



**PUBLIC CONSULTATION PAPER**

**[No.1/2011]**

**“INDEPENDENT CHAIRMAN AND VOTING BY POLL”**

The Securities Commission Malaysia (SC) invites your written comments on the issues set out in this consultation paper. Comments are due by 15 December 2011 and should be sent to:

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This Public Consultation Paper is dated 15 November 2011

## **1. Background and Introduction**

- 1.1. The *Corporate Governance Blueprint 2011* launched in July 2011 recognises that good corporate governance culture adds value to a company. In order to raise corporate governance standards, it is vital for boards to play the role of stewards and guardians of the company. Boards must lead by example and set the right tone from the top.
- 1.2. Boards must have the capacity and be independent of management to fulfill their fiduciary responsibilities. This includes leadership within the board of sufficient calibre and number; that bring strong independent judgement, knowledge and experience that can carry significant weight and influence in the board's collective decision-making process.
- 1.3. Equally important is the governance role of shareholders in guarding the company against unethical conduct and mismanagement. Shareholders of companies have equal responsibility to protect and advance their own interests by exercising the rights accorded to them to ensure that the companies they invested in are well governed.
- 1.4. As owners, shareholders must engage, debate and challenge management in order to ensure that the board pursues a strategy that is focused on sustainable value creation. This requires shareholders to exercise their rights to participate in the company's decision making process through voting at general meetings.
- 1.5. This paper is intended to generate discussion and obtain views from the public in respect of the following areas :
  - (i) Whether or not the chairman of a public listed company should be independent; and
  - (ii) Whether or not poll voting should be extended for all resolutions requiring shareholders' approval.

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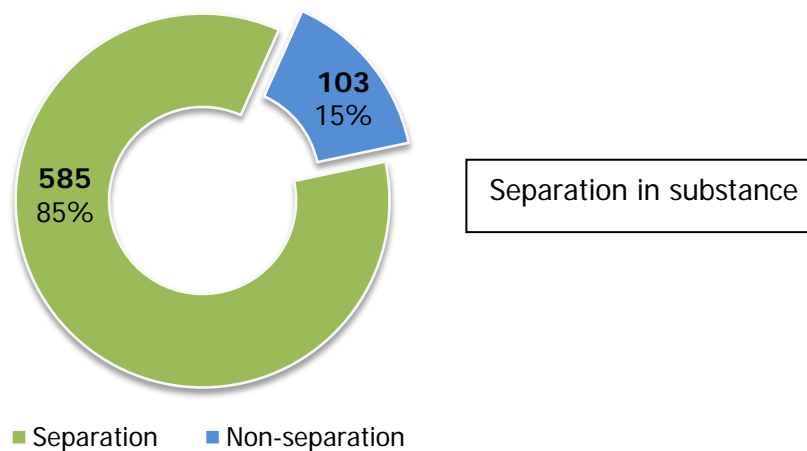
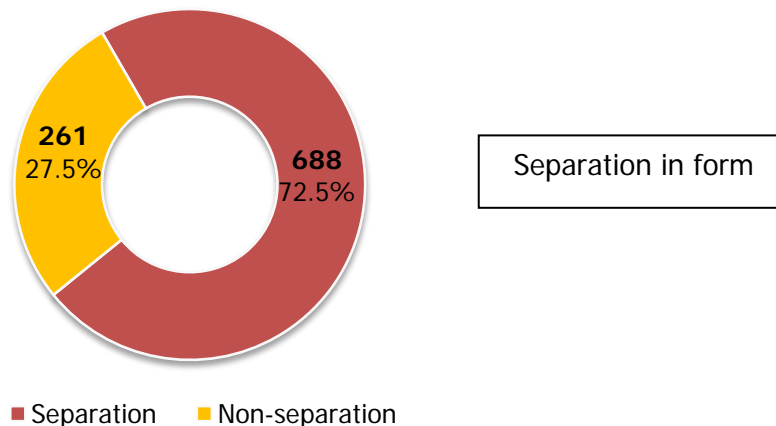
## **Part A: Independent Chairman**

2.0 In Malaysia, the roles of the chairman and chief executive officer (CEO) may be combined. The current *Malaysian Code on Corporate Governance* (Code) recommends, but does not obligate, that the roles of chairman and CEO be separated. The Code recognises that where the roles are combined, there should be a strong independent element on the board, and a decision to combine those roles should be publicly explained.

