

**POLICY GUIDELINES AND
REQUIREMENTS**

FOR

SALES OF CLUB MEMBERSHIPS

COMPANIES COMMISSION OF MALAYSIA

POLICY GUIDELINES AND REQUIREMENTS FOR SALE OF CLUB MEMBERSHIPS

1. INTRODUCTION

- 1.1 The Companies Commission of Malaysia (“Companies Commission or CCM”) views the sale of club memberships in golf or recreational clubs or resorts as a sale of interests within the meaning of section 84 of the Companies Act 1965. Consequently, a developer/operator of the golf or recreational clubs which seeks to offer for sale of interests to the public must comply with the requirements of Division 5 of Part IV of the Companies Act 1965. A failure to comply with the said requirements constitutes an offence under section 94 of the Act which is presently punishable with imprisonment of 5 years or a fine of RM100,000. It is also an offence under section 363 of the Companies Act 1965 which is presently punishable with imprisonment of 10 years or fine of RM250,000. Club membership interests
- The objective of Division 5 of Part IV of the Companies Act 1965 is essentially to provide protection to potential investors in a wide range of investments that goes beyond shares or debentures of a company by regulating public offering of interests - other than shares or debentures. The general scheme of regulation comprises the following:
- 1.2
- (i) Only public companies are allowed to make public offerings of interests; Objective of Regulation
 - (ii) Public offering must be accompanied with a statement (prospectus) containing prescribed information;
 - (iii) There must be a trust deed which has been approved by the Registrar of Companies (“Registrar”) containing covenants and matter stipulated by the Act and regulations made thereunder;
 - (iv) There must be a trustee to act for interest holders;
 - (v) There must be kept a register of interest holder;
 - (vi) There must be lodged with the Registrar annual returns in relation to the interest containing prescribed information; and
 - (vii) Winding up of schemes must be conducted in accordance with the provisions of the Act and the deed.
- 1.3 The Companies Commission appreciates that a number of the provisions of Division 5 of Part IV of the Companies Act 1965 may be inappropriate to certain types of interest. Consequently, in order to avoid unnecessary impediments to the development of these particular forms of business enterprise, the Companies Commission is prepared to recommend to the Minister to exercise his discretionary power as well as to exercise its own discretionary power under the Act so as to remove or adapt a number of the requirements which would otherwise apply to club membership. The relevant discretionary powers are as follows: Adaptation and exemption

- (A) Sections 96 - Power of the Minister to exempt a company from complying with all or any of the provisions of Division 5 of Part IV of the Act subject to such terms and conditions as may be specified.
- (B) Section 90(2) & (3) - Power of the Registrar to approve adaptations to or the omission of, matters and reports required by Companies Regulations 1966 to be included in the statement (prospectus) required to be registered under section 90 of the Act.

The manner in which the Companies Commission is prepared to consider the exercise of the above powers or recommend to the Minister to exercise his power is set out in the subsequent paragraphs. It should be noted that club memberships, other than those relating to members' clubs (member of a society or shareholder or member of a company), may take a number of forms, and new forms may be developed. The subsequent paragraphs will set out the general approach of the Companies Commission only. Modifications of details will certainly be required according to the nature of each particular case. Application should be made to the Registrar setting out full details of the proposed schemes and the various reliefs that are sought giving justifications to support the applications.

2. **POLICY GUIDELINES AND REQUIREMENTS**

- 2.1 Essentially any relief granted under section 90 or 96 of the Act has the effect of removing some safeguards and disclosure requirements which would otherwise apply. In considering the application for relief, the Companies Commission will have regard to an appropriate balance between investors' protection and the desire not to unnecessarily impede the promotion and growth of golf and recreational clubs in the country. In order to ensure that balance, the Companies Commission would impose the following policy guidelines and requirements as pre-conditions for granting the relief or recommending a grant for relief: Guidelines and requirements
- (1) The developer/operator must be a public company, as required by the Companies Act 1965. Only public company can offer interest or shares to the public;
 - (2) The paid up capital of the company, in the case of a developer/operator of a golfing club must not be less than RM5 million and in the case of developer/operator of non golfing club, must not be less than RM1 million;

