



## MAIN MARKET AND ACE MARKET

### ISSUERS COMMUNICATION

#### GUIDANCE ON CONFLICT OF INTEREST (ICN 1/2023)

[Issuance Date: 26 May 2023]

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#### A. INTRODUCTION

1. The Main Market Listing Requirements (“**Main LR**”) and ACE Market Listing Requirements (“**ACE LR**”) (collectively, “**LR**”) require a listed issuer to disclose the nature and extent of any conflict of interest (“**COI**”) or potential COI including interest in competing business involving directors, key senior management and legal representative of a listed corporation, as well as directors and chief executive of the management company or trustee-manager of a collective investment scheme<sup>1</sup> (collectively, the “**said person**”) in the following documents:
  - (a) statement accompanying notices of annual general meetings pertaining to election of directors<sup>2</sup>;
  - (b) relevant immediate announcements of the said person’s appointment<sup>3</sup>; and
  - (c) annual report in the various sections including those on the profile of directors, chief executive and key senior management<sup>4</sup>.

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<sup>1</sup> The collective investment scheme refers to a real estate investment trust (“**REIT**”), business trust (“**BT**”), closed-end fund (“**CEF**”) and exchange-traded fund (“**ETF**”).

<sup>2</sup> Paragraph (1)(f) of Appendix 8A, LR.

<sup>3</sup> Paragraph (e) in Part A, Part B and Part B(B) as well as paragraph (d) in Part B(A), of Appendix 9A, LR.

<sup>4</sup> Paragraphs 3(g), 4(g) and 4A(f) in Part A, of Appendix 9C, LR; and paragraphs 1(c) and 2(c) in Part B, paragraphs 3(c) and 4(b) in Part C, paragraphs 3(c), 5(c) and 6(b) in Part E, paragraphs 3(c) and 5(b) in Part F, of Appendix 9C, Main LR.



2. The listed issuer's audit committee ("AC") must also review and report to the board, any COI situation that arose, persist or may arise together with the measures taken to resolve, eliminate or mitigate such conflicts<sup>5</sup>, as well as disclose them in the AC report<sup>6</sup>. For this purpose, the AC's review and disclosure in the AC report must cover any COI that arose or might arise during the financial year as well as persisting COI from previous financial years.
3. These enhancements are aimed at improving the quality of COI disclosures of directors and key senior management, promoting better governance practices and accountability in relation to managing COI among listed issuers and enhancing investors' confidence. Further, Bursa Malaysia Securities Berhad ("the Exchange") also expects that directors and key senior management would be more vigilant in discharging their duties and obligations to the listed issuer, given the important fiduciary position they hold in the listed issuer.
4. The Exchange notes that there is a need to provide some guidance to facilitate listed issuers' compliance with the enhanced requirements above. Accordingly, we issued this ICN 1/2023 to highlight some key considerations in determining COI and clarify as well as illustrate application of the LR.
5. The guidance provided in this ICN 1/2023 is not meant to be exhaustive. The situations which will or will not give rise to COI may be subjective and will depend on the specific facts and circumstances. Hence, when in doubt, it is best for the listed issuer to disclose the matter<sup>7</sup>.

## **B. GUIDANCE ON COI**

6. A listed issuer may be guided by the principles and illustrations below in determining situations of COI, potential COI and interest in competing business for purposes of the COI requirements in the LR.

### ***Ambit of COI***

7. Generally, COI refers to situations where -

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<sup>5</sup> Paragraph/Rule 15.12(1)(h), LR.

<sup>6</sup> Paragraph/Rule 15.15(3)(f), LR.

<sup>7</sup> This was cited in *Delta-Pelita Sebakong Sdn Bhd v Wong Hou Lianq & Ors and Other Appeals [2020] MLRAY 41* where the Court of Appeal held that "...disclosure of potentially conflicting information is part of the commercial morality expected of company directors, and the general rule should be, when in doubt, disclose".



- (a) the interests of the said person (who is often a person in a position of trust), interfere, or appear to interfere, with the interests of the listed issuer or its subsidiaries (“**listed issuer group**”); or
  - (b) the said person has interests that may make it difficult to perform his or her role objectively and effectively.
8. In the past, assessment of COI largely revolved around situations where the director concerned had personal pecuniary interests which were in conflict with those of the listed issuer group<sup>8</sup>. With the enhanced COI requirements in the LR as discussed in paragraphs 1 and 2 above, the Exchange would like to clarify our expectations that interest in a COI involving the said person is not limited to direct financial interest but also include an indirect financial interest, non-financial interest (e.g. arising from relationships whether family, business or professional interests), or competing loyalties or interests.

