SID
Singapore Institute of Directors

The Directors' BULLETIN

ISSUE 1 • 2013

The Official Newsletter of Singapore Institute of Directors

MICA (P) 001/02/2012

SHAREHOLDER ENGAGEMENT

Contributing Towards Corporate Governance

Singapore Institute of Directors

MISSION STATEMENT

To promote the professional development of directors and corporate leaders and encourage the highest standards of corporate governance and ethical conduct

THE INSTITUTE'S OBJECTIVES ARE:

- To be the national association of company directors for the local business community. The SID works closely with its network of members, professionals such as accountants and lawyers, and the authorities to identify ways to uphold and enhance standards of corporate governance.
- To act as a forum for exchange of information on issues relating to corporate governance and directorship in Singapore. The SID plays a leading role in holding discussions and providing feedback to the authorities on matters of concern.
- To organise and conduct professional training courses and seminars to meet the needs of its members and company directors generally. Such courses aim to continually raise the professional standards of directors in Singapore by helping them raise their effectiveness through acquisition of knowledge and skills.
- To regularly publish newsletters, magazines and other publications to update members on relevant issues, keeping them informed of latest developments. These publications also serve as reference materials for company directors.
- To be responsible for the discipline of members. The SID has drawn up a code of conduct for directors in Singapore setting out the standards to ensure they discharge their responsibilities dutifully and diligently.

CONTENTS

PUBLISHER
Singapore Institute of Directors
3 Shenton Way #15-08
Shenton House
Singapore 068805
Tel : 65 6227 2838
Fax : 65 6227 9186
Email: secretariat@sid.org.sg
Website: www.sid.org.sg

EDITOR
Kala Anandarajah

DESIGN
Wini Tenorio

PRINTER
Entraco Printing Pte Ltd

FROM THE EDITOR

A Very Happy New Year to one and all and welcome to the first issue of the Directors' Bulletin for 2013!

The year has zipped by somewhat quickly and we are already near the end of the first quarter seemingly. Regardless of how quickly the days turn, what remains as I indicated last year as well is the fact that directors must ensure that they continue to fulfil their roles and responsibilities with the utmost skill and care. Whether in good times or bad times, the nature of the director's duty does not vary. What varies are the specific issues that a director will need to pay particular attention to.

Taking a slightly different stance with a first issue, this issue of the Directors' Bulletin looks at shareholders – shareholder activism in particular, although I would prefer to refer to this as shareholder engagement. Shareholder engagement is much more positive and sees a partnership evolving between the shareholder and the company.

Beginning with the right of shareholders in Singapore and examining the usefulness of shareholder engagement, the first article notes that the fundamental rights of shareholders include the right to receive information, to attend meetings, to be heard at meetings and to vote at meetings. Being heard at meetings is a powerful tool that a shareholder can utilise if he has also been equipped with the right information. Whilst the single vote of the shareholder may not change the ultimate decision of the company as a whole, the fact still remains that the shareholder has had the right to speak and to exercise his will as he chose.

The article goes on to stress, however, that there is a limit on what shareholders can seek to have an impact on. This limit is set at not being involved in matters which are reserved for the board and management. On this, the article titled "Preserving Balance In Corporate Governance" likewise notes that "the board of directors is and should be the locus of most corporate decisions; shareholding is, after all, designed to enable passive investment participation in the company. Shareholders should seek to to replace directors when they do not perform well." This is also the position at law as set out in the Companies Act, Cap 50.

Still on shareholder engagement, Mike Gray shares his views on how independent directors can engage with shareholders. For a multiple number of reasons, including whether shareholders feel whether their views are being heard by the board, independent directors have increasingly been called as part of the board to engage with shareholders. This is trend which is likely to grow rather than otherwise.

The theme on shareholder engagement as outlined in the series of articles included in this issue will also relate to one of the topics that have been planned for the 4th Annual Directors Conference to be held on 11 September 2013. With the overall theme of the conference focussed on value creation, Panel 3 will discuss this topic - The Shareholders: From Asking To Participating In Value Creation.

More information on the Conference will be made available in the coming weeks but please see page 5 below for a quick snap shot. But do lock the date in – 11 September 2013. It is promising to be another day of excellent sharing, discussion and banter with keynotes and panellists from Singapore and abroad.

Finally, a note of thanks to all the contributors to this issue of the Bulletin.

Kind regards,

Kala Anandarajah
Editor

CHAIRMAN'S MESSAGE

Dear Fellow Members,

In the last few weeks the attention of Singaporeans and residents as well as corporations, both large and small, has been taken up by a host of issues that have been hotly debated, both in and outside Parliament, many of which will have a significant impact on the lives of many in various sectors of our economy.

This was triggered first by the release of the "Population White Paper - A Sustainable Population For A Dynamic Singapore" or what is now commonly referred to simply as "The White Paper". This paper focuses on Singapore's aging population, the declining number of working age citizens from 2020, the current low birth rate and the decline in our citizen population from 2025 if no new immigrants are taken in. It also sets out the key considerations and roadmap for Singapore's population policies to address the demographic challenges and highlights three pillars for a sustainable population for a dynamic Singapore, namely, maintaining a strong Singapore core, creating good opportunities for Singaporeans and maintaining a high quality living environment.

Although the paper outlines the various strategies to achieve the desired outcomes including, steps to encourage a higher birth rate through further enhancement of the Marriage and Parenthood Package, continuing to take in the right immigrants but at a reduced pace, continued education and training of the Singaporean workforce, continued competitiveness through productivity improvements and continued investment in, and advanced planning of, our infrastructure, general public attention and reaction, however, was mainly fixated on the projected upper limit of 6.9 million size of Singapore's total population by 2030. The less than positive general reaction against the 6.9 million figure, despite the Prime Minister's clarification that this was the worst case scenario, was probably understandable given that many are frustrated by having to cope with the current strains and congestion of the public transport system and already feeling crowded out of their home environment by the presence of too many foreign workers at the current population of 5.3 million.

This White Paper was hotly debated in Parliament with many of its assumptions challenged, and, no doubt, it's implementation will be carefully monitored by many.