- (3) The officers of the developer/operator must include persons having experience and expertise in managing public companies or in related businesses;
- (4) The developer/operator must be majority owned by local shareholders;
- (5) Full list of facilities and amenities to be provided by the club must be clearly stated. Where the facilities involve services provided by affiliates, disclosures pertaining to the affiliation arrangements must be made and written confirmation by those affiliates must be attached. It would be the responsibility of the developer/operator to ensure that an appropriate replacement of facilities or amenities are made in the event of any discontinuation of any facility or amenity;
- (6) Maximum number of membership must be stated. It should reasonably corresponds to the size of facilities to be provided by the developer/operator. The maximum number of foreign membership must not exceed 50% of the total number. However in the event that the memberships allocated to Malaysians are not taken up after 12 months, the reserved memberships may be sold to foreigners subject to any conditions which may be imposed by any other relevant authorities;
- (7) The price of a membership should reasonably corresponds to the value, quality and duration of the facilities and amenities to be provided under the arrangement. The developer would have to declare all costs that might be incurred in relation to the development and to explain them clearly and unambiguously including such items as the cost of different types of facilities and amenities, management or other recurring costs, repair, administrative charges, etc.. The price of a membership offered for sale during the initial launch must be stated in the statement. The price of memberships during subsequent sale can be fixed by the developer/operator subject to market forces;
- (8) A trustee must be appointed to act for the interests of club membership holders. Only a trust company registered under The Trust Companies Act 1949 can be eligible for appointment to act as a trustee for this purpose;

List of facilities and affiliates

Maximum number of membership

Membership fee

Trustee to Act

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|------|---|--|
| (9) | Where a development (or a stage of development) is incomplete or is to undergo refurbishment, any payment paid by a purchaser is to be held in trust by the trustee or its representative pending completion of the development or refurbishment, and (according to the nature of the scheme) until a certificate of licence is issued to the purchaser. [For the purpose of this requirement the development or refurbishment may be considered as 'completed' at the stage when not less than half of the facilities and amenities to be provided for use by members (including the main club-house) are ready for immediate use by the members, while the rest are still in the process of construction. In the case of golf clubs, it must be shown that at least half the number of holes (subject to a minimum of 9 holes) are ready and payable by the members]; | Payment to be held in trust |
| (10) | The developer or operator would be permitted to utilize the monies held in trust by the trustee for purposes of development or refurbishment with the consent of the trustee and the provision of security in value equal to the amount proposed to be utilized. This security could be in the form of bonds, letters of credit or other form of security as approved by the Trustee. Alternatively, the said monies may be released by the Trustee to the developer/operator at various stages of completion of the project certified by an architect or quantity surveyor; | Monies available for use by developer/operator |
| (11) | If a purchaser breached the agreement of sale and purchase prior to the time the development or project was completed or prior to the closing date, then the funds held by the trustee in respect of payment by that purchaser, may be released or disbursed by the trustee in accordance with the terms of the agreement; | Breach of agreement |
| (12) | A 'cooling off' period of at least 10 days after the date on which the purchaser lodges an application form with the developer/operator or its' authorised agent must be provided during which the purchaser may withdraw that application or rescind that contract without any deduction or penalty; | 'Cooling off period' |
| (13) | Where the developer of the land is not also the operator of the scheme the developer should be made a party to the approved deed and be bound by those covenants appropriate to it; | Developer to be made a party to the deed |
| (14) | The applicant desiring relief must prove that the relevant approvals from local government bodies and other relevant authorities have been obtained in respect of the development or refurbishment; | Approval from relevant authorities |

