in Asia and globally, issues such as director re-elections and approving audited financial accounts may seem "administrative", but are now considered substantive by many shareholders.

The argument that a show of hands empowers minorities also fails to take into account that controlling shareholders can easily ask for a vote by poll should they not "like" the results from a vote by a show of hands.

Recommendation
III. Reinforce commitment to shareholder rights

- Companies to make public their commitment to respecting shareholder rights and take active steps to inform shareholders of how these rights can be exercised.

- Establishment of a taskforce to determine whether the law should be amended to enable companies to directly provide information to beneficial owners of shares.

[1] "Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance", page 8.
[2] "ACGA Asian Proxy Voting Survey 2006"
[3] "Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance", page 10.

© ACGA Ltd, 2011

- Establishment of a taskforce with a view to providing a credible electronic voting platform.

ACGA: We agree with the recommendation that companies should publicly commit to respecting the rights of shareholders, although we have concerns that this exercise may quickly degenerate into boilerplate disclosure. Far better for issuers to show their commitment through their actions—being open to meeting shareholders, making senior management available, paying healthy dividends wherever possible, voting by poll at AGMS and so on.

On the issue of electronic voting, while we believe that this is an option that shareholders should have access to, the setting up of a fully functioning and market-based e-voting platform can be a long and arduous process, as other markets in the region have discovered over the past decade. Furthermore, while the SC noted that the Companies Act does not "preclude electronic voting"[4] and the third bullet point mentions the establishment of a taskforce to investigate setting up a credible e-voting platform, companies could still choose not to provide e-voting. (*See appendix*)

Chapter 2: Role of Institutional Investors

Recommendations
I. Formulate a new code for institutional investors

- Institutional investors to drive the formulation of a new code and publish their commitment to the new code for institutional investors.

II. Create an industry driven umbrella body for institutional investors

- Institutional investors to work together towards the establishment of an umbrella body.

ACGA: These suggestions are well-intentioned and we fully support the idea of institutional investors taking on a more proactive role in corporate governance. However, we question whether these ideas will bear fruit at this stage in Malaysia? Is the investment industry ready? As one fund manager in Malaysia pointed out, unit trust fund managers, government fund managers and other fund managers do not belong to the same institutional framework and are often lobbying against each other; hence the idea of an institutional investor-driven stewardship code might not be feasible at the moment.

It is worth noting that Malaysia has not seen a great deal of engagement or activism by local institutional investors, whose usual policy has been and, for the most part, continues to be "voting with their feet".

Khazanah Nasional, the investment holding arm of the government, has a mandate to transform certain industries "with the objective of pursuing the nation's long-term economic interests". While this makes them active investors, their specific mandate is not necessarily closely aligned to other institutional investors. The Employees Provident Fund, another government agency, has also become increasingly interested in the governance of its investee companies, and in 2010 published its "Corporate Governance and Voting Guidelines". Yet,

[4] "Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance", page 11.

© ACGA Ltd, 2011

beyond these two institutions we have seen little evidence of engaged shareholders, other than a few institutional investors, such as Aberdeen Asset Management and Corston Smith.

One of the expectations that the SC has for the Code is the "diligent exercise of voting rights"[5]. We suggest that the SC starts with this first and mandate a policy whereby institutional investors would need to publish their voting policies and also how they have voted at AGMs annually. The Thai Securities and Exchange Commission put such a policy in place in 2005.

We also agree that creating an industry umbrella body for institutional investors is a good idea. Once again, however, some fundamental questions need to be asked. Who will lead it? Who will fund it? Moreover, such a body needs to be independent. It should not be set up by the government or with government funding. We believe this would defeat the purpose of such a body.

Chapter 3: The Board's Role in Governance

Section 3.3.2 Case for change
Recommendation
III. Mandate the separation of the position of the chairman and the CEO

- The position of chairman and CEO must not reside with the same person.
- The chairman must be a non-executive member of the board.
- A consultation on mandating independent chairmanship will be carried out

ACGA: We agree that the chairman and CEO should be separated. While we understand that most companies that currently have a separate chairman and CEO only follow the letter of the guideline rather than the substance, imposing an independence criteria on a company's chairman could, we fear, only lead to more box-ticking.

In this context, it is worth emphasising that the quality and authority of an independent chairman is critical. Most Asian listed companies—and Malaysia is no exception—are either family-controlled or majority state-owned, hence it is very likely that any "independent chairman" will be loyal to the majority shareholder. We would suggest that it would be better to mandate the recommendation made in the Corporate Governance Code that a board nominates an INED to be the senior independent director to whom concerns may be conveyed. The lead independent director would be responsible for, among other things, ensuring that independent directors can perform their duties responsibly; call meetings of the independent directors as needed; serve as principal liaison between the independent directors and the chairman and senior management; and respond to shareholder and other stakeholder questions and comments.

With regard to the question of allowing a former CEO to become the chairman after a "cooling-off" period, it is extremely unlikely that a former employee would ever be completely free of their loyalty to the company in the Asian context. A "cooling-off" period, therefore, would not have a great deal of meaning in this context.

[5] "Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance", page 17.