2.0.1 In a board survey conducted by the Securities Commission Malaysia (SC) in 2008, 72.5% of 949 public listed companies had the role of the chairman and CEO separated. However, a number of those companies did not observe separation in substance. These are companies that exhibited strong familial relationship between the chairman and the executives including the CEO.

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### Main Market and ACE Market of Bursa Malaysia



2.0.2 *The International Corporate Governance Network Global Corporate Governance Principles: Revised (2009)*<sup>1</sup> states that – ‘the chair has the crucial function of setting the right context in terms of board agenda, the provision of information to directors, and open boardroom discussions to enable the directors to generate effective board debate and discussion and to provide constructive challenge which the company needs.’

2.0.3 It goes on to state that – ‘this role will be most effectively carried out where the chair of the board is neither the CEO nor a former CEO. Furthermore, the chair should be independent on the date of appointment as chair and should not participate in executive remuneration plans. Where the chair is not independent, the company should explain the reasons why this leadership structure is appropriate, and keep the structure under review’.

<sup>1</sup> ICGN Global CG Principles: Revised (2009) – (ICGN Principles)

2.0.4 The *Corporate Governance Blueprint 2011* goes a step further to recommend mandating the separation of the position of the chairman and CEO and that the chairman should be a non-executive member of the board. This mandatory separation of both the roles addresses issues of conflicts of interest, blurred responsibilities and inefficiencies.

2.0.5 In order for a board to have the capacity to act independently in fulfilling its responsibilities, it requires strong independent leadership and it is generally the chairman's responsibility to lead the board. This is a widely debated topic and this paper is intended to generate discussion and to obtain views from the public in respect of whether or not the chairman should be an independent director. The responses to the consultation questions posed in this paper will assist the SC in its effort to further instill a culture of good governance.

## 2.1 Duties of the Chairman

2.1.1 The chairman of the board should undertake, amongst others, the following responsibilities<sup>2</sup>:

- Monitor the workings of the board, especially the conduct of board meetings;
- Ensure that all relevant issues for the effective running of the company's business are on the agenda;
- Ensure that quality information to facilitate decision making is delivered to board members on a timely basis;
- Encourage all directors to play an active role in board activities;
- Chair general meetings of shareholders; and
- Liaise with the CEO and the company secretary on the agenda for board meetings.

2.1.2 Many boards will find additional duties and responsibilities that are relevant to their circumstances.

## 2.2 Independence Criteria

2.2.1 Most literature discuss on an "independent chair" in terms of a mere separation of the position of chairman and CEO. However, this consultation does not focus on the separation of the roles in form but separation in substance i.e. the independence criteria to be imposed on the chairman.

2.2.2 Persons appointed as independent directors must satisfy the definition of "independent director" set out in Paragraph 1.01 and Practice Note 13 of the *Listing Requirements of Bursa Malaysia*. This is set out in Table A below.

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<sup>2</sup> Corporate Governance Guide, "Towards Boardroom Excellence", Bursa Malaysia

**Table A**

“Independent Director” means a director who is independent of management and free from any business or other relationship which could interfere with the exercise of independent judgement or the ability to act in the best interests of an applicant or a listed issuer. Without limiting the generality of the foregoing, an independent director is one who –

- (a) is not an executive director of the applicant, listed issuer or any related corporation of such applicant or listed issuer (each corporation is referred to as “said Corporation”);
- (b) has not been within the last two years and is not an officer (except as a non-executive director) of the said Corporation. For this purpose, “officer” has the meaning given in section 4 of the *Companies Act 1965*;
- (c) is not a major shareholder of the said Corporation;
- (d) is not a family member of any executive director, officer or major shareholder of the said Corporation;
- (e) is not acting as a nominee or representative of any executive director or major shareholder of the said Corporation;
- (f) has not been engaged as an adviser by the said Corporation under such circumstances as prescribed by the Exchange or is not presently a partner, director (except as an independent director) or major shareholder, as the case may be, of a firm or corporation which provides professional advisory services to the said Corporation under such circumstances as prescribed by the Exchange; or
- (g) has not engaged in any transaction with the said Corporation under such circumstances as prescribed by the Exchange or is not presently a partner, director or major shareholder, as the case may be, of a firm or corporation (other than subsidiaries of the applicant or listed issuer) which has engaged in any transaction with the said Corporation under such circumstances as prescribed by the Exchange.