#### ***Key CA 2016 requirements on COI***

9. The legal duty to avoid COI for directors and officers of a company are codified in the Companies Act 2016 (“**CA 2016**”). In this regard, the CA 2016 recognises situations of COI under section 218. In the said section, a director or officer must not do the following to gain a benefit for himself or any other person, or cause detriment to the company, without the consent or ratification of a general meeting:
- (a) using the property of the company;
  - (b) using any information acquired by virtue of his position as a director or officer of the company;
  - (c) using his position as such director or officer;
  - (d) using any opportunity of the company which he became aware of, in the performance of his functions as the director or officer; or
  - (e) engaging in business which is in competition with the company.
10. In addition to the above, the CA 2016 also specifies requirements for a director interested in a proposed or existing contract with the company. In such instances, the director must<sup>9</sup> -

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<sup>8</sup> This was clarified in the Questions and Answers 9.43 for the Main LR and Questions and Answers 9.38 for the ACE LR. These Questions and Answers have since been superseded.

<sup>9</sup> Sections 221 and 222 of CA 2016.



- (a) declare the nature of his interest at a board meeting;
  - (b) not participate in any discussion while the contract or proposed contract is being considered during the board meeting; and
  - (c) not vote on the contract or proposed contract.
11. Further, a director who holds any office or owns any property which may give rise to a conflict with his duties or interest as director must declare the fact and nature, character and extent of the conflict at a board meeting<sup>10</sup>.

*COI examples for the LR*

12. For purposes of the LR, in addition to the above, the following are some examples of COI involving a said person which would warrant disclosure i.e. where the said person-
- (a) uses property or resources of the listed issuer group for his or her personal purpose or business;
  - (b) channels benefits or resources meant for the listed issuer group to a company which he or she has an interest in;
  - (c) discloses trade secrets to a competitor where he or she has an interest in;
  - (d) influences decision of the property developer listed issuer to develop an area where the said person owns property so that he or she will also enjoy the benefit either financially (e.g. capital appreciation of the property) or non-financially (e.g. convenience from the infrastructure developed) from such development;
  - (e) prioritises his or her private venture by depriving the listed issuer from an identified business opportunity;
  - (f) leverages on the listed issuer's business or developmental plan by acquiring adjacent lands using the said person's private company;
  - (g) is involved in a business which offers similar products or services that are likely to replace or substitute the products or services offered by the listed issuer group;
  - (h) holds offices or directorships in competitors of the listed issuer group; or

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<sup>10</sup> Section 221(6) of CA 2016.



- (i) provides financial assistance to, or receives financial assistance from, the listed issuer group on terms and conditions which are more favourable to the said person than normal commercial terms.

### **Potential COI**

13. A potential COI is a COI that has yet to materialise or happen, but may arise subsequently due to, among others, prevailing relationships or interests of the said person. Examples (which are not exhaustive) include the following:
- (a) The said person having similar business with that of the listed issuer group in a geographical location which the listed issuer group is not currently operating in, but which the listed issuer group may expand its venture in subsequently.
  - (b) The said person purchasing substantial building materials for construction of his or her own property at a massive discount from a contractor which has been shortlisted as one of the contractors for the listed issuer's project. There could be potential COI as the said person may favour awarding the listed issuer's project to the contractor that gave him the discount.

### **Illustrations**

14. The following are illustrations on compliance with the COI requirements in the LR for reference:

**ILLUSTRATION I**

**Facts:**

- *Mr. A* has a family-owned business, *ABC Sdn Bhd*, which undertakes property development of luxury condominiums in Klang Valley.
- *PLC X* is in the business of property development of residential apartments in Penang and Johor.
- *PLC X* appoints *Mr. A* as its director on 15 June 2023.
- *PLC X* has a financial year ending on 31 December 2023.

**Disclosure Obligations:**

While *ABC Sdn Bhd* and *PLC X* may not be in direct competition with each other given the different location and types of property development, there is still potential COI as *Mr. A* may be put in a position where his duty to act in the best interest of *PLC X* may conflict with his personal interest in *ABC Sdn Bhd*. For



example, *Mr. A* may not propose or vote for *PLC X's* future plan to expand its project to Klang Valley, due to his interest in *ABC Sdn Bhd*.

Hence, *PLC X* must disclose the nature and extent of *Mr. A's* potential COI with *PLC X*, in the immediate announcement of *Mr. A's* appointment and the directors' profile section of its annual report. The disclosure must include description of -

- *ABC Sdn Bhd* including its business;
- *Mr. A's* interest in *ABC Sdn Bhd* (e.g. through his family relationship etc); and
- how the potential COI arises.