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|------|--|--|
| (15) | The developer/operator must write to all club membership holders or have endorsed upon the relevant certificate a note to inform them of the requirement to furnish subsequent purchasers of their interest with a copy of a current statement (prospectus) failing which the said club member would be committing an offence under section 363 of the Companies Act 1965; | Subsequent purchasers must be furnished a prospectus |
| (16) | The developer/operator of the club must provide to a club membership holder who wishes to sell his interest with a current copy of the statement (prospectus) within 14 days upon request by him and the payment of a fee not exceeding RM20; | Furnishing a copy of prospectus |
| (17) | There must be a provision to allow any member on payment of a fee not exceeding RM5 to request from the developer/operator to furnish him within 14 days a certificate certifying - | Certificate of good standing |
| | (i) Whether the monthly or annual fees payable by the member are in good standing. | |
| | (ii) Whether there are any legal proceedings in existence or contemplated in respect of the club or developer/operator as far as the developer/operator is aware; and | |
| | (iii) Whether the development or project is sufficiently covered by insurance. | |
| (18) | There must be in existence a liaison committee comprising a specified number of member whose function is to advise the trustee with regards to any breach of the covenants in the deed by the developer/operator; | Liaison committee |
| | Members of this committee must be appointed from amongst members themselves at a general meeting convened for that purpose by the trustee; | |
| (19) | It would be desirable for all developers/operators to belong to an association of clubs developers/operators in existence in the country recognised by the Registrar. | Membership of association |

3. **DUTIES AND RESPONSIBILITIES OF TRUSTEE**

A trustee must observe the following duties and responsibilities which are in addition to and complementing, but not in derogation of, any duties and responsibilities already stipulated by the Companies Act and the regulations made thereunder:

- (a) To receive purchase monies paid by purchasers and hold them in trust until the trustee has determined that any necessary conditions have been complied with for example, the completion of the development or project to the requisite specification;
- (b) To repay the fund to a purchaser in the event the purchaser withdraws from the transaction or of failure on the part of the developer to complete the development or project subject to the terms and conditions of the sale and purchase agreement;
- (c) To hold the monies standing in the balance of the sinking fund and manage or invest them in suitably liquid and secured investment specified in the deed;
- (d) To release fund to the developer on completion or progressive completion of the development against the architect's or quantity surveyor's certificate;
- (e) To ensure that the Register of Club Membership Holders is properly maintained;
- (f) To ensure that the development or project is adequately covered by insurance during the duration of the arrangement.

Any trust company registered under the Trust Companies Act 1949 is eligible for appointment to act as trustee for any arrangement or scheme. However, a trust company to be appointed for the purpose should be independent and not related whether directly or indirectly to the developer/operator.

In order to carry out the duties and responsibilities properly, a trust company must employ specialist, qualified or experienced staff and be supported by an appropriate efficient computer system.

4. **ESTABLISHMENT OF A SINKING FUND**

A sinking fund shall be established for the purposes of covering the costs of periodic major repairs or replacements. A sum of not less than 10% of the total monthly or yearly expenses or fees paid by club membership holders must be paid into the fund to be kept in a separate trust account and administered by the Trustee. Monies in the sinking fund may be invested by the Trustee in suitably liquid and secured investments as specified in the trust deed. Any interest or income arising out of the investment shall accrue to the fund.

5. **ADDITIONAL DISCLOSURE REQUIREMENTS IN THE STATEMENT (PROSPECTUS) UNDER SECTION 90 OF THE ACT**

Before a developer/operator or its agent invites the public to purchase club membership it is required by section 90 of the Act to issue a statement (prospectus) a copy of which has been registered by the Registrar. Apart from complying with the disclosure on matters and reports as specified in the 7th Schedule of the Act and such other matters as required by the regulations (subject to such adaptations as the Registrar may permit), disclosures must also be made in the Statement with regards to the following matters:-

- (i) the number of units of interest, if any, to be released for promotional purposes;
- (ii) The fact that the Minister has granted the exemption to the management company and/or developer from the requirement of section 88(1)(b)(iii) of the Companies Act 1965 which relates to the obligation of the management company and/or developer to repurchase any interest at the request of interest holders;
- (iii) schedule of phases of development applying to the scheme;
- (iv) all facilities and amenities situated or to be built in the development must be disclosed. If any of these are not completed, there must be set out the proposed date of completion for each of those facility or amenity. If any of the facility or amenity which is available for use by the club membership purchasers is not owned by the developer/operator or is outside the development project, disclosure must be made as to who owns it and what cost, if any, would be payable by the purchasers to make use of the facility or amenity;
- (v) where members are provided the right to use facilities and amenities in affiliated establishments, disclosures must be made with regard to the rules and conditions applicable to such right and the circumstances under which such right may be denied by the affiliated establishments.
- (vi) price list which specifies the asking price for the interest during the launch;
- (vii) the addresses of the places where copies of the plans and specifications relating to the scheme would be made freely available for inspection;
- (viii) details of any blanket mortgages or encumbrances on the property (if applicable) on which the scheme or arrangement is situated or to be situated;