© ACGA Ltd, 2011

Section 3.4.2 Case for change
Recommendation
I. Mandate the Nominating Committee

- All boards must establish a Nominating Committee.
- The chair of the Nominating Committee must be an independent director, and where a senior independent director position exists, the senior independent director is encouraged to assume the chair of the Nominating Committee.
- The role of the Nominating Committee must be enhanced – specific focus areas include recruitment, assessment, training and diversity (of directors).

ACGA: We broadly support this initiative, although certain safeguards need to be put in place to ensure the Nominating Committee's role is not undermined: the committee should comprise only non-executive directors, with independent directors in the majority. This would be to prevent issuers from appointing a chairman, CEO or CFO as members of this committee—something that would undermine its purpose and effectiveness.

We also have concerns as to how such a rule would be enforced and by whom? And in the case of smaller companies, with small boards, the question arises as to whether a Nominating Committee will in practice have any impact on the views of the controlling shareholder (assuming a family business structure)?

Section 3.5 Commitment of board members
Recommendation
I. Limit the number of directorships held by individual directors

- Directors are permitted to serve up to only five listed companies in Malaysia.
- Directors must advise the chairman or senior independent director in advance of accepting any invitation to serve on another company board.
- Assessment through the Nominating Committee, and approval of the existing board is required prior to accepting any new appointments on boards of other listed companies.
- The board must disclose in the company's proxy form and annual report, that such an assessment has been carried out by its Nominating Committee.

ACGA: We broadly support these measures. However, we believe that if the regulator is going to limit the number of directorships held by individual directors, they should include all companies that a director sits on, whether it is in Malaysia or outside.

© ACGA Ltd, 2011

APPENDIX

Electronic voting in Asia

Electronic voting has been evolving in Asia over much of the past decade. However, its adoption has proven more difficult than authorities had originally envisaged. Below are three markets that have adopted or are in the process of adopting e-voting and the issues they have faced along the way.

JAPAN

The only market that has offered e-voting for any length of time in the region is Japan. It is run by a company called Investor Communications Japan (ICJ), a joint venture between the Tokyo Stock Exchange (TSE), Broadridge Financial Services (formerly ADP Investor Communication Services) and the Japan Securities Dealers Association (JSDA). The platform is based on Broadridge's "ProxyEdge" voting service, which processes almost 100% of the votes cast electronically in the US. ADP stands for Automatic Data Processing. It is also strong in the US in fields such as payroll processing.

After various delays, ICJ became operational in time for the June 2006 proxy voting season in Japan. Around 111 issuers signed up to the system that year. Although those numbers were low compared to the 3,000-odd listed companies in Japan and the more than 1,600 firms on the first section of the TSE, they were more impressive when viewed in market-cap terms. The 111 issuers accounted for 46% of the aggregate market cap of Nikkei 225 companies and 31% of the market cap of all companies listed on TOPIX, according to data supplied by ICJ.

It appeared that the main reason more companies did not sign up was because they wanted to see how the first year of operation went before committing themselves since it was a system that the issuer paid for. For investors, by far the biggest advantage of ICJ is that they have until noon of the day before meetings to cast their vote. This has significantly increased the amount of time available for analysis of meeting agendas.

By the 2007 voting season, 215 companies had signed up, while by the 2008 voting season saw that number rise to more than 300. To date, only 390 companies have signed up to ICJ. The low adoption rate is for a number of reasons: there are competing e-voting platforms in the market, the cost to the companies, but most importantly, market players acknowledge that companies will not employ e-voting until the government mandates it.

KOREA

K-evote, an electronic voting system for exercising voting rights through the internet (http://evote.ksd.or.kr), was launched on September 23, 2010 by the Korea Securities Depository (KSD). Companies that opt for the electronic voting system by a resolution by the board of directors will register their shareholders meeting agenda in advance at the KSD. Shareholders will be able to access the website in order to vote from 10 days prior to the date of the shareholders' meeting until the day before the meeting. The KSD hopes that e-voting will allow shareholders to exercise their voting rights more easily, despite the fact that many listed Korean companies' hold their AGMs at the same time in the month of March.

Korea Ship Finance Co., Ltd. was the first company to adopt the electronic voting system in September 2010. But during this year's AGM season, take-up was very low, with most

© ACGA Ltd, 2011

companies so far reluctant to take up e-voting. As of September 2011, a total of 37 companies had adopted e-voting, but most of them were shell companies set up to facilitate ship financing.

TAIWAN

Taiwan regulators amended the law in 2006 to allow electronic transmission of share votes. After a false start by a private provider, finally in 2009, the Taiwan Depository & Clearing Corporation (TDCC) established a domestic e-voting platform called "StockVote". It allows shareholders to vote electronically up to five days ahead of the AGM.

Thus far, the adoption of StockVote has been limited: only six companies signed up to use it in 2010 and a similar number in 2011. The main reason for the reluctance of listed companies is that the vast majority of them prefer to vote by acclamation. Taiwan regulators are aware of this, which is why in July 2009 the Executive Yuan, the cabinet, approved for presentation before parliament an amendment to Article 177-1 of the Company Act authorising, "the competent authority, by considering the scale, shareholder numbers and structure of shareholders of such company, and other situations it deemed to be necessary, may order a company to include electronic voting as one of the company's shareholder meeting voting methods". The bill is under review by the Legislative Yuan, Taiwan's parliament.

© ACGA Ltd, 2011