The White Paper was followed by the 2013 budget which was labelled a Budget for "quality growth" by Deputy Prime Minister and Minister for Finance Mr Tharman Shanmugaratnam, a budget which recognized that quality growth may come at the expense of some parts of the economy. The budget seeks to strike a balance between social concerns and economic growth.

As already anticipated by many and in line with the intents expressed in the White Paper, levies on foreign workers were increased and dependency ratio ceilings were reduced in order to push companies to innovate and increase productivity and reduce our dependence on foreign workers.

Property tax rates for high end residential properties with annual values above $30,000 will go up as will additional registration fees (ARF) for cars with open market value (OMV) above $20,000.

The budget has also focused on the elderly, sick and low income groups and measures to cope with the higher inflation rates through personal income tax rebates for those aged 60 years and above and through a one-off GST vouchers for the lower and middle income households.

The Budget's twin priorities as enumerated by DPM Tharman would be economic restructuring and keeping society inclusive.

Various measures following the Budget have now been announced or implemented and which in turn have become hot discussion topics among various sectors of our population.

Top among these is the possible long overdue new public housing policy hinted by Minister for National Development Mr Khaw Boon Wan and his undertaking to restore the affordability of flats for first time buyers. He has also announced that singles aged 35 years and above earning $5,000 or less per month will from July this year be able to buy new two room flats. The issue of the cost of public

CHAIRMAN'S MESSAGE (cont'd)

housing and the anticipated new policy and the recently introduced tiered ARF and the limitation of car loans to a maximum of 60 percent of the value and a repayment period not exceeding 5 years are likely to occupy the greatest interest of most Singaporeans since they involve two of the traditional 5Cs considered so important by Singaporeans not so long ago.

On the corporate front the current concerns of business owners, boards and management are manpower shortages and increasing wage costs arising from the new foreign worker policy, notwithstanding a $3.6 billion Wage Credit Scheme (WCS) introduced in the 2013 Budget. This scheme is intended to incentivize employers to pay higher wages to employees earning below $4,000 in gross wages per month and is effected through the Government funding 40% of wage increments for this group of workers for the next 3 years. The main objective is to assist companies to cope with the higher wage costs arising from the tightening of foreign worker inflow. Although this scheme has been welcome by businesses in general, its transient nature has raised concerns that employers may pay most of the additional increases in the form of bonuses and reduce such bonus payments or even reduce employment when WCS is withdrawn in 2016. There have therefore been calls for the scheme to be tweaked to place greater emphasis on basic pay increases in computing WCS to ensure that wage increases are more lasting and do support productivity improvements. Of even greater concern for some, in particular SMEs, is whether in the longer term their businesses would be robust enough to remain viable and competitive operating in Singapore or a relocation or even closure may be on the card if they are unable to re-structure sufficiently to meet operating conditions in the new normal.

The next few years will be particularly challenging for many businesses.

In the 5th issue of our Bulletin last year I touched on the importance of effective boards and why it is important that there should be a formal and transparent board nomination and election process to ensure that appropriately qualified and competent persons are elected and that the board comprises a mix of individuals with the right diversity of skills, experience, gender, nationality and culture to meet the challenges faced by the company. For many businesses in Singapore this is particularly critical today as they ponder and chart the future of their businesses.

Like companies, institutions and associations must also be managed by the right boards and committees comprising individuals with the necessary commitment, passion, competence and experience that would allow such organizations to deliver the desired outcomes. At your Institute, a Council renewal and leadership succession plan was put in place in the second half of 2012. As a result of this plan we now have 7 new members or just over one third of our enlarged Council. Full particulars of their background and experience are given in this issue of the Bulletin and from which you will see the diverse skills, experience, industries, professions and gender they represent. Together with the remaining 13 members, your Council has both the depth and diversity of experience to take your Institute forward as it seeks to broaden its activities to meet the diverse needs of, and remain relevant to, its growing membership.

2012 has been a good year for SID and we look forward, with your support and participation, to an even better year in 2013 as we all seek to successfully meet the new challenges of managing our economic growth in an inclusive society.

On behalf of our Council I wish all of you a successful 2013.

Warm regards and best wishes,

John KM Lim
Chairman

SID Governing Council

2012/2013

Chairman	: Mr John Lim Kok Min	
First Vice-Chairman	: Mr Willie Cheng	
Second Vice-Chairman	: Mr Adrian Chan Pengee	
Treasurer	: Mr Soh Gim Teik	
Council Members	: Mrs Yvonne Goh	Mr Daniel Ee
	Mr Basil Chan	Mr Andy Tan Chye Guan
	Mr Yeoh Oon Jin	Mr Kevin Kwok
	Ms Yeo Lian Sim	Mr David Conner
	Ms Kala Anandarajah	Mrs Elaine Lim
	Dr Ahmad Mohd Magad	Mr Lim Chin Hu
	Mr Chaly Mah	Mr Kee Teck Koon
	Ms Tan Yen Yen	Mr Robert Chew

SAVE THE DATE!!!

Corporate Governance: From Form to Value Creation

SID DIRECTORS CONFERENCE 2013

Wednesday, 11 September
9am to 5.30pm

Marina Bay Sands
Singapore

- Panel 1: Value Creation: From Processes to Outcomes
- Panel 2: The CEO: Reconciling Compensation, Values and Value Creation
- Panel 3: The Shareholders: From Asking to Participating in Value Creation

New Council Members

From the Insitute

Introduction

The Governing Council of the Singapore Institute of Directors has been refreshed and has a number of experienced and prominent individuals joining the Council. We provide here a quick snapshot of the seven (7) new Council members as well as an insight of their thinking on corporate governance and their role in Council.

Mr Robert Chew

"We are seeing a growing number of tech start-ups in Singapore and with this, a growing number of directors on the boards of start-ups. This is a segment that SID probably does not cover well enough today. I hope to work with friends in this start-up space to get more of such directors to know about SID and to join as members."

Mr Chew retired from Accenture at the end of September 2007. He remains active in the IT industry through his role as the Chairman of the national IT Standards Committee and as a member of the National Grid Advisory Council, the Singapore Standards Council and the Technology Committee of the Singapore Chinese Chambers of Commerce and Industry. Mr Chew is a member of the boards of OpenNet Pte Ltd, Alexandra Health Pte Ltd, Integrated Health Information Systems Pte Ltd, National Council of Social Service, Dover Park Hospice, Singapore Hospice Council and TOUCH Community Services.

