

Capital Markets

## SGX RegCo Elaborates on Directors' Duties under the SGX-ST Listing Rules

### Executive Summary

On 5 May 2022, the Singapore Exchange Regulation ("**SGX RegCo**") issued a Regulator's Column on "*Duties of directors under the Listing Rules*", elaborating upon its expectations on the duties of directors of issuers listed on the Singapore Exchange Securities Trading Limited ("**Listed Issuers**").

Under Singapore law, directors' duties and responsibilities can be found at common law as well as in legislation. For instance, the Companies Act 1967 sets out among other things, the duties and responsibilities of directors of Singapore-incorporated companies. Directors of Listed Issuers must note the interaction of their statutory duties with their obligations under the SGX-ST Listing Rules (Mainboard) ("**Mainboard Rules**") and SGX-ST Listing Rules (Catalist) ("**Catalist Rules**") (collectively, "**Listing Rules**").

In this Regulator's Column, SGX RegCo shared that what it expects of directors of Listed Issuers under the Listing Rules is aligned with what is expected of directors under Singapore law, namely the duties to: (a) act in good faith and in the best interests of the company; (b) avoid conflicts of interest; and (c) exercise due care, skill and diligence.

This Update highlights SGX RegCo's key expectations concerning the duties of directors of Listed Issuers under the Listing Rules, how directors are expected to fulfil them, and possible actions that SGX RegCo may take in the event of breaches of directors' duties under the Listing Rules. We also briefly include some practical comments for consideration.

### Duty to Act in Good Faith and in Best Interests of the Company

- **Act in interests of shareholders as a whole.** SGX RegCo highlighted that one of the key principles underlying the Listing Rules is that a director of a Listed Issuer must act in the interests of shareholders as a whole. For real estate investment trusts ("**REITs**"), under the Securities and Futures Act 2001, the manager of an authorised REIT ("**REIT Manager**") has a duty to act in the interests of all the participants of the authorised REIT as a whole. Similarly, under the Business Trust Act 2004, the trustee-manager of a registered business trust ("**Trustee Manager**") has the duty to act in the interest of all the unitholders of the registered business trust as a whole. Directors of a REIT Manager or a Trustee Manager must also take reasonable steps to ensure that such a duty is discharged. In the case of conflict of interests, directors of a REIT Manager or a Trustee

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Manager must give priority to these interests over the interests of the REIT Manager and its shareholders or, as the case may be, the Trustee Manager.

- **Possess necessary character and integrity.** Directors and the management of the Listed Issuer ("Management") are required to, among others, have the appropriate experience and expertise and be of the character and integrity expected of a Listed Issuer. These requirements are set out in the Listing Rules and implemented as a continuing obligation under the Listing Rules.
- **Make commercial judgements in good faith and rationally.** This involves the director applying his/her mind to the matter before him/her, and considering what is in the best interest of the company. SGX RegCo stated that while it does not intend to judge the commercial merits of transactions, it will consider stakeholders' concerns and, where appropriate, require companies to be more transparent in their business decisions so that shareholders are able to make informed investment or voting decisions. For commercial transactions including major acquisitions, interested person transactions, disposals, mergers and delistings, the Listing Rules provide safeguards such as the requirement for a financial adviser (who shall be independent in some cases) to ensure that the terms of the transaction are on normal commercial terms and not prejudicial to the interests of shareholders.
- **Ensure the sustainability of the company's business and operations.** An important aspect of the duty to act in the best interest of the company involves the director ensuring the sustainability of the company's business and operations. In this regard, a director has to take into account the environmental, social and governance factors that may have an impact on the company's business in deciding on the strategy and the company's future direction.

### Duty to Avoid Conflicts of Interest

- **Duty of loyalty.** One important facet of the duty to act in good faith is the director's duty of loyalty. A director has a duty of undivided loyalty to the company, and shall not position himself/herself where the duty to advance the company's interests may conflict with personal or other extraneous interests. SGX RegCo provided a few examples of what the duty encompasses, including:
  - **Multiple employment.** A director must obtain prior consent before acting for two companies (including related companies) with potentially conflicting interests.
  - **No inhibition:** A director should not be inhibited by the existence of other employments or interests from acting faithfully and effectively.
  - **Actual conflict.** A director must take care not to find himself/herself in a position where there is an actual conflict of duty so that he/she cannot fulfil the obligations to one principal without failing in the obligations to the other.
  - **Prohibition on profit and self-dealing.** Without full informed consent of the company, a director is (i) not permitted to retain any profit which he/she made through the use of his/her position as a director; (ii) prohibited from entering into, on behalf of the company, an arrangement or transaction with himself/herself or with a company in which he/she is interested.

