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Suggestions for sound corp governance

The current review of the relevant Acts is a good opportunity to fix anomalies and match international best practice

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SOUND corporate governance is key to the integrity of our securities markets. Corporate governance in Singapore is founded on the Companies Act and Securities and Futures Act, the Code of Corporate Governance, and the Singapore Exchange Listing Manual.

We understand that the Companies Act and Securities and Futures Act are being reviewed. The review is timely and we offer the following suggestions for the betterment of our corporate governance and securities markets.

Our first suggestion relates to the role and responsibilities of independent directors. These were recently highlighted by resignations of independent directors at China Aviation Oil and Swissco.

The Code of Corporate Governance, revised in 2005, states as a principle: 'There should be a strong and independent element on the board, which is able to exercise objective judgement on corporate affairs independently - in particular, from management.'

In the accompanying guideline, the Code clarifies that an 'independent' director is 'one who has no relationship with the company, its related companies or its officers'. The guideline continues that any director receiving 'significant' payments from the company would not be independent and that payments exceeding S\$200,000 a year are significant.

Obviously, the upshot of the Code of Corporate Governance is that independent directors should be detached from the day-to-day fray of the company's businesses and operations.

Yet, the Companies Act does not distinguish between executive and independent directors, except in Section 201B, which stipulates that listed companies must appoint an audit committee, comprising a majority of non-executive directors.

Otherwise, the Act appears to contradict the Code of Corporate Governance. The Companies Act, Section 4, states that an 'officer, in relation to a corporation, includes (a) any director or secretary of the corporation or a person employed in an executive capacity by the corporation'.

By the Companies Act, any director (including an independent director) is an officer. The Act imposes a heavy burden of duties, responsibilities and liability on all officers.

Singapore court decisions have confirmed that the duty of care is similar for executive and independent directors.

This 'equality' does not make sense from a business perspective; independent directors are not supposed to get deeply involved in the company. Not being executives, their access to information is often limited, and dependent on the goodwill of management. Indeed, in her letter of resignation from the board of China Aviation Oil, independent director Lee Suet Fern famously wrote: 'It has become, as a result of the company's approach to information flow and the management of decision making, review and oversight, increasingly difficult for me to properly discharge my duties.'

The contradiction between the Companies Act and Code is fundamental. As mentioned above, the Code states that an independent director must have no relationship with the company's officers. Yet, the Companies Act states that a director, including an independent one, is an officer. How can someone be an officer and yet have no relation to any other officer?

What's 'independence'?

It is high time to amend the Companies Act to distinguish between executive and independent directors, and assign responsibilities and liability accordingly.

Our second suggestion relates to the meaning of 'independence'. In the world's major capital markets, including the UK, Hong Kong and Australia, anyone linked to the substantial shareholders of the company is deemed to be not independent. Indeed, the Council for Corporate Governance and Disclosure had suggested that Singapore follow the same principle, but was overruled.

Really, we should follow international best practice. Our securities markets are sufficiently mature, and our pool of experienced professionals and business executives wide and deep enough to provide a large reservoir of talent. There is no reason to consider people linked to substantial shareholders as being independent.

Independent directors who are not aligned with major shareholders can be relied upon - and seen to be relied upon - to look after the interests of all shareholders, big and small.

Our third suggestion concerns executive directors who mislead the market with inaccurate information. Under current law, the Monetary Authority of Singapore (MAS) can secure a civil penalty against them. However, investors are limited in legal action to recovering the director's gains from wrongdoing.

In cases of misleading disclosure (as opposed to insider trading), the wrongdoer's monetary gain may be little or nothing. But the harm caused might be substantial. We suggest that the Securities and Futures Act be amended to enable investors to sue executive directors to recover any losses resulting from misleading information provided by the executive directors.

Our fourth suggestion relates to the performance of directors. The Code of

Corporate Governance requires that every company disclose the attendance of directors at board and committee meetings in the annual report. This is certainly a good step towards transparency in corporate governance.

However, we think that it is important and necessary to go further. Our suggestion is that companies be required to publish the dates and times (morning, afternoon, or evening) of all board and committee meetings. Given the complexity of business, it would be very comforting and reassuring to shareholders to know that directors gave due attention to company affairs.

Publication of attendance and meeting dates would also substantially increase the transparency of the contributions of persons who hold multiple independent directorships.

Our fifth suggestion relates to resignations of directors. We commend the Singapore Exchange (SGX) for providing listed companies with a template for announcement of director resignations. This has certainly reduced the number of resignations for 'health' or 'personal' reasons.

Especially when independent directors resign around the time of announcement of financial results, it is important that they provide sensible explanations. Otherwise, unfounded rumours might distort market prices.

The problem for an independent director in explaining his or her resignation is defamation law; the director may say something that opens him or her to legal action. The prudent director would consult lawyers before issuing their resignation letter.

Consequently, even with the new SGX template, investors may be challenged to understand the real reason for a director's resignation; worse, they may misconstrue it. Our suggestion is that some form of safe harbour be established for statements made by a resigning director. One way would be to consider the statement to be made in the course of the director's duties, and hence attribute any possible liability to the company, not the individual director.

Conserve resources

Our final suggestion addresses good governance as well as conservation of resources. It has been suggested that the government or SGX provide free online access to all announcements and filings by listed companies for a period of five years from publication. This is an excellent idea, in line with international practice, which we endorse.

We would add to this by suggesting that SGX offer all shareholders of listed companies an easy way to opt out of receiving annual reports in paper. In today's networked world, it is just as easy to get the annual report through SGX's website. This would save many trees and also ease the back-breaking burden on Singapore Post's delivery staff.

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