

Background

SGX RegCo had on 5 May 2022 issued an article in the Regulator’s Column on its expectations of directors under the Listing Rules. These expectations are consistent with the expected duties of the directors as set out in the Companies Act 1967. While carrying out their duties, directors of SGX-listed companies should also note their statutory duties together with their obligations under the Listing Rules. Below sets out the expectations of the directors’ duties under the Listing Rules.

1

Duty to act in good faith and in the best interests of the company

2

Duty to avoid conflicts of interests

3

Duty to exercise due care, skill & diligence

1. Duty to act in good faith and in the best interests of the company

Rule 103(6) of the SGX Catalist Rules

Directors of an issuer shall act in the interests of shareholders as a whole.

Rule 406(3) of the SGX Catalist Rules

Requires directors and management to have the necessary character and integrity.

Securities and Futures Act 2001 & the Business Trust Act 2004

The manager of an authorised real estate investment trust and the trustee-manager of a registered business trust has a duty to act in the interests of all the participants of the authorised real estate investment trust as a whole and all the unitholders of the registered business trust as a whole respectively.

- Directors are expected to exercise judgements on the commercial merits of corporate transactions. And decisions arrived at must be made in good faith, on a rational basis and in in the best interest of the company.
- SGX RegCo does not seek to exercise judgement on the commercial merits of transactions undertaken by companies. However, SGX RegCo will consider stakeholders’ concerns and, where appropriate, query companies to provide more transparency in their business decisions so that shareholders can make an informed investment or voting decision on the company.
- In exercising this duty, directors are also expected to consider the environmental, social and governance (“ESG”) factors as this may affect the sustainability of the business and operations of the company.

2. Duty to avoid conflicts of interest

A director owes a duty of undivided loyalty to the company and should not place himself or herself in a position where the duty to advance the company’s interest may conflict with personal interests or other extraneous interests. As such, the director should note the following:

a) Double employment

A director who acts for or is involved in two companies (including related companies) with potentially conflicting interests without informed consent may be in breach of the obligation of undivided loyalty.

b) No inhibition

A director should not be inhibited by the existence of other employments or interests from acting faithfully and effectively

c) Actual conflict

A director must take care not to find himself or herself in a position where there is an actual conflict of duty so that he or she cannot fulfill the obligations to one principal without failing in the obligations to the other.

d) No profit

A director is not allowed to retain any profit which he or she has made through the use of the position as director without the fully informed consent of the company.

e) No self-dealing

A director is prohibited from entering into, on behalf of the company, an arrangement or transaction with himself or herself or with a company in which he or she is interested without the fully informed consent of the company.

- Director’s duty to address conflicts of interests is encapsulated in Chapter 9 of the listing rules which prescribes requirements for entry into interested persons transactions.
- Directors should also ensure that there are clear policies and procedures for dealing with conflicts of interest in the company as set out in the Code of Corporate Governance. Where a director has a direct or indirect interest in a transaction; or faces a conflict of interest, he or she should make appropriate disclosures and recuse himself or herself from meetings, and abstain from deliberations and voting on the transaction.

3. Duty to exercise due care, skill & diligence

Rule 406(3)(a) of the SGX Catalyst Rules

Directors must have the appropriate experience and expertise to manage the company’s business. They must exercise due care, skill and diligence in doing so.

Rule 302 of the SGX Catalyst Rules

A director whose act or omission causes the company to breach the Listing Rules is also deemed to have contravened the Listing Rules.

Rule 719(1) of the SGX Catalyst Rules

An issuer should have adequate and effective systems of internal controls (including financial, operational, compliance and information technology controls) and risk management systems.

