



**MINORITY SHAREHOLDER WATCHDOG GROUP**  
Shareholder Activism and Protection of Minority Interest  
**BADAN PENGAWAS PEMEGANG SAHAM MINORITI BERHAD**  
(Incorporated in Malaysia • Company No : 524989-M)

## **MSWG COMMENTS ON THE SECURITIES COMMISSION'S DRAFT GUIDELINES ON DUE DILIGENCE CONDUCT**

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It is laudable to see that the new Guidelines has extended the responsibilities of directors and all relevant persons in performing due diligence exercise, through properly established process and procedures to identify material issues, risks and opportunities in making their decisions for corporate proposals.

The new Guidelines is well structured to contain more detailed provisions for mandatory due diligence obligations, to hold directors and all persons accountable for the preparation and submission of corporate proposals to Securities Commission for approval.

MSWG comments are as follows:

### **1. Paragraph 2.07**

Principal advisers are required to undertake a reasonable investigation to ensure that the information contained in the corporate proposal is accurate, complete and consistent. As such in conducting due diligence exercise, we hereby stress that the principal adviser (as well as other experts) need to obtain **independent** verification of facts wherever appropriate. Reasonable, independent verification would usually require checking with information sources both outside and inside the company. Courts have recognized that independent verification is an essential step in the due diligence process. For example, the court in *Escott v. BarChris Construction Corp.*(1968) held that it is "not sufficient to ask questions, to obtain answers which, if true, would be thought satisfactory, and to let it go at that, without seeking to ascertain from the records whether the answers in fact are true and complete."

Industry knowledge, commercial insights and street smart verification are often as important as traditional analysis.

**2. Paragraph 2.31**

We agree that the responsibility for due diligence continues up to and including the implementation of the corporate proposal as stated in paragraph 2.31, to protect the interest of shareholders. Nevertheless it should be made clear who is ultimately responsible to ensure that this due diligence process continues to be conducted until the full implementation of the corporate proposal.

**3. Paragraph 3.12**

The proposed draft stated that the due diligence working group (DDWG) should, at the minimum, comprise the principal adviser, the senior representatives of the applicant/ issuer and such advisers/ experts as are appropriate in the relevant corporate proposal. However, it is not clear from the guidelines whether a director(s) of the Board must sit on the DDWG. We are of the view that at least one director must be a member of the DDWG given the importance of the due diligence process for the submission of corporate proposal(s) to the Securities Commission. This also reinforces the obligations of the Board of Directors in the due diligence process and facilitates cooperation in providing information for the exercise.

**4. Paragraph 3.19**

While we note that the examples outlined under paragraph 3.19 is not an exhaustive list of the examples of due diligence enquiries in respect of the applicant/ issuer, we would suggest a review and assessment of the applicant/issuer's internal controls and risk management to be included in the list as well. This is critical, especially for IPO companies.

**5. Other Issues To Consider**

- (i) Corporate proposal is full of contingencies. How are contingencies dealt with and disclosed in due diligence exercise?
- (ii) Corporate proposal is often expensive. Costs should be a disclosure item for due diligence conducted.
- (iii) Any laws and regulations limiting due diligence exercise that can expose risks to the company must be disclosed for investor awareness.
- (iv) Public listed companies undertaking corporate proposals which may not require submission to the SC for approval should also be expected to adopt these Guidelines as a guide for the scope, quality and conduct of due diligence to be undertaken.
- (v) Best practices in corporate governance must be emphasized. Only then violation of laws or regulations can be avoided.

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