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- **Addressing conflicts of interests.** Directors should be familiar with and ensure compliance with Chapter 9 of the Listing Rules, which sets out the duty to address conflicts of interest and prescribes certain rules for entry into interested persons transactions. In addition, the board of directors ("**Board**") should have clear policies and procedures for dealing with conflicts of interests – see the Practice Guidance to the Code of Corporate Governance. For instance, where a director has a direct or indirect interest in a transaction or faces a conflict of interest, he/she should make appropriate disclosures and recuse himself/herself from meetings, and abstain from deliberations and voting on the transaction.

### Duty to Exercise Due Care, Skill and Diligence

- **Comply with Listing Rules, continuing listing obligations.** SGX RegCo stated that the duty of due care, skill and diligence is premised upon each director's obligation to ensure compliance with the Listing Rules. It bears to note that a director's act or omission that causes the company to breach the Listing Rules is also deemed to contravene the Listing Rules. Directors (including executive, non-executive, and independent directors) have, both collectively and individually, a continuing duty to be up to date with the company's affairs, and comply with their continuing listing obligations to ensure they properly discharge their duties.
- **Objective test/standard.** A director must possess the appropriate experience and expertise to manage the company's business, and exercise due care, skill and diligence in doing so. The test for the standard of care, skill and diligence is objective: has the director exercised the same degree of care, skill and diligence as a reasonable director in his/her position? The standard is not lowered to take into account any inadequacies in the individual's knowledge or experience; the standard is higher if a director held himself or herself out to possess, or in fact possesses, some special knowledge or experience.
- **Exercise individual judgement and evaluation.** In making business decisions, a director must exercise his/her own judgement to evaluate all the facts and advice provided, and not pass the matters to their co-directors or the Management to resolve the matters for him/her. Even where the director has consulted professionals on a relevant matter, the director remains responsible. If a director is required to make a recommendation to shareholders, the director cannot simply state that the Board has considered professional advice without also assessing the matter himself/herself.
- **Comply with disclosure obligations.** The regulatory regime is a disclosure-based one. Therefore, a director must, where appropriate, disclose and explain the process, rationale and considerations in his/her decision-making. Such disclosure and explanation are especially crucial for interested person transactions and contentious or complex corporate actions or transactions. In SGX RegCo's view, it is not sufficient for a director to state that the terms of a transaction are made on "willing-buyer-willing-seller" basis without conducting proper due diligence. SGX RegCo also encourages

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directors to disclose and explain if they have considered other available alternatives before deciding to proceed with a particular transaction.

Further, where the Board seeks external legal advice concerning disclosure obligations, SGX RegCo expects the Board to be conversant with the Listing Rules requirements and make its own assessment on the reasonableness of the legal advice. In assessing compliance with disclosure obligations, SGX RegCo will not accept sole reliance on external legal advice or the Management as a justification, and highlighted that the Board remains responsible to decide on whether the information is material and should be disclosed immediately.

- **Interface with the Management.** In order for the Management to escalate material information to the Board in a timely manner, directors must ensure that the company's internal controls and policies are adequate and effective for this purpose. SGX RegCo stated that though the Management (including the executive directors) is required to provide the Board with complete, adequate and timely information, directors cannot plead ignorance if it is reasonable in the circumstances for the directors to inquire further on the matters. SGX RegCo provided examples of circumstances where it is reasonable for directors to make further inquiries, for instance, where directors are put on notice of material or adverse developments in the company that need close monitoring to ensure compliance with the Listing Rules.
- **Supervise delegated functions.** In instances where the directors delegate particular functions to those under them in the management chain,<sup>1</sup> directors are still under a duty to supervise the discharge of such delegated functions. The directors are required, in all instances, to direct their minds to the decision, and demonstrate that they applied proper judgement on the facts.

## Consequences for Breach of Directors' Duties under Listing Rules

SGX RegCo highlighted that where a breach of directors' duties under the Listing Rules is found, SGX RegCo may take action. Under the Companies Act 1967, breaches of directors' duties may result in criminal prosecution and civil action against the errant director found to be in breach of his/her duties. SGX RegCo stated that in appropriate cases, it may refer such breaches to the relevant authorities.

Furthermore, it bears to note that since 1 August 2021, SGX RegCo has a wider range of enforcement and administrative powers under the enhanced enforcement framework, such as having the power to require a director or executive officer to resign from an existing position with a Listed Issuer. For more information on this enhanced enforcement framework, please refer to our earlier July 2021 Client Update on "*SGX Enhances SGX RegCo's Enforcement Powers and Disclosures on Whistleblowing Practices*", available [here](#).