Application

Disclosure of facilities and amenities

- (ix) if a property management company has been engaged by the developer/operator for managing the club development, then the identity of the property management company must be disclosed. There must also be disclosed all material terms of the contract entered into with the property management company; Property management company
- (x) if the club membership scheme is a 'right-to-use' scheme, then there must be disclosed to the purchasers the risks involved in the event that the chargee or creditor of the developer/operator will enforce the charge or to seek recourse for debts owing;
- (xi) the estimated monthly or yearly expenses payable by club membership purchaser must be disclosed to the proposed purchasers. Any increase in the sum payable by more than 5% must be approved by the trustee and the club members must be informed; Monthly or yearly expenses
- (xii) club membership purchasers must be informed of any regulation/restrictions on the sale of membership for example, restriction on sale of memberships to foreigners; Restriction or sales
- (xiii) the 'cooling off' period or rescission right of a purchaser should be disclosed and set forth in bold letters in the front page of the statement. 'Cooling off period'

6. **REGULATIONS OF ADVERTISING AND SALES**

The regulation of advertising or calling the attention of the public to an offer for sale of club memberships is generally covered by section 40 and section 363 (10) of the Companies Act 1965. Developers/Operators of clubs are required to obtain prior consent of the Trustee for every advertisement or brochure and lodge a copy with the Registrar on publication. Advertisement

It is envisaged that 'hard-sell' techniques used by sale agents of a developer/operator may pose serious problems to consumers. Consumers may be forced to sign sales and purchase agreements under undue pressure by sales agents. It is therefore desirable for a developer/operator to be responsible for the actions of its agents. In this regard, a developer/operator must ensure that only 'fit and proper' persons are engaged or employed as sales agents. An appropriate covenant must be made in the Trust Deed. Sales technique

7. **SUBSEQUENT SALES OF INTEREST HOLDERS**

Pursuant to section 363(4) of the Act, interest holders are permitted to offer their interest for sale to the public on condition that the offer is accompanied by a copy of the statement under section 90 of the said Act.

Recognizing the difficulties for interest holders to assemble the necessary information for inclusion in the statement, it is decided to shift that responsibility to the developer/operator and for the developer/operator of the club to provide the interest sellers with an updated copy of the statement within 14 days upon request by the sellers and the payment of a fee not exceeding RM20. This requirement would be stipulated as a condition for the relief from section 88(1)(b) (iii) of the Act. In this connection, the developer/operator would be required to write to all interest holders or have endorsed upon the relevant certificate a note informing them of this requirement and explaining the procedure for obtaining a copy of the statement.

Responsibilities of developer/operator and sellers pertaining subsequent sales

The Companies Commission would not insist upon compliance with section 363 of the Act by interest sellers who comply with the procedures mentioned above. The Companies Commission would not accept any responsibility as to the validity or enforceability of any contracts entered into between sellers and purchasers of interests pursuant to this policy.

8. **IMPLEMENTATION AND TRANSITIONAL PROCEDURES**

Some of the matters mentioned above may not be applicable for a particular arrangement. Parties who believe that certain matters may be inappropriate to their schemes are welcomed to make submission to the Companies Commission. Consideration would be given based on merits.

All golf and recreational clubs must comply with the requirements of the Companies Act 1965 and the aforesaid policy guidelines. Existing clubs prior to 31 December 1992 had been given a moratorium period until 31 December 1992 for which to comply. During the moratorium, development and construction of the project were allowed to proceed and the sales of memberships would also allowed to continue. However, developers/operators were advised to comply with the requirements as soon as possible. For that purpose, a club would be deemed to be existing if the development or construction was completed, or the development or construction was in progress, or the plans for the development or construction had been approved or in the process of being approved by the relevant local authorities as at the date thereof. New clubs which had not commenced any development or construction on the project nor submitted any plans of the project to the authorities for approval as at the date thereof, should comply with the aforesaid policy requirements with immediate effect.