Mr David P. Conner

"Requirements for corporate governance continue to evolve, becoming more and more strict in most jurisdictions, including in Singapore. Having served on the Corporate Governance Council here in Singapore, I got an in depth look at many of the latest corporate governance issues, and I now hope to contribute to the SID governing council by bringing this experience,

as well as the experience I've gained through serving on numerous boards, to the table. I believe SID has, and should continue to have, an active voice in the ongoing debate regarding overall director responsibilities."

Mr Conner joined OCBC Bank ("OCBC") as Group Chief Executive Officer and Director on 15th April 2002. He was last elected to the OCBC Board in April 2010 and continues to serve as a non-executive director after stepping down as Group CEO on 14th April 2012.

During his 10-year career with OCBC, Mr Conner held several positions with OCBC Group Companies; serving as the Chairman of Bank of Singapore Ltd, Singapore Island Bank Ltd and Lion Global Investors Ltd, as well as a Director of Great Eastern Holdings Ltd, OCBC Bank (Malaysia) Berhad, OCBC Al-Amin Bank Berhad and as a Commissioner of PT Bank OCBC NISP Tbk.

While CEO of OCBC, Mr Conner also served as a member of the Corporate Governance Council of the Monetary Authority of Singapore ("MAS"), as two time Chairman and as a member of the Council of the Association of Banks in Singapore, the Malaysia-Singapore Business Council and the f-Next Council of the Institute of Banking & Finance.

Mr Conner had extensive banking experience in the Asia Pacific region prior to joining OCBC, having worked for over 25 years with Citibank N.A. where he served as Managing Director and Market Manager for Citibank Japan from 1999. He was also Chief Executive Officer of Citibank India from 1996 to 1999, and prior to that, was Country Corporate Officer for Citibank's Singapore operations.

Currently, Mr Conner is also on the board of the Singapore Olympic Foundation, the Singapore University of Technology & Design (SUTD), and the advisory board of the Lee Kong Chian Business School of Singapore Management University ("SMU"). He is a trustee of Washington University in St. Louis where he also serves as Chairman of the university's International Advisory Council for Asia, and he was elected to the governing council of the Singapore Institute of Directors in late 2012.

Mr Conner holds a Bachelor of Arts from Washington University in St Louis and a Master of Business Administration from Columbia University.

Mr Kee Teck Koon

What you see as being your contribution to SID?

"To contribute to the transformational journey of SID, by bringing to bear my personal corporate experiences, and insights gained through involvement in boards of a broad range of organisations."

What is the one single aspiration you have for SID and would push for?

"To help further develop SID a)as the leading national and regional organisation for advocacy and thought leadership in the areas of director responsibilities and board governance, and b) into a quality members organisation that corporates and company nomination committee members would need to or want to tap into."

What do you see as the key challenge facing directors in Singapore today?

"Besides keeping abreast of the constantly changing regulatory and legal requirements on board governance, the critical challenge for directors in Singapore is being able to continually refresh so as to be able to add real value to business, especially in engaging the management substantively and meaningfully in business strategies and execution issues."

Mr Kee is currently a Non-Executive Chairman of CapitaCommercial Trust Management Ltd, Changi Airports International Pte Ltd, NTUC First Campus Co-Operative Ltd and Lien AID Ltd. He also holds directorship positions in NTUC Enterprise Co-operative Ltd, NTUC LearningHub Pte. Ltd., Alexandra Health Endowment Fund and Raffles Medical Group Ltd (listed on the SGX-ST).

Prior to Mr Kee's retirement as the Chief Investment Officer of CapitaLand Limited ("CapitaLand") on 1 July 2009, Mr Kee held several senior appointments within the CapitaLand Group and was responsible for overseeing the CapitaLand Group's financial advisory services, commercial real estate and retail real estate businesses. Mr Kee holds a Degree of Master of Arts and a Degree of Bachelor of Arts from University of Oxford.

Mrs Elaine Lim

What you see as being your contribution to SID?

"Working collectively with the SID Council to truly represent Directors in Singapore – in all aspects, across all sectors and with all stakeholders."

What is the one single aspiration you have for SID and would push for?

"Make SID relevant to all Directors!"

What do you see as the key challenge facing directors in Singapore today?

"Keeping up with changes and effectively leading/managing against the changing landscape."

Mrs Lim is the Managing Director of Citigate, Dewe Rogerson, I.MAGE Pte Ltd. With more than 30 years of experience, Mrs Lim is one of Singapore's pioneering corps of local communications professionals.

After two years as a journalist, she moved into public relations and investor relations. She spent four years with an international hotel chain and more than two years with the Stock Exchange of Singapore before moving into consultancy practice.

She has the rare distinction of starting two public relations consultancies from scratch, and building them into the top 5 in Singapore.

Upon leaving Ogilvy PR after nine years, Mrs Lim established i.MAGE Public Relations in November 1988 with an initial staff of four and quickly built up a formidable track record as the largest independent public relations consultancy. She spearheaded the consultancy's thrust into capital market transactions and investor relations. Todate, she has led Citigate Dewe Rogerson, i.MAGE to support the launch of more than 250 IPOs, which represent more than 30% of all companies listed on SGX-ST.

In 1999, i.MAGE merged with Citigate Dewe Rogerson through a share swop, to form Citigate Dewe Rogerson, i.MAGE.

Mrs Lim's diverse experience spans nearly every sector of business – from capital markets, banking and finance, manufacturing, hospitality, professional services, logistics, property to FMCGs, retail and F&B. She is also recognised for her strong track record in government campaigns and programmes on investment, social security, skills development, public transportation and social issues.

An investor relations specialist, she was invited by the Singapore Management University to initiate a new course in investor relations in 2007. She taught this course for two semesters as an adjunct lecturer until 2008.

An active advocate of corporate governance, she is a member of the Organising Committee for the prestigious Singapore Corporate Awards organised by The Business Times and supported by SGX. SID is a supporting partner together with the other professional bodies.