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<sup>1</sup> Subject to the company's constitution.

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## Practical Comments

This Regulator's Column reiterates SGX RegCo's expectations of directors under the Listing Rules, which are consistent with what is expected of such directors under Singapore law, namely, (a) to act in good faith, (b) to avoid conflicts of interests and (c) to exercise due care, skill and diligence.

It also seeks to provide insights on how SGX RegCo expects directors to fulfil their duties, particularly the duties that are expressly set out in the Listing Rules, and the potential actions SGX RegCo may take as well as the potential consequences in the event of any breach of directors' duties under the Listing Rules.

It should be highlighted that not all companies listed on the SGX-ST are incorporated under the Companies Act 1967. Accordingly, there could be differences between duties imposed on the directors of a Singapore incorporated company and a non-Singapore incorporated company that is listed on the SGX-ST. All Listed Issuers and their directors should therefore carefully review the Regulator's Column to acquaint themselves with the expectations that SGX RegCo has set out for directors of a Listed Issuer and to ensure that compliance can be made with such expectations. If you have any queries on the above or require any advice on listing obligations in general, please feel free to contact our team below, who will be happy to assist.

Please click [here](#) for SGX RegCo's Regulator's Column on "*Duties of directors under the Listing Rules*" dated 5 May 2022.

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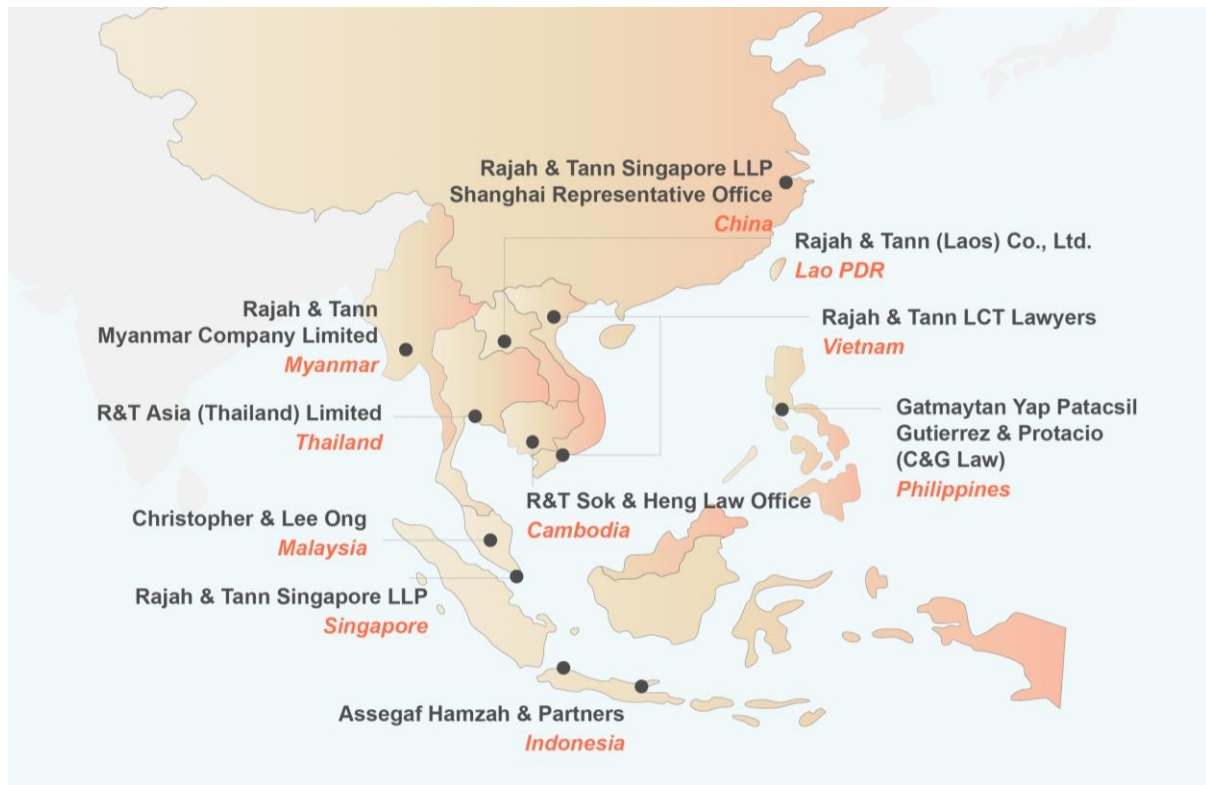
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