Moratorium

To put existing clubs with development pending completion in line with the present policy guidelines and requirements, the developer/operator of these clubs would be required to obtain an architect's or quantity surveyor's assessment on the percentage of completion of all facilities and amenities in the development as mentioned in the prospectus as at the date of the prospectus. A schedule of the expected dates for the completion of the various facilities and amenities pending completion must also be provided by the developer/operator. The amount of money collected from purchasers corresponding to the percentage of uncompleted facilities or amenities or securities of an equivalent amount should then be transferred to the trustee and subject to the same control and supervision of the trustee.

Development
pending
completion

Clubs with completed development or refurbishment must also comply with the legal requirements and policy guidelines so long as there is continued sales of club memberships and so long as club memberships are transferable. More emphasis should be placed on the obligation of the developer/operator to ensure that the development is properly maintained and managed and club members' interests are preserved.

Completed clubs

Companies Commission of Malaysia

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ADDITIONAL POLICY GUIDELINES AND REQUIREMENTS FOR SALE OF CLUB MEMBERSHIPS

1. *MARKETING AGENT*

- 1.1 The consent of the Companies Commission of Malaysia (“Companies Commission or CCM”) must be obtained before a marketing agent is appointed.
- 1.2 The Developer/Operator is required to obtain an approval in principle from the Companies Commission before such an appointment made.
- 1.3 There should be an appropriate power in the trust deed which empowers the developer/operator to appoint a marketing agent.
- 1.4 The trust deed must also stipulate that the developer/operator must be responsible for the proper performance and conduct of the marketing agent.

2. *ROLE OF TRUSTEES*

Trustees must:-

- 2.1 play their role as stipulated in the Companies Act 1965 and the relevant trust deed and ensure the interest of members are preserved.
- 2.2 ensure that development and facilities as promised in the trust deed are delivered and properly maintained.
- 2.3 make regular visits to clubs to inspect the condition of the Club and its facilities and seek remedial actions in the event of any matter not to his satisfaction.
- 2.4 ensure that interest of members are preserved and protected.
- 2.5 hold meetings with members of the Liaison Committee to get feedback on the management of the club and its facilities.
- 2.6 investigate into complaints by members.
- 2.7 report to the Companies Commission any non-compliance with the covenants of the trust deed by the developer and / or the operator.

3. *MINIMUM COMPLETION OF DEVELOPMENT*

- 3.1 At least 50% of all developments and facilities must be certified to be completed before sale of memberships is allowed.
- 3.2 Certification must be given by an architect or a quantity surveyor.

- 3.3 Photographs showing the stages of completion of various development and facilities must be submitted to the Companies Commission.

4. *MAXIMUM NUMBER OF MEMBERSHIP*

- 4.1 Guidelines stipulate that the maximum number of membership must correspond with the size and the facilities of the club.
- 4.2 As a guide-
- For a golf club – every 9 holes – 2,000 members.
 - For a non golf club – 4,000 members
- 4.3 Variation from this guide may be considered if the club can provide appropriate justification.

5. *REFUNDABLE SECURITY DEPOSITS*

- 5.1 For tax reasons, some clubs structured their membership price to include a refundable security deposit (RSD).
- 5.2 RSD must be secured.
- 5.3 If developer or operator intends to utilize RSD for its developments or operation, it should issue unsecured notes or unsecured deposit notes to evidence the indebtedness of that corporation in respect of the deposit as required by section 38 of the Companies Act 1965.
- 5.4 Otherwise RSD should be kept by the Trustee in a separate trust account for the members.
- 5.5 Subject to exemption granted by the Minister from the provision of section 88(1)(d) of the Companies Act 1965, a developer or operator may borrow money from RSD trust account for the development or operation of the club if approved by the trustee subject to the provision of a security of value equal or higher in value than the sum to be borrowed as agreed by the trustee.

6. *UTILISATION OF SINKING FUND*

- 6.1 Sinking fund may only be released for major repair and replacement.
- 6.2 A repair or replacement for a golf club is considered major if the cost of repair or replacement exceeds RM25,000.
- 6.3 A repair or replacement for a non-golf club is considered major if the cost of repair or replacement exceeds RM10,000.
- 6.4 Sinking fund is not meant for normal maintenance and minor repairs or replacements.