She currently serves on the Board of Singapore Land Authority. She is also an Independent Director of Catalist-listed HSR Global Limited.

A graduate of the University of Chicago Graduate School of Business, Mrs Lim was named the PR Professional of the Year in 1995 and awarded the Lifetime PR Achievement Award in 2012 by the Institute of Public Relations Singapore.

Mr Lim Chin Hu

What you see as being your contribution to SID?

"Fund raising through annual golf invitation. SID is a non-profit organisation and needs to generate funding to conduct our activities."

"Increase the awareness of directors the importance of continuous education through professional training."

What is the one single aspiration you have for SID and would push for?

"Help raise the professionalism of directors by equipping them with the right training & personal development courses & seminars."

What do you see as the key challenge facing directors in Singapore today?

"Independent directors tend to be appointed by friends of the executive directors or management team especially with small & medium market cap companies. Appointments of these directors creates a natural conflict of interest. For Singapore corporate governance in listed companies to move up a notch, nominating committee should be seek out of suitably qualified truly independent director with the right skillsets to take on a constructive role and strengthen the overall board governance."

Mr Lim is the Managing Partner of Stream Global Venture Catalyst Pte Ltd.

He was CEO of Frontline Technologies Corp. Ltd; a SGX listed company with operations in South East Asia, China and India. He was Managing Director of Sun Microsystems Singapore and held various management positions in Hewlett Packard Singapore & SE Asia.

Mr Lim previously served in various organisations: as a council member in Singapore Infocomm Technology Federation (SiTF), a board member of Infocomm Development Authority of Singapore (IDA); a council member of IT Standards Committee, National Infocomm Manpower Council and an independent director of Si2i Ltd.

He currently sits on the board of Changi General Hospital and Integrated Healthcare Information Systems. He is also an independent director of G-Able (Thailand); Caledonian Investments Pty Ltd (New Zealand); Kulicke & Soffa Industries Inc (NASQAD: KLIC and IDA's Personal Data Protection Advisory Committee.

Mr Lim holds a Bachelor of Science degree from La Trobe University, Melbourne, Australia and a Diploma in Electrical and Electronics Engineering from Ngee Ann Polytechnic.

Mr Chaly Mah

"It is indeed a privilege to serve on the Singapore Institute of

Directors' Council. As I have served on various boards including the Global Board and Executive Committee of Deloitte, I hope to contribute to SID by sharing the experience and best practices that I have gained globally. SID plays a vital role and I look forward to seeing it become the leading organisation in promoting the highest standard of corporate governance, not only in Singapore but in the region as well.

In my opinion, the greatest challenge facing directors is the ability to continuously stay up-to-date and relevant in this fast changing world. To do this, they must constantly develop themselves and learn from the best global practices."

Mr Mah is the CEO and Regional Managing Director of Deloitte Asia Pacific. He is also the Chairman of Deloitte Singapore and CEO of Deloitte Southeast Asia.

Mr Mah is both a member of Deloitte's Board of Directors, which represents the interests of its member firms and their partners, and its Executive, which leads and manages the global organisation's affairs, and is responsible for determining the global vision and setting its strategic course.

He has extensive experience in serving both multinational and local companies across a wide spectrum of industries and has advised companies with operations in the Asia Pacific region in the areas of mergers and acquisitions and corporate finance.

Besides being the Chairman of the Board of Directors of the Singapore Land Authority, Mr Mah serves on the Boards of Sentosa Development Corporation and the Singapore International Chamber of Commerce. He is also the Chairman of the National University of Singapore Business School Accounting Advisory Board and is a Council Member of the Singapore Division of CPA Australia, having served as its President in his previous term.

Ms Tan Yen Yen

What you see as being your contribution to SID?

"I hope to bring my experience of sitting on non-profit board (Singapore Science Center) and listed board (SPH and Gemalto) to SID, contributing working experience and new ideas to the associations."

What is the one single aspiration you have for SID and would push for?

"To raise the professional standards of Singapore directors and be recognised in the Asia region as the leading associations for Director's professional development."

What do you see as the key challenge facing directors in Singapore today?

"Diversity in terms of low woman representation in Singapore. Companies need to cast the net wider in search of directors on their board, be ready to find diverse individuals (beyond gender) to complement and bring diversity of ideas and discussions to their board."

Ms Tan is Senior Vice President, Applications, responsible for managing Oracle's applications software business across the Asia Pacific region. In this capacity, she drives Oracle Applications' revenue, profitable growth, and client satisfaction.

Prior to joining Oracle, Ms Tan was Vice President and Managing Director for Hewlett-Packard Singapore (HP), with overall P&L responsibility for HP Singapore and led HP's enterprise business.

Ms Tan plays an active role in Singapore's infocomm industry. She served as Chairman of the Singapore Infocomm Technology Federation from 2009-2011. During this period, she was also Director of Infocomm Development Authority of Singapore from 2009-2011 and Deputy Chairperson on the Ministry of Information, Communications and the Arts (MICA) Internet and Media Advisory Committee. She was a member of the Government Parliamentary Council of MICA and the Economic Strategies Committee's IT Working Group subcommittee.

Ms Tan is currently the Chairman of Singapore Science Centre, Director of Singapore Press Holdings, Director of Gemalto, Director of Defence Science and Technology Agency, Director of Cap Vista and Advisor Mentor of TNF Ventures. She was recently appointed to the Board of Singapore Institute of Directors. Additionally, she sits on the Board of Advisors of National University of Singapore's School of Computing and Singapore Institute of Management's International Academic Panel.

An award-winning corporate leader, Ms Tan has earned a reputation for her contributions to the industry. These include 'Most inspiring women' by Women's Weekly 2009 Great Women of our Time Awards; the 7th International Management Action Award (IMAA) in 2010; and 'IT Leader Award 2011' by the Singapore Computer Society (SCS).

