

ORGANISATION: MINORITY SHAREHOLDER WATCHDOG GROUP

RESPONSE TO CONSULTATION QUESTIONS: CONSULTATIVE DOCUMENT ON REVIEW OF CRIMINAL, CIVIL AND ADMINISTRATIVE SANCTIONS IN THE COMPANIES ACT 1965

Question 1:

Do you agree that a contravention of the statutory provisions on directors' duties should be enforced by criminal sanctions enforceable by initiating criminal proceedings and/or civil penalty proceedings?

Yes, agreed. A director as an individual is in a fiduciary position in relation to the company. This means that he/she must not put himself/herself in a position where his/her duty to the company and his/her self interest conflict.

The proceedings for negligence, default, breach of duty or breach of trust must go wider than merely breach of statutory duty. Criminal sanctions are more effective to serve as a powerful deterrent from self-dealing. By providing for criminal sanctions, errant directors would not be able to avoid criminal penalties or even prison sentences. The duties imposed by the law on directors pertaining to a contravention of their statutory duties should be examined in detail for effective enforcement.

The criminal, civil and administrative sanctions to be imposed under the Companies Act 1965 should also be consistent with the relevant provisions covering such sanctions under the Capital Markets & Services Act 2007 currently in force.

Question 2:

Do you agree that criminal sanctions for the contravention of directors' duties should be imposed only where the contravention is accompanied by fraud or dishonesty?

Yes, agreed. Fraud or dishonesty in this context has developed over the years. It can tantamount to unlawful or illegal transactions. Where a criminal offence is committed, which involves a contravention by a director of his/her duties, the law must be emphasized that such conduct is unacceptable and cannot be tolerated. Criminal sanctions must be direct actions against errant directors as opposed to merely being able to sanction the company. Furthermore, errant directors concerned must not be allowed to use shareholders to ratify their unlawful acts or illegal transactions. It follows that any contravention or a breach, which involves a fraud or dishonesty on minority shareholders or misappropriation of the company's assets and property, must be meted out with criminal sanctions.

Fraud or dishonesty can seem to be abuse or misuse of power to benefit the majority at the company's expense or can involve the majority members of the company exercising their voting power beyond the scope of that power in such a way to misappropriate or expropriate the company's property.

Question 3:

Do you agree that where there is no fraud or dishonesty in relation to a contravention of the legislative provisions on directors' duties, the regulator should be empowered to bring civil penalty proceedings?

Yes, agreed. A clear distinction must be made between contravention of substantive provisions of company law as against procedural lapses and the extent of damage it has caused. The penalties and/or fines for second and subsequent contraventions should be more severe to act as a deterrent. Where any attempt to ratify a contravention or wrongdoings by directors, it should not absolve them of personal liability arising under the statute.

Question 4:

Do you agree that the regulator should be empowered to bring public interest litigation? If yes, in what situations should the public interest litigation be allowed? Should the regulator be allowed to initiate public interest litigation only when there is a breach of directors' duties or should there be other instances where the regulator is allowed to do so?

Yes, agreed. Regulators should be empowered to bring a court action on behalf of public interest. Public interest cases should be allowed where it involves issues which are of broad public interest or stakeholder concern, that affect a significant number of people, not just an individual and where the injury has arisen because of a breach of public duty or violation of the law.

Question 5:

Do you agree that in cases where a contravention involved fraud or deliberate wrongdoing or dishonesty, a criminal sanction should be imposed on officers involved in the contravention and not the company?

Yes, agreed. Offences such as fraud or deliberate wrongdoing or dishonesty are not committed by the company, but by the directors or officers as agents of the company. The duties and responsibilities of directors and officers arise out of their position as agents and trustees of the company. Hence directors and/or officers, who are perpetrators of the offence, should be made personally liable.

Question 6:

Do you agree that the general penalty provision under section 369 of the Companies Act 1965 should be revised to reflect the view that whether or not there should be criminal sanction for a contravention should be decided on a section-by-section basis?

Yes, agreed. The company law should provide for circumstances and situations for the regulators to prosecute and mete out their punitive actions effectively. Contravention by a director of his/her fiduciary duties in terms of the no-conflict rule and the no-profit rule need to be considered. The prosecutions for a criminal sanction should be cognizable in provisions on a section-by-section basis under the Companies Act. This will result in expeditious disposal of cases as the court's decision can take a long time, causing considerable delays and expenses involved.