7. CONSTITUTION OF LIAISON COMMITTEE

- 7.1 The function of the Liaison Committee is to advise the trustee of any breach of the covenants by the developer or operator.
- 7.2 The members of the Committee must be appointed from amongst the members.
- 7.3 The Liaison Committee must have at least 5 members each of whom must not be related in any manner with the developer or operator or officers of the developer or operator.

8. PAY-BACK SCHEME

- 8.1 A Pay-back scheme is a scheme where the operator guarantees a payback of either a fixed sum or the purchase price at the end of the duration of the scheme or a pre-determined period.
- 8.2 This scheme is permitted if it is:-
- (i) guaranteed by an insurance scheme of a reputable insurer approved by the Companies Commission; or
 - (ii) guaranteed by a scheme of placement of deposits by operator with the trustee which is approved by the Companies Commission.

9. EXTENDED LIFE PROSPECTUS

- 9.1 Section 90 – No offer for sale of club memberships to the public is permitted unless the buyer is given a prospectus, a copy of which has been registered with the Companies Commission.
- 9.2 A registered prospectus is only valid for six months.
- 9.3 Companies Commission is prepared to extend the validity period to twelve months pursuant to section 48(8)(a) of the Companies Act 1965 for a club if :-
- 9.3.1 all projects and facilities as covenanted in the trust deed are fully completed and received the necessary CFs;
 - 9.3.2 the completion is certified by the trustee;
 - 9.3.3 no material change is likely in the information disclosed in the prospectus.
- 9.4 A demonstrated stability in content of the past two registered prospectus after the completion of the projects and facilities would be adequate to meet the requirement.
- 9.5 The operator must undertake to comply with all the conditions stipulated for extension.

10. *CONDITIONS FOR EXTENDED LIFE PROSPECTUS*

- 10.1. The accounting information and the report by an approved company auditor must relate to a period ending on a date not more than six months prior to the date of issue of the prospectus.
- 10.2. There must be a statement in the prospectus and the application form which states that no membership will be sold on the basis of the prospectus after 12 month from the date of the prospectus.
- 10.3. The prospectus must also contain a statement that the company will supply a purchaser with the latest audited accounts on request without charge.
- 10.4. A supplemental deed must be executed.
- 10.5. At each lodgement of prospectus for registration a letter of undertaking must be provided stating:
 - 10.5.1 that the directors are satisfied that all conditions for extension have been complied with; and
 - 10.5.2 that the directors have made all reasonable enquiries and are satisfied that they are not aware of any information or circumstances the omission of which would result in the prospectus being false or misleading in a material particular.

11. *RENEWAL OF PROSPECTUS*

- 11.1 Application for renewal should be submitted to the Companies Commission at least two weeks before the expiry date.
- 11.2 The application letter should highlight the changes made vis-a-vis the existing prospectus and give an undertaking that the new prospectus is the same as the existing prospectus except for the changes highlighted.
- 11.3 Registration of the new prospectus can usually be done in less than five days.

12. *SUPPLEMENTAL TRUST DEED*

- 12.1 All proposal to alter, delete or add any provision must first be submitted to the Companies Commission for an approval in principle.
- 12.2 Prior approval of the Companies Commission is necessary for minor or immaterial changes.
- 12.3 Any proposal to amend the trust deed must be supported by a letter of consent from trustee and his statement whether the proposal will prejudice the interest of members or impose additional liabilities on members or release the company or trustee from any obligations to members or release the company or trustee from any obligations to members. Otherwise, a members' meeting must be called to approve the changes.

13. *APPOINTMENT OF CHIEF EXECUTIVE OFFICER (CEO)*

- 13.1 Every scheme must appoint a CEO.
- 13.2 Prior approval of Companies Commission must be obtained before an appointment is made.
- 13.3 The CEO must be a person who is familiar with the operation and responsibilities of the company and the club.
- 13.4 The CEO is expected to personally look into and solve all complaints relating to the club and its operation.

Companies Commission of Malaysia

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