



Directors' independence has been a key focus of the Securities Commission Malaysia (“**SC**”) and Bursa Malaysia Securities Berhad (“**Bursa**”) lately as can be seen from the following amendments and proposed amendments in relation to the requirements and eligibility of independent directors of public listed companies:

#### **Revision to Malaysian Code of Corporate Governance (“MCCG”)**

The SC issued the revised MCCG on 28 April 2021 which took effect on the same day. The revisions in relation to directors' independence include:

1. recommending that if a board of directors intends to retain an independent director after nine years, the board should provide justification and seek annual shareholders' approval via a two-tier voting process (previously required after 12 years);
2. discouraging a listed company from appointing active politicians as directors;
3. recommending that board committee meeting to be conducted separately from board meeting to enable objective and independent discussion; and
4. recommending that the Audit Committee of a listed company to have a policy that requires a former partner of the external audit firm of the listed company to observe a cooling-off period of at least three years before being appointed as an Audit Committee member. This applies to all former partners of the audit firm and affiliate firm (including those providing advisory services, tax consulting etc). Previously, the cooling-off period of at least two years applied to former key audit partner.

## **Amendments to Bursa Listing Requirements**

Bursa amended the Main Market Listing Requirements and ACE Market Listing Requirements (collectively, “**Listing Requirements**”) to enhance the requirements and eligibility of independent directors by:

1. lengthening the cooling-off period from two years to three years for:
  - (i) an officer;
  - (ii) an adviser; or
  - (iii) a transacting party of prescribed transactions, of an applicant, listed issuer or any related corporation of the applicant or listed issuer; and
2. extending the three years cooling-off period to a non-independent non-executive director of an applicant, listed issuer or any related corporation of the applicant or listed issuer. Prior to the amendments to the Listing Requirements, the cooling-off period did not apply to a non-executive director (whether independent or not).

The persons stated above have to observe the minimum cooling-off period of three years before he or she may be appointed as an independent director. The appointment is subject to satisfaction of all the criteria on independence as set out in the Listing Requirements as well as shareholders’ scrutiny and approval.

The amendments have been in effect since 1 October 2020.

## **Bursa’s proposed amendments to Listing Requirements**

Bursa has issued a consultation paper on 21 July 2021 (“**Consultation Paper**”) to seek public feedback by 1 September 2021 on, amongst others, the following proposed amendments to the Listing Requirements in relation to independent directors:

1. amendment to the definition of “independent director” under the Listing Requirements by specifying that an independent director is one who has not served as an independent director of an applicant, listed issuer or any related corporation of the applicant or listed issuer for a cumulative period of more than 12 years from the date of his first appointment as an independent director; and
2. requiring a former independent director who has served for a cumulative period of more than 12 years from the date of his first appointment as an independent director in an applicant, listed issuer or any related corporation of the applicant or listed issuer to observe a cooling-off period of a minimum three years before he or she may be reappointed as an independent director. The appointment is still subject to satisfaction of all the criteria on independence as set out in the Listing Requirements as well as shareholders’ scrutiny and approval.

It should be noted that under the proposed amendments to the Listing Requirements, the computation of the 12-year tenure includes the tenure as an independent director in a related corporation of an applicant or listed issuer. This means that the service as an independent director on a listed subsidiary, for example, will also be taken into account when computing the tenure of 12 years.

### **The case for directors' independence**

The issue with long-serving independent directors is explained in the MCCG. Independent directors' long tenure and familiarity with a company may erode the board's objectivity. An independent director may become too sympathetic to the interests of the board and management or too accepting of their work due to the independent director's long or close relationship with them. An independent director may also become a 'dependent' director due to prolonged insular recruitment processes and attractive remuneration packages and material benefits.

There is a strong case for ensuring independence of independent directors in public listed companies. As mentioned in the Consultation Paper, the boardroom is where strategic decisions are made, governance is exercised and risks are overseen. It is essential for independent directors to avoid entrenchment, provide more rounded consideration of issues, foster constructive challenge and guard against any biases or group think.

With the regulatory enhancement towards the requirements and eligibility of independent directors, public listed companies should assess the independence of their independent directors periodically and rigorously to ensure effective functions of their board of directors.



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