Ms Tan has a degree in Computer Science from National University of Singapore and an Executive MBA degree with Helsinki School of Economics Executive Education. ■

Shareholder Activism – Shareholder Rights And Its Effectiveness

By Kala Anandarajah
Partner, M/s Rajah & Tann LLP
and SID Council Member

Introduction

Shareholder rights and responsibilities have always occupied a separate section in the Singapore Code of Corporate Governance when it was first issued in 2001. In the most recent revised Code of Corporate Governance 2012 ("Code 2012"), shareholder rights and responsibilities continue to have prominence. The Code 2012 reminds that "companies should treat all shareholders fairly and equitably, and should recognise, protect and facilitate the exercise of shareholder rights…". Amongst the two key rights highlighted are the need to actively engage shareholders and put in place investor relations policy to "promote regular, effective and fair communication with shareholders" and to encourage greater shareholder participation at general meetings and "to allow shareholders the opportunity to communicate their views on various matters affecting the company".

Clearly the emphasis is on giving the shareholders, regardless of how small or how big, a voice. The question always remains as to whether the mere voice is sufficient as this in itself cannot necessarily directly influence the decisions made by the company.

To this end then, is the shareholder now better equipped then he was say 20 years ago or even 10 years ago? Whilst on paper, this writer takes the view that there has been no real change, save for allowing proxy voting, at least in practice there appears to be more listening going on. This is perhaps the more important aspect that has been borne out by the ever increasing shareholder activism.

This article revisits old ground in

looking at some of the basic rights of shareholders, reviews the state of shareholder activism, and concludes that perhaps the better approach is to promote shareholder engagement, which has over the years achieved small wns. As Mahatma Gandhi allegedly said, "whatever you do will be insignificant, but it is very important that you do it." We all must start somewhere.

Basic Shareholder Rights

The Companies Act, Cap 50, prescribes certain fundamental rights that a shareholder will have. These include the following:

- Adequate and secure methods for registration of shares to ensure protection of ownership.
- Ability to transfer the shares of the company freely, subject only to such pre-emption rights, or requisite approvals being obtained as the shareholder has agreed to. This is typically more a private company concern rather than a listed company issue.
- Ability to obtain relevant information on the company in a timely manner and on a regular basis.
- Ability to attend and participate in general meetings
  - Ability to receive such information as is adequate to enable one to make an informed decision before actually exercising one's right to vote.
  - Ability to requisition a resolution to be discussed and if possible to be carried at general meetings, subject only to compliance with the procedural requirements necessary to requisition such a resolution.
- Ability to vote at the meetings.
  - Ability to appoint up to two proxies to attend and vote on its behalf. This is being further evolved.
- Ability to elect the board of directors, the external auditors, and to modify the articles of association as the need arises.
  - Ability to demand for a poll on any question or matter other than the election of the Chairman of the meeting or the adjournment of the meeting.
  - Ability to inspect the minute books of the company and to make copies thereof without charge, or alternatively, entitlement to be furnished, within 14 days after he has made a request in writing to the company, with a copy of any shareholder meeting minutes of the company at a charge not exceeding S$1 per page.
  - Ability to inspect the register of members at no charge and various other registers.
- Ability to participate in dividend distribution and generally to share in the profits of the company.

Amongst the various rights spelt out above, perhaps the strongest right that a shareholder has is the ability to exercise voting rights. The right to vote is a fundamental proprietary right and has been recognised in many cases, including from as long ago as in 1992 in *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors*. A shareholder who is deprived of his right to vote can commence proceedings to declare the resolution passed invalid. It is no defence that the right to vote, if not deprived, would not have made a difference to the outcome of a meeting. In the old English case of *Pender v Lushington* (1877), the court observed as follows:

> But there is another ground on which the action may be maintained. This is an action by Mr Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded an individual right in respect of which he has a right to sue. … He has a right to say, 'Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you.' What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.

The right to vote has been tweaked from time to time, with amendments made to the Companies Act in May 2003 allowing companies some flexibility in the way they structure their share capital. Shareholders could since then be provided with more than one vote per share. Specifically, private companies and private company subsidiaries of public companies could also have non-voting or multiple voting equity shares. However, for public companies, as a matter of good corporate governance and to ensure that all investors are treated equally, the one-share-one vote principle will continue to prevail. More recent tweaks do recognise electronic voting, for example.

It is clear that shareholders' ability to influence management or other decisions taken on behalf of the company varies according to their proportionate shareholdings in the company. To a large degree, such voting power translates into a potential influence over management. Yet, for the average small shareholder, the fact such a shareholder has power under the Companies Act to call for a meeting to have an extraordinary item discussed where the directors fail to requisition the meeting at the request of the shareholders is a reflection of shareholder power to some extent.

Separately, it is essential not to take away the shareholders' right to vote at meetings simply because it is physically difficult to have the shareholders vote. For example, shareholders who do not attend the physical meeting do not have a means of exercising their votes, short of a proxy vote. Allowing for electronic voting and voting in absenteeism can eliminate this. Such voting mechanisms

also increase the sense of participation of shareholders in the general corporate strategy of the company. This is something that has gained traction in recent times especially with listed companies. The Code 2012 provides that apart from companies allowing "corporations which provide nominee or custodial services to appoint more than two proxies", there is also express mention that "companies should … allow for absentia voting at general meetings…".

Shareholder Activism Or Engagement

Having discussed the basic shareholder rights, this article quickly discusses the much bandied concept of shareholder activism. The phrase "shareholder activism" is not a term of art and may broadly be said to refer to shareholders taking a more active role in the affairs of a company. Some quarters like to limit this to small shareholders actively pursuing personal goals and pushing their rights without the interest of the company as a whole in mind. However, the preferred approach is to recognise that it is in fact shareholder engagement at the multiple levels, whether with the small or the institutional or the majority shareholder, that become productive.

With shareholder engagement, it is utilising all of the rights discussed in the preceding section but also a variety of other continuing efforts throughout the year. The process is not always formalised, and if formalised has, until the last decade, had very little bite. Examples of formalised shareholder activism include the growth of proxy advisory companies and the formation of shareholder associations, which have in recent times started getting traction in Singapore. With the greater traction, there has also been more bite.

Shareholders have also been lauded as being the push behind pay policy shifts and "say on pay", for example. On the latter, which forms but a component of the US Dodd-Frank Act 2010, shareholders have managed to get a non-binding vote of executive pay. The verdict is still out as to whether this will indeed improve corporate governance; but the fact remains that the change was brought about through shareholders constructively engaging the corporations and authorities.

