



NEW SC GUIDELINES ON CONDUCT OF DIRECTORS OF LISTED CORPORATIONS AND THEIR SUBSIDIARIES

Introduction

On 30th July 2020, the Securities Commission Malaysia (“**SC**”) issued new Guidelines on Conduct of Directors of Listed Corporations and Their Subsidiaries (“**Guidelines**”) to strengthen board governance and oversight in listed issuers and their subsidiaries.

In its press release[1], the SC stated that these guidelines:

(a) were issued in line with the SC’s Corporate Governance Strategic Priorities (2017-2020) which seeks to, among others, promote the proper discharge of directors’ fiduciary duties among corporate Malaysia; and

(b) set out guidance on duties and responsibilities of boards in company group structures and requirements for the establishment of a group-wide framework to enable, among others, oversight of group performance and the implementation of corporate governance policies.

To Whom the Guidelines Apply?

These guidelines apply to[2]:

- (a) directors of a listed corporation; and
- (b) directors of subsidiaries of a listed corporation;

whether incorporated in Malaysia or otherwise.

Do the Guidelines Apply to Directors of Listed Corporations and their Subsidiaries Only?

The Guidelines apply to directors only but we shall always bear in mind that the legal meaning of directors under the **Companies Act 2016** includes[3]:

- (a) the chief executive, the chief financial officer and any other person primarily responsible for the operations or financial management of a corporation, by whatever name called; and
- (b) in the case of a corporation formed or incorporated or existing outside Malaysia—
 - (i) a member of the corporation’s board of directors or governing body; or

(ii) a person occupying or acting in the position of a member of the corporation's board, by whatever name called and whether or not validly appointed to occupy, or duly authorised to act in, the position;

Therefore, the Guidelines also apply to the above company officers even if they are not members of the board of directors of their companies.

What Are the Main Scopes of the Guidelines?

The Guidelines impose three main requirements on directors including:

- (a) Conduct Requirements for Directors (which is further divided into conduct of directors and managing of conflict of interests);
- (b) Maintaining Proper Records and Accounts; and
- (c) Group Governance.

When the Guidelines Will Become Effective?

The chapters on Conduct Requirements for Directors and Maintaining Proper Records and Accounts became effective and applicable immediately from 30th July 2020. The chapter on Group Governance will be effective as of 1st January 2021.

The Companies Act 2016

Some parts of the Guidelines are also imposed under the Companies Act 2016 on all company directors in Malaysia:

No.	Chapter References and Content of the Guidelines	Corresponding Sections under the Companies Act 2016
1	Conduct Requirements for Directors	
1a	Paragraph 3.03 of the Guidelines provides: In directing or managing the business and affairs of the corporation, a director must exercise reasonable care, skill and diligence by– (a) applying the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and (b) applying any additional knowledge, skill and experience which the director has.	Section 213
1b	Paragraph 3.02 of the Guidelines provides: A director who is appointed by virtue of his position as a representative of a shareholder, must act in the best interest of the corporation in which he sits as a board member. In the event of any conflict between his duty to act in the best interest of the corporation and his duty to his nominator, he must not subordinate his duty to act in the best interest of the corporation to his nominator.	Section 217

1c	<p>Paragraph 3.04 of the Guidelines provides:</p> <p>A director is required to among others–</p> <ul style="list-style-type: none"> (a) maintain a sound understanding of the business, and keep abreast of relevant developments to ensure he is able to discharge his duties and responsibilities effectively; (b) prepare for board meetings, contribute constructively to board discussions and decision-making, and conduct due inquiry before approving a matter; (c) ensure key transactions or critical decisions are deliberated and decided on by the board in a meeting; and (d) ensure his decisions and the basis for those decisions, including any dissenting views are made known and properly minuted. 	<p>Take note that this legal requirement is new and there is no corresponding section under the Companies Act 2016.</p>
2 Maintaining Proper Records and Accounts		
2a	<p>Paragraph 4.01 of the Guidelines provides:</p> <p>A listed corporation and its directors must cause to be kept the accounting records and other records to–</p> <ul style="list-style-type: none"> (a) sufficiently explain the business, transactions and financial position of the listed corporation and its subsidiaries; (b) enable the preparation of true and fair financial statements; and (c) enable the accounting and other records of the listed corporation and its subsidiaries to be conveniently and properly audited. 	Section 245
2b	<p>Paragraph 4.05 of the Guidelines provides:</p> <p>If any accounting and other records referred to in paragraph 4.01 and paragraph 4.02 of the Guidelines are kept at a place outside Malaysia, the SC may direct the directors of a corporation to produce any of those records at a place in Malaysia and how those records are to be kept in Malaysia. The directors of a corporation must comply with the direction issued under this paragraph.</p>	<p>Take note that this legal requirement is new and there is no corresponding section under the Companies Act 2016.</p>
3 Group Governance		
3a	<p>Paragraph 5.01 of the Guidelines provides:</p> <p>A listed corporation and its directors must ensure there is an adequate group wide framework for co-operation and communication between the listed corporation and its subsidiaries to enable it to discharge its responsibilities including oversight of group financial and non-financial performance, business strategy and priorities, risk management including material sustainability risks, and corporate governance policies and practices.</p>	<p>Take note that this legal requirement is new and there is no corresponding section under the Companies Act 2016.</p>
3b	<p>Paragraph 5.02 of the Guidelines provides:</p> <p>A listed corporation and its directors must establish and ensure the group wide framework on corporate governance include a code of conduct and ethics, policies and procedures on anti-corruption, whistleblowing, managing conflict of interest, managing material sustainability risks, and board diversity including gender diversity.</p>	<p>Take note that this legal requirement is new and there is no corresponding section under the Companies Act 2016.</p>
3c	<p>Paragraph 5.03 of the Guidelines provides:</p> <p>A subsidiary of a listed corporation and its directors must provide the listed corporation with any information requested by the listed corporation to enable the board of the listed corporation to oversee the performance of its subsidiaries effectively, including assessing non-financial performance of the group.</p>	<p>Take note that this legal requirement is new and there is no corresponding section under the Companies Act 2016.</p>