2.2.3 Strong independent leadership of the board is critical to striking the right balance between ownership and control. An independent chairman will be in a position to marshal the board’s priorities more objectively and provide a voice for the independent directors. Given the chairman’s role, an independent chairman may provide a balance to the influence of the CEO.

2.2.4 The purpose of separating the roles of the chairman and CEO is to ensure that there is clear division of responsibilities and for the chairman to be able to exercise independent judgement. The independence criterion will not be a panacea but it is a start. By not imposing an independence criterion, the chairman may not be completely independent, complying only in form. The

appointment of truly independent non-executive chairman could send positive signals to the market of the board's independence and integrity as it is one of the attributes of an effective chairman.

- 2.2.5 In tandem with the independence criterion, the independent non-executive chair should possess the fundamental attributes such as relevant experience, character, capacity and broad familiarity with the company and commitment to the demands of the company.
- 2.2.6 There is always the issue of independence of mind and not just merely a fulfillment of the relationship criteria. Independence of mind allows an independent chairman to possess the courage to ask hard questions and to possess the objectivity to deal with conflicts of interest. This is a subjective test and will be difficult to prove.
- 2.2.7 Practical difficulties may arise especially for family-owned companies to comply with the independent chairman criterion.

### 2.3 **Comparison with other jurisdictions**

In all jurisdictions reviewed, it is common practice to require the separation of the chairman and CEO. United Kingdom (UK), South Africa, Australia and Thailand require the chairman to be independent. Jurisdictions such as Australia, UK and South Africa have set out specific "independence" criteria in varying detail within the respective codes.

#### 2.3.1 **United Kingdom**

The *UK Corporate Governance Code 2010* states that the chairman should on appointment meet the independence criteria set out within the code. A chief executive should not go on to be chairman of the same company. If, exceptionally, a board decides that a chief executive should become chairman, the board should consult major shareholders in advance and should set out its reasons to shareholders at the time of the appointment and in the next annual report.

#### 2.3.2 **South Africa**

The *King Code of Governance for South Africa 2009* (King III) states that the board should elect a chairman of the board who is an independent non-executive director. The CEO of the company should not also fulfill the role of chairman of the board. It is also recommended in King III that the chairman should be independent and free of conflict upon appointment.

A lead independent director should be appointed in the case where an executive chairman is appointed or where the chairman is not independent or conflicted. The appointment of a chairman, who is not independent, should be justified in the integrated report and the role of the chairman should be formalised.

### 2.3.3 **Australia**

The *Corporate Governance Principles and Recommendations* issued by the Australian Securities Exchange recommend that the chair should be an independent director. The chief executive officer should not go on to become chair of the same company. A former chief executive officer will not qualify as an independent director unless there has been a period of at least three years between ceasing employment with the company and serving on the board.

### 2.3.4 **Thailand**

The *Principles of Good Corporate Governance for Listed Companies 2006* recommends that the board should separate the roles and responsibilities of both positions. In order to achieve a balance of power, the two positions should be held by different individuals. The chairman of the board should be an independent director.

### 2.3.5 **Singapore**

The *Code of Corporate Governance 2005* states that the chairman and CEO should in principle be separate persons, to ensure an appropriate balance of power, increased accountability and greater capacity of the Board for independent decision making. The division of responsibilities between the chairman and CEO should be clearly established, set out in writing and agreed by the Board. In addition, companies should disclose the relationship between the chairman and CEO where they are related to each other.

In June 2011, the Corporate Governance Council in Singapore issued a consultation paper which proposes to introduce in the *Singapore Code of Corporate Governance* a new provision that independent directors should make up at least half of the Board where—

- (i) the Chairman and the CEO is the same person;
- (ii) the Chairman and CEO are immediate family members;
- (iii) the Chairman and CEO are both part of the management team; or
- (iv) the Chairman is not independent.