3. Duty to exercise due care, skill & diligence

- As stipulated in Rule 302, a director is also deemed to have contravened the Listing Rules when the company is in breach of the rules. Therefore, directors must continually stay abreast of the company's affairs and the listing rules for them to discharge their duties with due care, skill and diligence.
- In the deliberation of the transactions, director must undertake his own assessment and evaluate all the facts and advice provided and not leave matters to be resolved by the management and other directors.
- As such, pursuant to Rule 719(1), the Management (including the executive directors) must ensure that internal controls and policies are adequate and effective in ensuring that Management escalates material information to the Board in a timely manner.
- The director may rely on professional advice when performing duties as a director, however he must still exercise the same degree of care, skill and diligence as a reasonable director would. This would include making proper inquiry where the need for inquiry is warranted. The standard is not lowered to accommodate any inadequacies in the director's knowledge or experience. For directors who possess specialized knowledge or experience, the bar is raised for them. Directors cannot absolve their responsibility just because professionals have been consulted on the matter.

Disclosures in announcements and circulars

- As disclosure is a key tenet in the disclosure-based regime, directors should, where appropriate, disclose and explain the process, rationale and factors considered in arriving at their business decisions. This should apply for interested person transactions and contentious or complex corporate actions or transactions.
- SGX expects proper due diligence to be undertaken on a transaction and not simply stating that the terms of a transaction are arrived at on a "willing-buyer willing seller" basis in the announcements and circulars. In addition, it is expected that directors disclose and explain whether they have considered other available options before pursuing the transaction in question.
- Where directors are required to make a recommendation to shareholders, directors should not proffer a bald statement that the board had considered professional advice such as the independent financial adviser's opinion without undertaking its own assessment. Directors should state its detailed basis for recommending shareholders to vote in favor of the transaction.
- The Board may seek external legal advice in relation to its disclosure obligations but the Board is expected to be familiar with the Listing Rule requirements and assess the reasonableness of the legal advice. SGX will not accept sole reliance on external legal advice or Management as justification that they have complied with their disclosure obligations.

In the event of breaches

- SGX may consider the director's suitability for appointment, and may require the resignation of a director or object to his or her appointment in any issuer under the enhanced enforcement framework which took effect from 1 August 2021.
- Breaches of directors' duties can result in criminal prosecution and civil action against the directors under the Companies Act 1967. In appropriate cases, SGX may refer such breaches to the relevant authorities.

4. Other matters

Engagement of introducers, placement agents, consultants for fund-raising activities

- Dealing in capital markets products are regulated by the Monetary Authority of Singapore ("MAS"), under the Securities and Futures Act 2001 ("SFA"). A company must hold a Capital Markets Services ("CMS") license to conduct activities regulated under the SFA, unless an exemption apply. Individuals representing CMS licensees or exempt financial institutions need to be appointed as representatives.
- For fund-raising activities, a CMS license for "dealing in capital markets products" is required. Capital markets products include securities, securities-based derivatives contracts and collective investment schemes.
- "Dealing in capital markets products", in respect of capital markets products that are securities or securities based derivatives contracts, means (whether as principal or agent): (a) making or offering to make with any person; or (b) inducing or attempting to induce any person to enter into or to offer to enter into, any agreement for or with a view to acquiring, disposing of, subscribing for, entering into, effecting, arranging or underwriting any securities or securities based derivatives contracts;
- Issuers are advised to ensure that background checks are conducted on potential introducers, placement agents or consultants to be engaged for fund-raising activities to ensure that they are licensed to deal in capital market products (unless exempt under SFA). We wish to also share a recent prohibition order issued by MAS on an individual following conviction for dealing in securities without a license (<https://www.mas.gov.sg/regulation/enforcement/enforcement-actions/2022/mas-issues-prohibition-order-against-ms-nancy-tan-following-conviction-for-dealing-in-securities-without-a-licence>).

Please refer to this [link](#) for the list of regulated activities that only CMS licensees are allowed to conduct, and this [link](#) for CMS-licensed entities.

Useful References:

- Regulator's Column: Duties of directors under the Listing Rules dated 5 May 2022 (Please click [here](#))

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