Question 7:

Do you agree that in the case of a contravention of procedural requirements, the criminal liability on the company should be removed where there are meaningful and alternative sanctions available on individuals who are involved in the contravention?

Yes, agreed. Only those who are in charge of, and responsible to the company for the conduct of its business should be held liable for the contravention of procedural lapses or compliance requirements.

Removal of criminal liability on the company itself in certain circumstances may be appropriate, where it is clearly obvious that the individuals bear responsibility for the contravention.

Question 8:

Do you agree that the term 'officer who is in default' should be re-phrased to mean 'An officer is "in default" for the purposes of the provision if he authorises or permits or participates in the contravention?'

Yes, agreed. Refinement to the term would make it clearer which individual under which circumstances would be held liable for a breach or a contravention.

The word "officer" is to include a director, manager, company secretary or any person who is to be treated as the officer of the company for the purposes of the provision in question. No distinction should be made between officers who work part-time and full-time. After all, they are in office as directors, managers or company secretaries in the course of the execution of their duties.

Question 9:

Do you agree that the definition of 'officer in default' should be extended to include a person who is negligent i.e., by failing to take reasonable steps to prevent the contravention?

Yes, agreed. Reasonable steps could mean that the person must exercise a degree of both skill and diligence, failing which he/she could be held responsible for damages due to his/her gross or culpable negligence.

Question 10:

Do you agree that section 130 of the Companies Act 1965 should be clarified to state that a person who is disqualified under the section ceases to hold office as a director of a corporation and ceases to be entitled to be directly or indirectly concerned or take part in the management in Malaysia of a corporation for so long as he shall be so disqualified?

Yes, agreed.

Grounds for disqualification should be made explicitly clear and disqualification order to be strictly observed. Stricter rules have also to be imposed in relation to disqualification. Relevant laws and regulations concerning various aspects of good corporate governance practices need to be examined as well.

Question 11:

Do you agree that a director who has contravened the legislative provisions relating to director's duties should be disqualified upon an application by the regulator?

Yes, agreed. Following a statutory investigation, such person should be disqualified and unfit to be involved in the management of the company.

Such disqualification of directors by the regulator should be made public.

Question 12:

Do you agree that a person may be disqualified as a director or to not take part or not be involved in the management of a company for persistent default or contravention of the Companies Act 1965?

Yes, agreed. The consequence of persistent default or contravention of the Companies Act 1965 must be treated seriously.

A disqualified person who continues to involve himself/herself in the management of the company should be made to incur personal liability for the company's debts.

Any person who continuously acts on the instruction of a person of whom he/she knows to be a disqualified person, should also incur personal liability for the company's debts.

Question 13:

Do you agree that there should be an automatic disqualification for:

- (a) conviction of an offence involving fraud or dishonesty;**
- (b) for being an undischarged bankrupt;**
- (c) where there has been a conviction in relation to offences in connection with the promotion, formation or management of a company or section 132?**

Yes, agreed.

Automatic disqualification should apply for all the three categories mentioned above. No exemption should be allowed for good corporate governance practices.

Question 14:

Do you agree that section 130A of the Companies Act 1965 should be amended to state that a person may be disqualified if within the last five (5) years, the person has been a director of two (2) or more companies when they are wound up in insolvency and that the manner in which the company is managed, including the director's conduct in relation to the management, business or property of the company, was wholly or partially responsible for the companies' insolvent liquidation?

Yes, agreed. One of the most common grounds for disqualification of a director by leading jurisdictions is for trading whilst insolvent. The law needs to give an expanded meaning to the word 'director' to embrace not only those who have been properly appointed as directors but also those who act as de facto and shadow directors. As regards public listed companies, provisions under section 130A of the Companies Act 1965 appear relevant in this context of de facto or shadow directors.

Question 15:

Do you agree that the Companies Act should be amended to require the regulator to keep a register of persons who have been disqualified from managing companies?

Yes, agreed. The reform of the Companies Act must be underpinned by effective sanctions and enforcements.

The regulator keeping a register of persons disqualified from managing companies will ensure effective monitoring and stricter enforcement. This register should be made available to the public and other stakeholders.