

SGX REGCO: EXPECTATIONS OF THE BOARD AND NOMINATION COMMITTEES IN THE APPOINTMENT AND RESIGNATION OF DIRECTORS

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On 1 July 2021, the Singapore Exchange Regulation (“SGX RegCo”) released a new Regulator’s Column regarding its expectations of the Board and Nomination Committees (“NCs”) of SGX-listed companies when directors join or resign.

1. Directors are fiduciaries of the company

The SGX RegCo noted that directors are fiduciaries of the company, who have undertaken to act on behalf of others in circumstances which give rise to a relationship of trust, confidence and loyalty. As such, the SGX RegCo emphasised the importance of the process on the nomination and appointment of directors, and disclosures relating to the resignation of these directors.

The Corporate Governance Advisory Committee (“CGAC”) has also issued a revised Practice Guidance 4 in relation to the board nomination process, which may be found.

here: <https://api2.sgx.com/sites/default/files/2021-06/Practice%20Guidance%20%281%20Jul%202021%29.pdf>

2. Independence of directors

The SGX RegCo highlighted that the CGAC’s Practice Guidance 2 on board composition states that the Board should have a strong and independent element. In this regard, the Board and NC should assess the independence of directors by first determining whether any circumstance or relationship exists which might either impact a director’s independence, or the perception of his or her independence. If the Board determines that a director is independent notwithstanding the existence of such circumstances or

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relationships, the Board should disclose these relationships and explain why these directors are nonetheless deemed independent in its annual report and announcements where applicable.

3. Multiple Directorships

As stated in the CGAC's Practice Guidance 4 on board memberships, the responsibilities of a director are complex and demanding. As such, the Board and NC of each company should take note of whether any director is overboarding and failing to devote sufficient time and resources to properly discharge his or her duties to the company. Some of the ways in which Boards may deal with this issue include:

- capping the number of directorships and principal commitments of each director;
- taking into account whether an individual director holds a full-time executive position; and
- taking into account the financial year-ends and/ or reporting timelines of the respective companies which the director sits as a board member.

4. Resignations and disclosure of the cessation

The SGX RegCo also raised concerns about companies' disclosure of the reasons for the cessation of a director's appointment. It noted that Boards are often disclosing boilerplate statements such as "to pursue personal interest" or "for personal reasons". In this regard, the SGX RegCo stressed that the Board must elaborate on the reasons for the director's resignation if the information is material to investors. In particular, any material governance concerns and matters concerning the management of the company's affairs which have a material impact on the company's financial performance or operations should be disclosed.

Some examples of reasons of cessation which the SGX RegCo highlighted as providing sufficient clarity include:

- board renewal;
- retirement;
- inability to properly discharge his or her fiduciary duties;
- inability to share the same vision with the board members on the strategic direction and business plans of the company;
- differences in decisions over the company's business and future plans; and
- overboarding

5. Past performance as directors

The SGX RegCo noted that NCs must perform stringent due diligence on every potential director. In this regard, some considerations which the NC should take into account include:

1. whether the potential director has fully discharged his or her duties and obligations during his or her previous directorship with an SGX-listed company
2. whether the potential director had previously served on the board of companies with adverse track record or a history of irregularities;

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3. whether the potential director is or was under investigation by professional associations or regulatory authorities, and if so, whether it has any bearing on the candidate's suitability as a director; and
4. the reasons for the potential director's resignation from the board of another company, and whether it may affect their ability to act as director.

6. Companies at relatively higher risk

The SGX RegCo also noted that there have been instances of directors leaving a company when the company is at a relatively higher risk, such as when a company is issued with a modified audit opinion or emphasis of matters relating to material going concern issues, and/or prior to the need for an independent review or special audit. In these instances, directors should consider whether their resignation would place the company in jeopardy or affect the company's ability to look into matters of concerns.

The SGX RegCo also highlighted that when short seller or media reports highlight company-specific issues or transactions, directors should remain with the company to assist in resolving the issues raised.

In respect of individuals who have resigned as directors in the above instances, the SGX RegCo highlighted that they have the power to object to, and publicly query the appointment of, such individuals as directors of SGX-listed companies in the future. If the SGX RegCo does raise such queries, the NC will need to publicly reply to the SGX RegCo's queries and justify why that individual is deemed suitable despite the history of "jumping ship". If the responses are unsatisfactory, the SGX RegCo may issue a Notice of Compliance objecting to that candidate's appointment as director of SGX-listed companies. The Board will then have to publicly state its considerations on whether or not to remove the said director from his or her post.

The full article issued by the SGX RegCo may be found here:

<https://www.sgx.com/media-centre/20210701-regulators-column-what-sgx-regco-expects-nomination-committees-when-directors>

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