

Background

On 13 December 2020, SGX RegCo has issued a regulatory column to issuers on what Nominating Committees should consider when faced with a situation where directors of listed issuers are being called in for questioning by police investigators. A summary of the regulatory column is provided below.

1. Nominating Committee's Obligations

- a) **Fiduciary Duties.** Under Rule 720(1), issuers must ensure under Mainboard Rule 210(5)(b) or Catalist Rule 406(3)(b) that directors comply with the character and integrity requirements on a continuing basis.
- b) **Independent Assessment.** It is the responsibility of the company's Nominating Committee (NC) to disclose its independent assessment on the continued appointment of the director in compliance with Rule 720(1) read with Rule 210(5)(b) (or the equivalent Catalist rules 406(3)(b)). This must be done via an announcement on SGXNet or the company's annual report and Notice of AGM when the director is up for re-election.
- c) **NC Assessment.** When a director, or Board is under investigation, the NC must rigorously satisfy itself as to whether the allegations against the directors and conditions or restrictions imposed by the regulatory authority or government agency, would cast any doubt on their suitability or continuing ability to act as directors; or more crucially, affect shareholders' confidence in the company. The NC should also consider whether any measures need to be undertaken to safeguard against risks associated with the directors' continued appointment.

2. What the NC should ask itself:

- a) **Should the director continue to serve on the Board?**
- b) **Whether it is in the best interest of the Company and the shareholders for the director to remain on the Board while an investigation is ongoing.**

The NC should also monitor material developments relating to the investigation or require the director concerned to update on material developments. This will enable the NC to continue to consider the developments and assess the director's suitability and demonstrate compliance with the character and integrity limbs of Rule 720(5) read with Mainboard Rule 210(5)(b) (or the equivalent Catalist rules 406(3)(b)), if necessary, via SGXNet.

3. Scenarios and Key Questions:

There are 3 typical scenarios when an investigation gets underway, namely, (1) the entire board is under investigation; (2) a director is investigated for an offence involving the company, and (3) a director is investigated for an offence not involving the company. Regardless of the scenario, the touchstone consideration for NCs should be: **Is any decision, disclosure, action or non-action in the best interest of the company and the shareholders?** Please refer to Table 1 (in the next page) for key questions that could be raised in relation to the scenarios.

To Note: The list of questions in Table 1 are not exhaustive. NC should consider the necessary questions that are relevant to their cases and circumstances. This should be read with enhancements made by SGX RegCo to listing rules (effective on 7 February 2020) that provide guidance on disclosure obligations for investigations, under Practice Note 7A / 7.1 of listing rules (Catalist/ Mainboard Rules).

Table 1

Scenario 1: The entire board is under investigation.	
1	Does or will the fact that the entire board is under investigation impact investor confidence in the company?
2	If the entire board is under investigation for disclosure offences, will this affect investor confidence in the timeliness and accuracy of the company’s announcements?
3	Should the NC consider appointing one or two new independent directors (IDs) to the board to give investors confidence that the board is now subject to additional checks and balances? We understand that in such a situation, the resignation of the entire board may not be practical.
4	To further shore up investor confidence, should the NC consider designating one of the incoming IDs as a Lead ID?
5	In terms of the search process for the new incoming IDs, should the NC seek the help of an external party, such as a professional search firm, the Singapore Institute of Directors or perhaps the Securities Investors Association (Singapore)? This is again aimed at giving investors’ confidence in the independence of the new IDs.
6	If doubts on the integrity of the investigative process persist, should the new IDs form a special committee to oversee the investigative process? This may assure the market that the company is cooperating fully in the investigative process and is not being impeded or influenced in any way by the board.
Scenario 2: A director is being investigated for an offence involving the company.	
1	What is the director being investigated for?
2	If the investigations point to potential wrongdoing or misconduct by the director or impropriety in the Company’s affairs, how can investors’ confidence in the company and shareholders’ interest be protected if the director remains on the board?
3	Should a special committee be appointed to oversee the investigation or the matters of concern ?
4	Should an independent law firm or audit firm be appointed to conduct expedient reviews on the adequacy and effectiveness of the company’s internal controls and recommend enhanced approval processes or measures in the interim?
5	Should there be any Chinese Walls or changes to reporting lines to ensure the integrity of investigations?
6	Should there be additional checks and balances on the director’s power and authority, particularly for executive directors?
7	Will the company’s reputation and investors’ confidence in the company be affected if the director remains on the board?
8	Is the board taking the position that the acts were unauthorized?
9	Is the board seeking legal advice and reserving its rights against the director?
10	Is the board instructing counsel?
11	Will any of these things make it difficult for the board to continue to be a well-functioning board?
Scenario 3: A director is being investigated for something that does not involve the company.	
1	Will the director be able to dedicate sufficient time if he remains on the board while the investigation is ongoing?
2	How much of a distraction will it be from the important business of the company?
3	What is the reputational impact to the company?

Useful References:

SGX Regulator’s Column

<https://www.sgx.com/media-centre/20211213-regulators-column-what-nominating-committees-should-consider-disclosures>

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