

Reminder by SC - What do you know about prospectus under CMSA?

Following a statement released by the Securities Commission Malaysia (SC) on 26 January 2021, which reminded the unlisted public companies to comply with requirements in SC's prospectus guidelines and securities laws, we believe that the following information will be useful to the players.

What is a prospectus?

A prospectus¹ is a mechanism that invites applications or offers to subscribe for or purchase securities. Alternatively, it is a mechanism that offers securities for subscription or purchase. It can take the form of a notice, a circular, an advertisement or a document.

Importance of a prospectus

A person is prohibited to issue, circulate or distribute any form of application for securities unless the form is accompanied by a copy of a prospectus which has been registered by the SC.²

The failure to do so amounts to an offence punishable with a fine not exceeding RM10 million or imprisonment for a term not exceeding 10 years or both.³

Content of a prospectus

A prospectus should contain, among others, the following:⁴

- (a) date of issue of the prospectus;
- (b) a statement that it has been registered by the SC;
- (c) if it contains any statement made by an expert, the date on which the statement was made and whether it was prepared by the expert for incorporation in the prospectus.

The failure to comply with the requirements amounts to an offence. As a result, the issuer and each director of the issuer at the time of the issue of the prospectus is punishable with a fine not exceeding RM3 million or to imprisonment for a term not exceeding 10 years or both.⁵

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¹ Capital Markets and Services Act 2007 ("CMSA"), s 226

² CMSA, s 232 (2)

³ CMSA, s 232 (7)

⁴ CMSA, s 235 (1)(b)

⁵ CMSA, s 235 (7)

Besides, a prospectus also must contain all information that investors and their professional advisers would reasonably require, and reasonably expect to find in a prospectus.⁶ This information must be able to assist the investors or their professional advisers in making an informed assessment of the following:

- (a) the assets and liabilities, financial position, profits and losses and prospects of the issuer and, in the case of a unit trust scheme or prescribed investment scheme, of the scheme;
- (b) the rights attaching to the securities; and
- (c) the merits of investing in the securities and the extent of the risk involved in doing so.

Part II of the [Prospectus Guidelines](#) issued by the SC provides more specific requirements to be observed by the issuers.

Requirement to be registered

A prospectus is required to be registered by the SC before the date of the issue of the prospectus.⁷

Liability for misstatement

Stop Order⁸

The SC can issue a stop order if in its opinion a prospectus contains a statement or information that is false or misleading.⁹ Subject to a hearing by the SC, the issuer is not allowed to allot, issue, offer, make an invitation to subscribe for or purchase or sell, further securities to which the prospectus relates.

Following that, if the securities to which the prospectus relates have not been issued to the applicants, the applications shall be deemed to have been withdrawn. The issuer who receives the monies shall repay all monies received from the applicants within 14 days of the stop order.

If the securities have been issued to the applicants, the issue of securities shall be deemed to be void. The issuer shall repay all monies received from the applicants within 14 days of the date of service of the stop order.

⁶ CMSA, s 236 (1)

⁷ CMSA, s 234

⁸ CMSA, s 245

⁹ CMSA, s 245 (b)

Criminal liability¹⁰

A person who authorised or caused the issue of a prospectus which contains:

- (a) any false or misleading statement or information ; or
- (b) any statement or information from which there is a material omission,

is punishable with a fine not exceeding RM3 million or imprisonment for a term not exceeding 10 years or both.

Liability for damages¹¹

A person who acquires, subscribes for or purchases securities may suffer loss or damage as a result of any statement or information contained in a prospectus that is false or misleading, or from which there is a material omission.

Such person may recover the amount of loss or damage from all or any of the following:

- (a) the issuer and each director of the issuer at the time of the issue of the prospectus;
- (b) a person who consented or caused himself to be named and was named in the prospectus as a director;
- (c) a promoter;
- (d) a person who was responsible for preparing the prospectus, or responsible for conducting the due diligence of the information or statement contained in the prospectus;
- (e) a person named in the prospectus with his consent, as having made a statement, that was included in the prospectus;
- (f) a person named in the prospectus with his consent as a stockbroker, sharebroker, underwriter, auditor, banker or advocate of the issuer and had made a statement that was included in the prospectus;
- (g) a person who authorized or caused the issue of the prospectus.

Exclusion of liability clause void

The liability for loss or damage cannot be excluded or restricted by any provision, clause or term contained in any agreement, contract, document or prospectus that is given to an investor.¹²

¹⁰ CMSA, s 246

¹¹ CMSA, s 248

¹² CMSA, s 256

Defence

The CMSA made the following defences, among others, available for the above person:

- (a) due diligence has been made;¹³
- (b) the false or misleading statement accurately represented the statement made by a person consented to it and that person was competent to make it;¹⁴
- (c) the false or misleading statement was made based on a statement made by a public officer in the course of his duties.¹⁵

Judicial attitude

The courts have in the past upheld the importance of making accurate and true statements in prospectus, as can be seen from the excerpts below:

“That means that liability of any person for false and/or misleading statements or statements for which there are material omissions pursuant to s 57 of the SC Act (now s 248 of CMSA), applies across the board irrespective of the nature of the investor.”

- *AmTrustee Bhd & Ors v Aldwich Bhd (in receivership) & Ors*
[2018] 7 MLJ 152

“The underlying rationale for all investors, sophisticated or otherwise is that such information as is provided must be accurate or true. Primary facts stated must be true. If they are false that will occasion a basis for culpability under s 38(3) (now s 229(3) of CMSA) and other relevant attendant sections.”

- *Maybank Trustees Bhd (formerly known as Aseambankers Malaysia Bhd) v Amtrustee Bhd & Ors and other appeals* [2020] 4 MLJ 405

“When such information is incomplete, thereby giving impressions that are false and misleading, then the duty of care is breached, as are MIBB’s express contractual obligations. The statutory duties prescribed by the SCA 1993 are equally breached.”

- *Maybank Trustees Bhd (formerly known as Aseambankers Malaysia Bhd) v Amtrustee Bhd & Ors and other appeals* [2020] 4 MLJ 405

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