### 2.3.6 **India**

The *Corporate Governance Voluntary Guidelines 2009* issued by the Ministry of Corporate Affairs Government of India only requires a separation of the roles of chairman and CEO. It states that there should be a clear demarcation between the roles and responsibilities of the Chairman of the Board and that of the



managing director/CEO. The roles and offices of Chairman and CEO should be separated, as far as possible, to promote balance of power.

**The public's views and comments are sought with respect to:**

- 1. Whether or not the chairman of a public listed company needs to be an independent chairman? If yes, should it be made a requirement, or a best practice?**
- 2. Should a chief executive officer be allowed to assume the position of chairman? If yes, should there be a cooling-off period?**

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## Part B: Poll voting for all substantive resolutions

- 3.0 In Malaysia, most resolutions passed at general meetings are voted upon by a show of hands. Whether a resolution is voted on by a show of hands or poll is dependent on the company's articles of association. In Malaysia, the *Companies Act 1965* (CA) provides that at any annual general meeting, a proposed resolution put to vote at a meeting shall be decided on a show of hands unless a poll is demanded by specific categories of persons.
- 3.0.1 Voting by show of hands is viewed as unfair to shareholders as it does not represent the true voting position of the company's shareholders given that it ignores the number of shares held by each voting shareholder or proxy. When voting is done by a show of hands, each shareholder or proxy physically present has one vote.
- 3.0.2 Presently, the company law statutes in Malaysia do not include provision that mandate poll voting. However, poll voting is provided for under section 55 of the CA. Section 55 (1) of the CA states that "Notwithstanding any provisions in this Act or in the memorandum of articles of a company to which this section applies, each equity share issued by such a company after the commencement of this Act shall confer the right at a poll at any general meeting of the company (subject as provided in subsection 148(1) to one vote, and, to one vote only for each ringgit or part of a ringgit that has been paid up on that share."
- 3.1 Items requiring approval by shareholders at meetings.
- 3.1.1 Currently based on the relevant provisions in the CA and the Listing Requirements of Bursa Malaysia (LR), the following actions listed in Table A would require the approval of at least 50% of shareholders who attended and voted at the meeting. This type of shareholders' approval is referred to as an "ordinary resolution".

**Table A**

No.	Type of action	Relevant provision(s).
1.	The appointment of directors.	Section 126 of the CA
2.	Removal of directors by shareholders.	Section 128 of the CA
3.	Endorsing the contract between the company and the external auditor.	Section 172(1) of the CA
4.	Issue of shares in excess of the authorised share capital.	Section 62 of the CA.
5.	Issue of shares by directors.	Section 132D of the CA
6.	Related-party transactions.	Section 132E of the CA, Chapter 10 of the LR.
7.	Major corporate transactions – acquisitions, disposals, mergers, take-overs.	Section 132C of the CA, Chapter 10 of the LR.

- 3.1.2 The following actions listed in Table B require the approval of at least 75% of shareholders who attended and voted at the meeting. This type of shareholders' approval is referred to as a "special resolution".

**Table B**

No.	Type of action	Relevant provision(s).
1.	Take-overs and mergers affected by way of scheme of arrangement.	Section 176 of the CA.
2.	Reduction of share capital.	Section 64 of the CA.
3.	Alteration of objects in the company's memorandum.	Section 28 of the CA.
4.	Major disposal of assets	Paragraph 10.11A of the LR

### 3.2 Poll voting

- 3.2.1 The principle of 'one share one vote' seeks to promote shareholder democracy by ensuring that shareholders are accorded rights proportionate to the capital they invested in the company. Poll voting supports the principles of 'one share one vote' as each shareholder's voting power is equated to the number of shares held. Unlike when voting is by show of hands, each shareholder will only have one vote irrespective of the numbers of shares held. It has also been argued that voting by poll would best ensure full transparency of voting and effective enfranchisement of all shareholders, including those who have lodged proxies.
- 3.2.2 While poll voting supports the principle of 'one share one vote', and must be encouraged, the SC is mindful that voting by show of hands offers companies an informal and expeditious means of making a decision, enabling uncontroversial proposed resolutions to be disposed of quickly. Mandating poll vote on resolutions which can be resolved efficiently through a vote taken by a show of hands may cause administrative and procedural burden. Furthermore, the move towards poll voting will be easier with an effective and credible electronic voting platform.
- 3.2.3 Hence, the *Corporate Governance Blueprint 2011* recommends that poll voting should not be mandated except for resolutions approving related-party transactions. This is to enable disinterested shareholders who vote on transactions to convey to companies that such transactions are not acceptable unless they benefit the companies. For other substantive resolutions, a phased approach will be taken in mandating poll voting when the need arises.
- 3.2.4 Whilst there are merits to voting by a show of hands, it does seem anomalous given its unrepresentative nature of the attendance at annual general meetings of large companies. Voting by a show of hands is also considered as an antiquated way to manage the vote at annual general meetings of companies with thousands of shareholders.

