

MINORITY SHAREHOLDERS WATCH GROUP

BADAN PENGAWAS PEMEGANG SAHAM MINORITI BERHAD
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INDEPENDENT DIRECTOR

CHOOSING THE RIGHT PERSON

THE position of the independent director has always been met with much cynicism. The question has always been how independent the independent director is, if at all.

The parties who typically recommend independent directors to the board are the existing directors, management and major shareholders. And if their recommendations come to fruition, there will always be aspersions cast on the independence of such independent directors. They will be perceived as being beholden to the parties who recommended their appointments.

So, is there a way to mitigate such aspersions?

The Malaysian Code on Corporate Governance (MCCG) makes it a practice for the board to not solely rely on recommendations from the existing directors, management and major shareholders.

(Under the MCCG, the companies are required to “apply or explain an alternative” when it comes to the practices).

The words “solely rely” in this practice seem to imply that they can rely on such recommendations provided they also look at other independent sources. Thus, the practice goes on to clarify that the board should utilise independent sources to identify suitable qualified candidates for

the position of the independent director.

In fact, the practice also states that if the selection was based on recommendations made by existing directors, management or major shareholders, the nomination committee should explain why these sources suffice and other sources were not used.

There are many other approaches and sources that are available to the board to enable it to identify the most suitable independent director candidate to the board. These include sourcing from a directors’ registry, the use of independent search firms and an open advertisement.

The Institute of Corporate Directors Malaysia has such a directors’ registry that companies can utilise.

There are also many independent search firms (head-hunters) whose services can be accessed if confidentiality is the order of the day. There is also the option of just advertising the vacancy for the position of an independent director. This will enable the company to attract a large pool of candidates. The idea is to cast a wide net before narrowing in towards the most suitable candidate.

There is no stigma in looking for talent publicly — to look for an independent director openly through open advertisements. Yet, we hardly see any such ad-

vertisements. If confidentiality is required, then an application address that does not reveal the identity of the company can be used. But then again, there is no stigma in revealing the name of the company that needs an independent director.

We often see advertisements that state that a company in a particular industry is looking for a candidate for some C-suite position along with the requisite qualifications, experience and other requirements.

To enable better assessment by shareholders and stakeholders, the MCCG states that the company should disclose in its corporate governance report how candidates for board positions were sourced, including whether such candidates were recommended by the existing directors, members of senior management or major shareholders. If a company discloses that their candidate was recommended by the existing directors, members of senior management or major shareholders, there may be aspersions of diminished independence on the part of the independent director.

Major shareholders will normally be able to appoint candidates of their choice to the board as nominee directors (non-independent non-executive directors) to safeguard their interest. As such, there is no need for the

major shareholders to want to have a say in the appointment of independent directors as well. To be fair, some major shareholders truly vote in independent directors.

When it comes to independent directors, it is better for companies to not choose from the recommendations of the existing directors, members of senior management or major shareholders and to disclose accordingly in the corporate governance report. This may provide greater comfort to minority shareholders.

But at the end of the day, it is the fiduciary duty of directors to act in the best interest of the company. As such, if boards truly believe, hand-on-heart, that a recommendation by the existing directors, members of senior management or major shareholders, are the best candidates for independent directors, then no one should second-guess the board for they are only fulfilling their fiduciary duty.

The only thing that we need to remember is that perception is just as important as reality. And that perception shapes reality. And in some cases, in the eyes of the perceiver, perception become reality.

The writer is chief executive officer of the Minority Shareholders Watch Group

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