Why Increased Shareholder Activism?

The rise in Singapore in shareholder activism is the result of a growing awareness of legal rights, a more financially literate population, and a more demanding financial and political climate. The bottom up approach of corporate governance is also a major impetus for this.

Another possible reason for increased shareholder activism can be attributed to the slow down in the markets. Where revenues and share prices rise in a buoyant economy, the deficiencies of a weak management and inadequate corporate strategic planning are not immediately discernible or even quibbled about. However, in times of economic downturn, such as the prolonged one that the global economy has been facing, concerns about the management and/or corporate policies of companies arise more readily. This is particularly pronounced where the shareholder attempts to use the traditional means for recording his dissatisfaction with a company, i.e. by selling his shares. This means that he could face a substantial loss as a consequence of a depressed market. It is, therefore, often more attractive for shareholders to seek to change the policies or the management of the companies in which they invest in the hope of reviving the value of their shares or forcing a strategy consistent with the purpose of their original investment. The fact of numerous corporate failures in recent times have also fuelled shareholder activism.

Another possible factor is the willingness of the press to report views from not just the company and the majority shareholders, but also the minority shareholders. The press is evidently an effective force in ensuring that the interests of all segments are publicised. All companies want to avoid negative publicity as that has a bearing on shareholder value at the end of the day.

Finally, yet another possible key enhancer of shareholder activism has been the increased call for better corporate governance and transparency in the region, including Singapore. The emergence of corporate governance codes requires more information to be disclosed. This means that shareholders are now appraised of director remuneration and other key facets of corporate decision making, which were closed to them previously. This allows for more intelligent questions to be asked and avoids the concerns of blind voting on corporate decisions which was prevalent previously.

Activism At AGMs

Activism at the annual general meeting ("AGM"') is typically thought of as being perhaps the most common form of engagement. If properly focused, even a single shareholder can arguably put adequate pressure on the board of directors to act properly in the interest of the company. In essence, the AGM is meant to be the forum where directors are held accountable to all shareholders for their stewardship. The AGM should be a discussive debating, information exchanging and decision making body. Yet, there is a real concern about how shareholder activism can disrupt the AGMs of companies. Some shareholders sometimes acquire a few shares for a specific purpose and attempt to use the AGM as a forum for private causes. On occasion, pressure or lobby groups use the meetings to draw media interest to social or environmental issues that have only a tangential bearing on a company's business. The noted objectives of such groups are disruption rather than

enlightenment, and self-advertising rather than company promotion. There is essentially no real interest in the active monitoring of the company's financial performance and work operations.

This in turn has called into question the very basis for holding AGMs since many of these meetings appear to be positioned in terms of activity at opposite ends of the behavourial spectrum. Indeed in the United Kingdom in 1999, a consultation document circulated by the Company Law Review Steering Group queried whether AGMs should be dispensed with altogether as being anachronistic. Notwithstanding unpleasant or torpid AGMs, the investing public, the professional bodies and the financial community of the United Kingdom were genuinely outraged that such a move was even contemplated. Not surprisingly, the proposal was immediately dropped.

Given the ineffectiveness of a number of AGMs in providing members with the opportunity to debate and to receive answers on the limited number of matters that are mandated to be placed before them, it is not surprising that AGMs have not always been treated with the respect they should be accorded both by management and shareholders. Yet, with the changes over the last few years bringing about greater transparency, more disclosure and increased opportunities for various quarters of shareholders to participate, the AGM can be used as a positive means of exchanging views, receiving feedback and engaging in fruitful discussions on next steps. To this end, even the Singapore Exchange has been taking positive steps to educate shareholders to better engage the companies at AGMs through collateral made available on their website in easy to understand manner.

As the barriers for participation by ALL shareholders are lowered, be it through electronic voting, proxy voting or any other means, but with reasonably low costs, shareholder engagement can and will become more effective. It goes without saying that entrenched and or majority ownership will remain a hurdle; but at least the communication would have started.

Shareholder Activities Must Stop At Matters Traditionally Reserved For The Board

Whilst shareholder engagement is a positive thing given that shareholders are often the forgotten guardians of corporate governance, any activity by shareholders must nevertheless be tempered. Engagement and discussions on corporate policies and business strategies should be welcomed. Yet, there must be a "no-go" zone when it comes to management of the company and its affairs; and importantly, when it comes to setting the corporate strategy. Shareholders must not be allowed to interfere with management and board matters. This is a fundamental separation of powers that even the Companies Act recognises.

The issues associated with the point made in the preceding paragraph are of course plentiful and complex, and are certainly not ones that can be resolved in an article of this length. The assumption if of course that there is no fraud or other misdeeds involved within the board or amongst individual directors. Whilst there may be instances to vote against the sale of a company or for opposing a major transaction, those are rights that could be exercised as valid shareholder rights when the matter is put to the vote at a general meeting. Short of this, to the extent that the matters do not go to the capitalisation of the company and, hence, not to the shareholder values as such, this writer maintains the view that corporate strategies and business direction must remain within the purview of the management and the board. If shareholders are not happy with particular board decisions, they have the right to use their voting power to replace directors.

Conclusion

The end game must be that shareholders should take advantage of the increasing number of avenues open to them to actively engage the company to positively steer it in the interest of the company as a whole. Despite the fact that shareholders need only act in their own personal interest, doing the right thing calls for a certain degree of social responsibility on the part of shareholders as well. They should use their rights for improving corporate governance within the company which can only translate over time to better shareholder value. ■

The views expressed in this article are entirely that of the writer and does not reflect the views of any organization that she may be working with or associated with.

Engagement With Shareholders By Independent Directors

By Mike Gray
Independent Director

Introduction

Independent directors of listed entities in Singapore sometimes tend to stereotype a shareholder as someone, often elderly, who turns up to the AGM with the main purpose of partaking in the free lunch after the meeting. The independent director will normally mill around with the shareholders after the meeting and share pleasantries over a cup of tea or coffee. At the worst a shareholder may actually ask a question at the AGM. The independent director need not fear as management will have usually guessed the main questions and will have provided a crib sheet with the agreed answers, which management or the chairman will answer.

