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The secretary as the gatekeeper



Comment

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WHO is a gatekeeper? There are a variety of services provided by a plethora of professionals to a corporation.

For example, rating agencies and analysts evaluate and provide some measure of assessment to credit worthiness and share value.

But the debacle of the subprime crisis and notorious failures have put in question the reliability of these agencies.

The validation and verification of financial statements and accounts by auditors as "true and fair" gives shareholders and investors some basis for measurement of the state of the business.

Due diligence exercise before a transaction by investment bankers, lawyers and auditors again permits some appraisal of prospect and worthiness of entry into the transaction.

In all of the above functions the corporate secretary may also play a part and a role.

John C Coffee Jr defines it as, "The term gatekeeper has been used in many different settings across social science, usually in ways that are metaphorical than precise. Typically, the term connotes some form of outside watchdog or monitor - someone who screens out flaws

and defects or who verifies compliance standards and procedures."

I would define gatekeepers as "professional officer or service provider of a corporation who certifies and verify the trustworthiness of the affairs of a corporation."

In this broad sense a corporate secretary may be considered an important gatekeeper of the legal and board affairs of a corporation.

The corporate secretary has many responsibilities, ranging from traditional roles of convening board meetings, setting the agenda, liaising between the Chair and non-executive directors with management, together with the work of committees.

A corporate secretary also settles wordings of resolutions, minutes and the keeping of records.

But with the burgeoning growth of governance expectations, the corporate secretary has far outgrown that of being merely a minute-taker and subordinate employee or external minor consultant.

Even before the rise of governance debate, it has already been noted by the courts in the oft quoted dicta that a corporate secretary's role and duty has quickened and expanded. And the regulators have followed suit.

In the core company legislation, there is express recognition by the Registrar of Companies that only members of certified bodies may act as corporate secretaries.

The existing Section 139 A of the Malaysian Companies Act 1965 is symptomatic of the

growing need for professionalisation of the work of corporate secretarialship.

The corporate secretarial professional now sits within the vortex of business decision-making and is expected to be guide and navigator, "sounding board" and advisor to the labyrinthine regulatory minefield of the corporate environment.

She is the silent witness to the animal spirits of the entrepreneur and may at times be ensnared between warring factions of shareholders contestations and boardroom tussles.

Gatekeeping can be perilous.

Whether in conditions of bulls or bears, a corporation in throes of success (real or otherwise) or failures (lurching towards insolvency), a corporate secretary can be caught between the rock and a hard place.

Corporate raiders, who in occupying a board seat, may attempt to ride roughshod of the laws and governance boundaries.

In one High Court case, *Industrial Concrete Products v Concrete Engineering Products Bhd* [2001] 2 MLJ 332, the hapless corporate secretary was buffeted by an executive director (nominee of a raider) to exclude certain minutes whilst the aggrieved non-executive director whose dissent was not in the draft minutes had to write in to insist on its inclusion.

In corporate contestations the corporate secretary can also be subject to lobbying and demand for information or insistence of non-disclosure from warring factions. The whistle-

blowing injunction which is favoured by regulators makes a corporate secretarial work additionally burdensome.

I recollect from my own experience the ethical perplexities of a company secretary cum legal manager being privy to a possible infraction of a control transaction. Her dilemma was whether to whistle-blow.

Mercifully the duty now is discretionary (unlike that of auditors) in nature as the secretary would have to deal with the dilemma of loyalty and compliance.

The sanctions of potential liability, be it in sphere of professional negligence and or prosecutorial penalties, are disincentives to gatekeeper's failure. However such sanctions come with costs and there are time lags.

Professional bodies must continue to provide capacity and competency training and upgrade. Stakeholders must take cognisance that there are complementary of institutions that engender good governance.

Only then the sobering and acerbic observation of John C Coffee Jr, "That gatekeeper failure is not by itself surprising. The history of financial frauds revealed many similar features over the last century. That gatekeepers failed en masse is probably more surprising."

May this not prove to be prophetic again.

Philip Koh is a senior corporate lawyer and this is an edited version of the paper presented at the Corporate Secretaries International Association Roundtable held in Kuala Lumpur today. The views expressed are entirely the writer's own.