Where the relevant Guidelines have no corresponding sections under the Companies Act 2016, this means these Guidelines are imposed by the SC at its own initiative. As stated by the SC:

“The new Guidelines take into account the evolving Malaysian corporate governance landscape, lessons learnt from the SC’s regulatory work in enforcing corporate governance breaches and the need to ensure that Malaysia’s framework remains relevant and effective. In discharging his fiduciary duties, a director owes the company duties of disclosure, honesty, candour and the duty to favour the company’s interest over his own.”[4]

Recent Legal Enforcement Cases

The following are recent enforcement cases involving directors breaching similar duties and legal requirements which are also encapsulated in the Guidelines:

No.	Parties	Court Sentence / Administrative Sanction by the SC
1	On 27 th August 2020, Transmile Group Bhd's founder and former chief executive officer was found guilty and convicted under Section 122B(a)(bb) with Section 122(1) of the Securities Industry Act 1983 for furnishing misleading financial statements to Bursa Malaysia in 2007. ⁵	The Sessions Court sentenced the Transmile Group Bhd's founder and former chief executive officer to a RM2.5 million fine (or eighteen (18)-month of imprisonment in default) and one (1) day in jail. ⁶
2	On 4 th December 2017, the SC reprimanded and fined five directors of TRIVE Property Group Bhd (Trive) following breaches of Regulation 4(1) of the Securities Industry (Compliance with Approved Accounting Standards) Regulations 1999 and section 369(b)(B) of the Capital Markets and Services Act 2007 for knowingly furnishing false or misleading statements in the 2014 audited financial statements of the company to the SC and Bursa Malaysia. ⁷	The SC imposed a total fine of RM2.55 million on the directors. ⁸
3	On 12 th December 2014, a substantial shareholder and former director of MEMS Technology Berhad together with the former executive director and Chief Financial Officer of the same company pleaded guilty to the offence under section 122B (b) (bb) of the Securities Industry Act 1983 for furnishing misleading statement in the Condensed Consolidated Income Statements for the twelve-month period ended 31 July 2007. ⁹	The Sessions Court imposed each party a fine of RM300, 000.00 (or two (2) years imprisonment in default). ¹⁰

Conclusion

Whilst the Companies Commission of Malaysia has always been entrusted with the legal duty and power to prosecute directors violating the **Companies Act 2016**, the SC is now empowered to take administrative actions against directors and chief officers of the listed companies and their subsidiaries for violating not only the **Companies Act 2016** but also the newly enforced Guidelines.

Such position is welcomed by the Minority Shareholders Watch Group (“**MSWG**”)[11], which stated:

“The fact that one more regulator, that is, the SC, can now take action for a breach of a director’s fiduciary duty is to be welcomed. This just goes to underscore the importance of the fundamental duty of being a director; to act in

the best interest of the company...SC can take administrative action under its latest guidelines must be seen as a welcome move.”

Moving forward, the directors and chief officers are reminded again (**please see above**) that some legal requirements of the Guidelines are new as there are no corresponding sections under the **Companies Act 2016** imposing similar requirements. These requirements may therefore have not yet been incorporated into the existing corporate governance framework of their companies.

Listed company directors and chief officers are therefore advised to formulate and implement the required measures for incorporating the effective part of the Guidelines into their company corporate governance framework and structure accordingly.

1 <https://www.sc.com.my/resources/media-releases-and-announcements/sc-issues-new-guidelines-on-conduct-of-directors-of-listed-issuers-and-their-subidiaries>

2 Paragraph 1.02 of the Guidelines

3 Paragraph 2.01 of the Guidelines

4 <https://www.sc.com.my/resources/media-releases-and-announcements/sc-issues-new-guidelines-on-conduct-of-directors-of-listed-issuers-and-their-subidiaries> (Datuk Syed Zaid Albar, Chairman of the SC)

5 <https://www.theedgemarkets.com/article/transmile-ceo-found-guilty>

6 <https://www.theedgemarkets.com/article/transmile-ceo-found-guilty>

7 <https://www.sc.com.my/resources/media-releases-and-announcements/sc-reprimands-and-fines-five-directors-of-trive-for-furnishing-false-statements>

8 <https://www.sc.com.my/resources/media-releases-and-announcements/sc-reprimands-and-fine>

9 <https://www.sc.com.my/resources/media-releases-and-announcements/former-directors-of-mems-convicted-over-submission-of-misleading-financial-statements>

10 <https://www.sc.com.my/resources/media-releases-and-announcements/former-directors-of-mems-convicted-over-submission-of-misleading-financial-statements>

11 <https://www.theedgemarkets.com/article/sc-issues-new-guidelines-conduct-directors-listed-issuers-and-their-subidiaries> (Mr Devanesan Evanson, CEO of Minority Shareholders Watch Group)

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