



The independent director: A cut above or the same as other directors?

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Independent directors (IDs) are there to provide checks and balances on executives and appointees of major shareholders on the board. However, there is a mismatch between what an ID is expected to do, and what he can and should do. There are areas where an ID can add value, but he must, like all directors, first be properly qualified with the requisite skills and probity.

When a listed company runs into difficulty, shareholders automatically look to the IDs and ask: What were they doing? How could they not know? Why did they not act to steer the company back on track?

At those times, IDs must feel like they are called upon to be ubiquitous, required to be everywhere at once and intimately aware of every detail — or shape-shifters, somehow staying independent

yet embroiled in the nitty-gritty of the company's operations like senior executives.

Much has been written on the role of IDs. I would like to focus on an area less touched upon — the mismatch between the expectations that are laid at an ID's feet and the limits of what he (or she) can achieve. (Ed: for convenience, the male gender is used to refer to all IDs and other persons in the Bulletin.) But make no mistake, there is substantive value that an ID can bring to



the company and shareholders, and he should be held accountable to this.

The duties of all directors

Companies listed on SGX are incorporated in a varied range of jurisdictions. The basic principles that underlie the roles of directors in different jurisdictions are, by and large, universal. The board is responsible for oversight of the company's business and management, and directors have a duty to act in the interests of the company.

Each jurisdiction's corporate laws further define the detailed responsibilities of directors. In Singapore, these include the responsibilities to act honestly, with reasonable diligence, and with due care and skill, and to avoid conflicts of interest, among others.

In the Singapore law context, the legal roles and responsibilities of directors apply to all directors, whether executive or non-executive, independent or not. Indeed, executive directors may be held to a higher standard by law because of their more intimate knowledge of the company.

Why then the requirement that certain directors be independent, since all directors are bound by their legal obligations and can be held to account should things go wrong in an organisation?

The need for IDs

While different jurisdictions introduced the concept of independent directors (itself a term used to mean different things) at different times and for possibly different reasons, the concept of an ID arguably took hold because of the hard

practical realities of human nature and the desire for checks and balances.

There was a recognition that directors who are executives or appointees of major shareholders inevitably may sometimes make decisions, whether consciously or unconsciously, that are influenced by the circumstances of their appointment and their role in the company or their role in the major shareholder.

Since listed companies potentially expose the personal assets of large numbers of retail and institutional shareholders to risk, many jurisdictions also sought to overlay, as an added tier of safeguards, the hard law of directors' duties applicable to all companies, with higher standard corporate governance principles applicable to listed companies that are a mix of best practices, guidelines, comply-or-explain requirements, and so on.

Definition of an ID

The latest iteration of the Singapore Code of Corporate Governance, being the 2012 Code, defines an ID as one "who has no relationship with the company, its related corporations, its 10% shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgement with a view to the best interests of the company".

An ID thus in theory is not influenced by any relationships which could colour his views of the matters for decision before him.

He is not part of or related to management. So he is in a position to make objective decisions on issues brought to him by management.

He is also not part of or related to any major shareholder. In many cases, the interests of a major shareholder and the body of shareholders as a whole are not aligned, and an ID can make

decisions uninfluenced by such a relationship, in the interests of the company, and the balanced interests of all shareholders.

That said, it is important to bear in mind that an ID's legal responsibilities are in essence no different from those of any other director of the company. An ID is just in a better position to exercise independent business judgement because he is theoretically unfettered by relationships that could undermine such judgement.

It goes without saying, following from this, that an apparently independent director who has a weak sense of integrity and is easily moved by overtures from management or major shareholders will not be able to fulfil the role adequately.

Skills and qualifications

Going back to the definition of an ID in the 2012 Code, the independent business judgement of an ID is to make decisions with a view to the best interests of the company.

One must not lose sight of the fact that, besides the element of independence, an ideal director (whether independent or not) must first and foremost be qualified to lead the company.

Knowledge of the business, relevant expertise and know-how, an understanding of how companies are run, prior industry experience, and/or particular professional qualifications, as well as an analytical mind and the dedication to acquire the knowledge necessary to inform his decision-making – these are all relevant in determining whether he will be able to add value and contribute constructively to the company.

Thus, having a director who is merely independent in itself will not help much to improve shareholder value, unless that ID has a particular set of attributes, of skills, experience, abilities and

probity, that equips him to contribute to good decision-making in the company.

Information transparency

Even if an ID has all the relevant attributes, he will not be in a position to know and see everything. As a non-executive, his engagement with the company and management is limited to board and committee meetings, the papers presented, and the regular and ad hoc reports that management circulates to the board.

With that information in hand, providing wise guidance, insights on major issues and strategic direction to management are key pillars of the ID's role. However, it should be recognised that an ID will not be in the position to know all the detailed nuts and bolts that an executive director will know, or be able to intervene and manage those aspects in the way an executive director can and indeed is obliged to as part of his job.

Nevertheless, one valuable contribution of IDs, which is equally if not more important to shareholders and investors, is that of external transparency of information. Providing investors with up-to-date accurate information underpins Singapore's disclosure-based regime and enables the market to trade properly.

Indeed, a company that intentionally, recklessly or negligently fails to notify SGX of such information as is required to be disclosed under the listing rules contravenes the Singapore Securities and Futures Act. It is an offence where such failure is intentional or reckless. Where the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer of the company (including a director), that officer is also guilty of the offence.

An ID is well-placed to inform the market or the relevant regulators if things have gone wrong in the organisation, even if he is not in a position

practically to change the course of the company. As an ID, his personal reputation is on the line.

He can also be subject to disciplinary action by the SGX. Under Chapter 14 of the SGX Listing Manual, SGX can investigate and initiate disciplinary proceedings against an ID. As a result of those actions, he may be subject to a private warning or public reprimand, a requirement for his resignation, or a prohibition of his appointment as director or executive officer of other issuers for up to three years, among others. SGX may also refer the matter to other relevant regulators if it considers that he may have breached certain laws or regulations.

All for one

In conclusion, shareholders should look to all directors equally and not just IDs to provide management, oversight and leadership to the company.

Executive directors in tandem with senior management must take the lead in ensuring the company's businesses and operations are run smoothly and effectively, costs are managed and revenue grows, and business risks are managed.

IDs are there to exercise their independent impartial business judgement in the company's best interests, and provide guidance, insight and strategic direction to management. They must have both the integrity as well as the requisite knowledge, expertise and skill set to inform their decision-making. They are also well-placed to ensure transparency of information about the company, thereby enabling the market to trade efficiently.

It is ultimately the responsibility of the Nominating Committee and the board to recruit the right directors to lead the organisation at each stage, though shareholders also have a part to play when they are asked to vote on the director's re-election. ■