The situation has to some extent been cosy over the years, with directors not viewing shareholder engagement as part of their job and shareholders not expressing much interest in speaking to directors. However, shareholder activism is on the rise in Singapore. Recent activity includes the removal of a chairman at WBL Group, rejection of the re-appointment of board members at an AGM of Grand Banks Yachts Ltd, the calling of an EGM by hedge funds to put three of their nominees on the board of Macquarie International Infrastructure Fund and the collapse of the share price of Olam International Ltd on a negative report by a shareholder - Muddy Waters. There are a number of other instances. In many of these cases the moves by shareholders came as a surprise as management and the board were not fully aware of the shareholder grouses or how to deal with them. This could be an indication a lack of adequate shareholder engagement.

The writing of this article and a shift in my own position on shareholder engagement from that of limited involvement, results from me being personally caught in some situations

similar to those set out in the paragraph above. This article will look at shareholder engagement from the perspective of independent directors rather than that of management or executive directors.

What Is Shareholder Engagement?

Shareholder engagement is the forum or means by which shareholders can give their views to the Board and the Board can communicate directly to the shareholders.

Some guidance as to shareholder engagement can be found in the Singapore Code of Corporate Governance (the "Code") which states that the Board needs to "identify the key stakeholder groups and recognise that their perceptions affect the company's reputation". In addition the Chairman should "ensure effective communication with shareholders".

The Code, in the section on "Communication with Shareholders" sets the principle that "Companies should actively engage their shareholders and put in place an investor relations policy to promote regular, effective and fair communication with shareholders".

This is further expanded in the Code under the Guidelines, which state that:

- "Companies should devise an effective investor relations policy to regularly convey pertinent information to shareholders. In disclosing information companies should be as descriptive, detailed and forthcoming as possible, and avoid boilerplate disclosures.
- The Board should establish and maintain regular dialogue with shareholders, to gather views or inputs, and address shareholders' concerns.
- The Board should state in the company's Annual Report the steps it has taken to solicit and understand the views of the shareholders e.g. through analyst briefings, investor road shows or Investors' Day briefings".

In summary the board has a fiduciary duty to take into account the shareholder interests and concerns. To this end, directors have to understand the shareholders' views on the company, its governance and its operations.

Why Do It?

Whether one likes it or not shareholder engagement has become important as shareholders, particularly if they gang up together, may end up voting down resolutions, calling EGMs, removing directors and putting their nominees on the board etc. In this age of high technology it is much easier for shareholders to disseminate their views publicly and join together with other shareholders into a lobby group. Also dissident shareholders can go viral with their grouses resulting in pressure on both the share price and on management.

What is important to note that such aggressive action may be taken by shareholders due to frustration rather than for any apparent concrete reasons. Shareholders are continuously looking towards better governance, improved transparency and risk management by the board. In addition shareholders may have views on how the company should be run and want their views heard. The danger from aggressive shareholders becomes more of an issue if the entity is exhibiting poor financial performance and shareholders are unable to get comfort that the board is tackling the issues properly. The formal written disclosures, required by the Companies Act and the Listing Manual, may not be enough to satisfy these shareholders.

Finally the Code of Corporate Governance does require that the boards of listed entities have an adequate shareholder engagement programme as mentioned above.

Why Should It Concern Independent Directors?

In the past it has normally been management that has been the source of communications between the listed entity and the shareholders. However, shareholders are now often expecting direct access to boards, due to an increase in expectations of the board with the enhancement of the corporate governance process. It may be also because shareholders are not sure whether their views are being passed to the Board, or whether management are accurately disseminating board policies.

Traditionally the Chairman of the Board has been the main contact but more frequently the independent directors are being drawn into discussion with shareholders. Typically this may happen if the chairman is executive and not independent or if the number of shareholders to be contacted is so large that the task needs to be shared. In some cases it may be that the chairman is the problem as far as the shareholders are concerned and they do not want to meet with the chairman.

Benefits Of Shareholder Engagement

Boards typically are worried about shareholder engagement as they fear that the shareholders may be stirring up trouble. This may not always be the case. Institutional shareholders could have extensive exposure to business strategies in a sector and may be able to provide useful advice to the board. In addition an external view on the company's performance may help fine tune strategies and provide an early warning signal of any issues. Finally, through better engagement, board members will be able to better understand the views of shareholders with respect to the company.

A further benefit of shareholder engagement is that it can increase

The situation has to some extent been cosy over the years, with directors not viewing shareholder engagement as part of their job and shareholders not expressing much interest in speaking to directors. However, shareholder activism is on the rise in Singapore. Recent activity includes the removal of a chairman at WBL Group, rejection of the re-appointment of board members at an AGM of Grand Banks Yachts Ltd, the calling of an EGM by hedge funds to put three of their nominees on the board of Macquarie International Infrastructure Fund and the collapse of the share price of Olam International Ltd on a negative report by a shareholder - Muddy Waters.

shareholder goodwill and trust. Shareholders, who have an interactive relationship with the board, will be more likely to support the board when it comes to the vote and are less likely to call EGMs, which are often initiated to establish dialogue with boards that ignore them. Furthermore dialogue with shareholders may bring up issues that they may have early and before they become a rallying point, particularly if such issues arise out of misunderstandings between them and the board.

Issues With Shareholder Engagement

One of the most difficult issues concerning shareholder engagement by independent directors is making sure that one avoids selective disclosure of sensitive information. The SGX listing rules, Paragraph 7 of Appendix 7.1, provides that information must not be divulged to any person outside the listed entity & its advisers, in such a way as to place such person in a privileged dealing position and Paragraph 23 of Appendix 7.1 provides further that under no circumstances should disclosure of material information be made on an individual or selective basis to analysts, stockholders or other persons unless such information has been previously fully disclosed and disseminated to the public.

Before letting independent directors loose on the shareholders, it is important that the company's disclosure policy should be communicated to them together with guidelines on what constitutes material information. In particular discussions with shareholders should avoid internal financial projections, strategic plans, significant undisclosed developments, specific business opportunities, and potential dividend policies or share buy backs. In fact anything that could be expected to affect the market price of the shares.