### 3.3 Comparison with other jurisdictions

#### 3.3.1 Hong Kong

Since 31 March 2004, the Hong Kong Stock Exchange (HKEx) rules have as a result of a package of corporate governance rule amendments, required voting by way of poll for connected transactions and transactions that are subject to independent shareholders' approval. In December 2010, the HKEx issued a consultation paper expressing intent to amend amongst others rule 13.39 to require any vote of shareholders at a general meeting to be taken by a poll except for procedural or administrative matters that could depending on the chairman's discretion be voted by a show of hands. The results of the poll vote must also be announced in the manner prescribed under rule 13.39(5).

The proposed amendment to Rule 13.39(4) allows the chairman to decide whether a resolution on a procedural and administrative matter should be excluded from the requirement for voting by poll. Procedural and administrative matters are those which–

- (a) do not appear on the agenda of the notice of general meeting or any supplementary circular to shareholders; and
- (b) relate to the chairman's duties to maintain the orderly conduct of the meeting and/or allow the business of the meeting to be properly and effectively dealt with, whilst allowing all shareholders a reasonable opportunity to express their views.

Examples of procedural and administrative resolutions are as follows:

- (a) To adjourn the meeting:
  - (i) to ensure orderly conduct of the meeting. (e.g. if the meeting facilities to house the number of members attending has become inadequate); or
  - (ii) to maintain discipline of the meeting, e.g. if it becomes impossible to ascertain the views of the members, or there is disorder or threat of disorder from members or if there is a disturbance caused by members or the uninvited public; or
  - (iii) to respond to an emergency such as a fire, a serious accident or hoisting of tropical cyclone warning signal No. 8 during a meeting; or

(iv) at the end of the annual general meeting to announce results; and

(b) To end a particular discussion which has gone on for too long and move on to the next business (e.g. if there are deliberate irrelevant or repetitive questions from the floor).

### 3.3.2 Singapore

In June 2011, the Singapore Exchange issued a consultation paper expressing the intention to amend its Listing Rules requiring that all votes of shareholders at any general meeting must be taken by poll. Singapore recognises that voting by poll may result in additional cost and administrative burden for issuers and hence will allow issuers time to prepare for the administrative and logistic matters in relation to the proposed amendment.

### 3.3.3 United Kingdom

In the UK, under the *Companies Act 2006*, unless otherwise provided in a company's articles, a proposed resolution put to vote at any general meeting shall be decided on a show of hands unless a poll is effectively demanded. Section 321 of the *Companies Act 2006* restricts companies' ability, through their articles to exclude members' rights to call a poll. However it allows articles to exclude the right to a poll on the election of the chairman of the meeting and the adjournment of the meeting. The section provides for three effective types of demands for a poll, including a demand made by at least five members with a right to vote on the resolution.

### 3.3.4 India

Votes in India are usually conducted by a show of hands rather than by poll. However, the right to demand for poll is provided for under Section 179 of the *Companies Act 1956* which states any member or members present in person or by proxy may call for a poll if they hold shares in the company giving them not less than 10% of total voting power or on which the aggregate sum of not less than Rs50,000 has been paid up. India does not mandate poll voting for related-party transactions.

**The public's views and comments are sought with respect to:**

- 1. Whether or not poll voting should be mandated for related-party transactions only?**
- 2. Whether or not after taking into account a suitable time allowance, poll voting should be mandated for all resolutions requiring shareholders' approval?**
- 3. Whether or not the requirement to conduct poll vote should exclude voting on procedural and administrative matters?**