#### ILLUSTRATION II

##### Facts:

- *Mr. C* is a director of *PLC Z* whose principal business is in the food and beverage industry. *PLC Z* has several full-service restaurants, fast food chains and cafes in Selangor and Kuala Lumpur. As part of *PLC Z's* expansion plan in 2023, it will be setting up restaurants offering Malaysian-fusion cuisine in selected shopping malls in Melaka by the 4<sup>th</sup> quarter of 2023.
- *DEF Sdn Bhd*, a private limited company owned by *Mr. C's* wife and daughter, has, in May 2023, embarked on a Nyonya restaurant chain business in Melaka.
- *Mr. C* declares this to the board of directors of *PLC Z* immediately.

##### Disclosure Obligations:

With *PLC Z's* expansion plan to Melaka in the 4<sup>th</sup> quarter of 2023, *PLC Z* and *DEF Sdn Bhd* could be potential competitors since both will be in the same industry offering substitutable products or services (restaurant business) in the same geographical location.

As such, *PLC Z* must disclose the nature and extent of the potential COI as well as interest in competing business involving *Mr. C*, in the directors' profile section of its annual report. The disclosure must include description of -

- *DEF Sdn Bhd* including its business;
- *Mr. C's* indirect interest in *DEF Sdn Bhd* through his family members; and
- how the potential COI arises.



### *Oversight by the AC<sup>11</sup>*

15. As highlighted in paragraph 2 above, an AC must review and report to the board, any COI situation that arose, persist or may arise during the financial year together with the measures to resolve, eliminate or mitigate such conflicts. The AC must also disclose them in the AC report.
16. In this regard, listed issuers may refer to the Corporate Governance Guide (4<sup>th</sup> Edition) (“**CG Guide**”)<sup>12</sup> for further guidance on how the AC may carry out its role in reviewing situations of COI such as ensuring that management establishes a comprehensive framework for the purposes of identifying, evaluating, approving, reporting and monitoring COI. The CG Guide also provides key factors, considerations as well as information that should be taken into account by the AC.
17. Some other possible non-exhaustive measures to address the COIs include the following:
  - (a) requiring declaration of COI as soon as practicable after the relevant facts have come to the knowledge of the said persons, as well as on a periodic and regular basis including at all board meetings;
  - (b) restricting participation of the said persons in any applicable board, committee or general meetings and requiring the said persons to abstain or recuse themselves from deliberation and voting on matters relating to the said COIs;
  - (c) undertaking an assessment on COI of the said persons during the performance appraisal on an annual basis and for new appointments, before the appointment;
  - (d) requiring the said persons to execute a non-disclosure or confidentiality agreement to protect any type of confidential and proprietary information or trade secrets;
  - (e) restricting the said persons from participating in businesses which compete with the listed issuer group; or

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<sup>11</sup> The audit committee obligations apply to a foreign listed issuer (by virtue of paragraph 4A.07(1), Main LR), a listed REIT (by virtue of paragraph 8.36(b), Main LR), as well as BT and CEF (given that there are no express provisions disapplying the requirements to the BT and CEF in Chapter 8).

<sup>12</sup> In particular, please refer to Section II under the heading “Review of COI situations and related party transactions” at pages 11 to 14 of the Guide which is available at: <https://bursasustain.bursamalaysia.com/droplet-details/resources/corporate-governance-guide-4th-edition>.



- (f) in extreme circumstances where the COI is likely to affect the performance of the said persons, requiring such persons to either divest the interest causing the conflict or resign from the listed issuer group.
18. Situations of COI for purposes of disclosure in annual report and the AC report exclude transactions entered into by a listed issuer group involving the interest of related parties which are regarded as related party transactions, as these are subject to specific disclosure requirements pursuant to Chapter 10 of the LR.
19. Apart from ensuring compliance with the LR, listed issuers are also reminded to ensure that any requirements under the law or guidelines<sup>13</sup> relating to COI are complied with.

[End]

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<sup>13</sup> These include, among others, the CA 2016 and the Guidelines on Conduct of Directors of Listed Corporations and Their Subsidiaries issued by the Securities Commission Malaysia (“said Guidelines”).

- The CA 2016 is available at:  
[https://www.ssm.com.my/Pages/Legal\\_Framework/Document/Act%20777%20Reprint.pdf](https://www.ssm.com.my/Pages/Legal_Framework/Document/Act%20777%20Reprint.pdf)
- The said Guidelines is available at:  
<https://www.sc.com.my/api/documentms/download.ashx?id=e5c77f58-2055-4d1c-82f2-79f552a67682>