The role of management versus the board in shareholder engagement needs to be clearly defined and communicated to shareholders. In general management normally will have driven shareholder communication, through the CEO, with the board overseeing the process. If the board is to be involved, shareholders need to be informed of this fact as they may be confused as to whom to contact. As regards the position of management, they may feel a threat that board members are discussing major issues behind their backs and side lining them. To this end communication with management must be maintained at all stages. Most importantly, the same and not conflicting messages need to be passed to shareholders by both management and the board. Far too often, in practice, either management or a board member tends to speak out of place in a one to one meeting with shareholders.

Analyse Your Shareholder Base

The extent of shareholder engagement will depend very much on the shareholder base of the entity. Shareholder groups may include:

- **Institutional investors** – tend to rank amongst the larger investors. They may include insurance companies, pension funds, mutual funds etc. They are accountable to the beneficiaries whose funds they manage and can exert influence in the management of companies because of their large voting rights. Sometimes they will be forced to vote one way or another because of a mandate.
- **Activist shareholders** – are often hedge funds. These are the most dangerous of the shareholder groups for boards and need to be watched carefully. The objective of a hedge fund is normally to make a quick profit and they may have a very short term view of the investment. They often look for entities with a week performance and can often put pressure on management to act in accordance with their wishes by threatening proxy contests if they do not get their own way.
- **Retail investors** – tend to be small by levels of investment but may be vociferous at AGMS.
- **Family shareholders** – Some listed entities are still controlled by family shareholders. Boards in this type of

entity are always subject to the thread of removal should they fall foul of the family.

- **Hidden shareholders** – some shareholders hide behind various overseas corporate entities and it may be impossible to contact beneficial shareholder. These are the most difficult to deal with as you do not know who they are or why they may be voting a particular way on a resolution.

Shareholders do not consist of a homogeneous group. The investor time frames, size, resources, personal interests may differ. Some may be passive investors and others may be activists. To this end it is important to know who your major shareholders are and what their principal reasons are for in investing in the company.

Once you know your shareholders you can set the priority as to which shareholders you need to engage with and the extent of such engagement.

The Engagement Meeting With Shareholders

There are many different ways, in addition to statutory disclosures and discussions at general meetings, that the board may choose to engage with shareholders. These include passive feedback, shareholder surveys, websites, blogs, conference call dial in etc. For the purpose of this paper I will only consider the one to one meeting between the independent director and shareholder as most of the other methods will be carried out by management or consultants.

Prior to any meeting with a shareholder, the director should develop an agenda and collect the relevant information. Preferably find out in advance what topics the shareholder wants to cover. There is nothing worse than not being able to answer a question and fumble your way through the meeting. However, also be mindful that you must not disclose significant information that is not available to other shareholders.

Preferably directors should aim to meet the shareholder jointly with at least one member of senior management. If a shareholder insists on a one on one session with the director for any particular issue, the member of management can be excused for that item. In any event if management is not attending the meeting the director should aim to be accompanied by another director or legal counsel, as witness to the discussion so as to avoid any potential misunderstandings.

If possible find an environment that is conducive so that the discussion can be as friendly and relaxed as possible. For major shareholders, discussion over a meal can be good way to break the ice. Personal contact rather than written is important. At the very minimum the director should call the shareholder by phone or such other electronic means that may be available such as "Skype". Once a good relationship has been established it is so much easier to deal with the issues.

During the meeting, try to listen to the shareholder rather than becoming defensive. If there are grievances, tell the shareholder that you will look into them. If the shareholder has ideas tell him that you will consider. Do not give decisions on matters raised unless they have been cleared prior to the meeting by the board/ management. It is also preferable not volunteer too much information unless questioned, as you may be trapped into mentioning issues that you may prefer not to disclose.

It is possible to turn around an aggressive shareholder group. Listen to their issues. Often they can be overcome one way or another. For instance is the shareholder has names for suggested board members, do not turn them down out right, but put them into the system with any board nominees. Preferably employ an external consultant to carry out the search so as the whole process can be seen to be independent of the board and the shareholders.

After the meeting make sure that you debrief both management and the board of the items discussed with the shareholder. With respect to the shareholder, it is important that contact is maintained on a continuing basis even though the issues may have been defused.

Conclusion

As regards shareholder engagement by directors there is no one size that fits all solution. Every company is different, shareholder bases are different and the issues are different. Some entities may require minimal involvement by independent directors others significant involvement. Directors need to identify clearly situations where shareholder engagement is necessary if they wish to avoid nasty corporate surprises that may hit them unaware. ■

> One of the most difficult issues concerning shareholder engagement by independent directors is making sure that one avoids selective disclosure of sensitive information.

New NYSE And Nasdaq Listing Standards On Independence Of Compensation Committees And Their Advisers: It's Time To Prepare

By Howard Dicker, Partner and
Lyuba Goltser, Counsel
Weil, Gotshal & Manges LLP

Overview

New corporate governance listing standards of the New York Stock Exchange and the Nasdaq Stock Market were approved by the Securities and Exchange Commission on January 11, 2013.[1] The new standards apply to any company with listed equity securities, other than controlled companies and certain other listed companies specifically exempted by the exchanges. In approving the listing standards, the SEC did not take the opportunity to align the NYSE and Nasdaq standards where they differ.

Companies should start to prepare for the following:

- **Independence Assessment Of Advisers.** Beginning July 1, 2013, a compensation committee may select or receive advice from a compensation consultant, legal counsel or other adviser only after conducting an independence assessment. A committee is not precluded from using a non-independent adviser, but it must first conduct the requisite assessment.
- **Compensation Committee Independence.** New, enhanced independence criteria for compensation committee members must be satisfied by the earlier of the first annual shareholders meeting after January 15, 2014, or October 31, 2014.
- **Compensation Committee Responsibility And Authority Over Advisers And Charter Amendments.** Compensation committee charters must be revised by July 1, 2013, to reflect certain responsibilities and authority over advisers specified in the new listing standards.
- **Nasdaq Formal Compensation Committee And Charter Requirements.** Nasdaq companies that do not have a compensation committee or formal written charter will need to have them in place by the earlier of the first annual shareholders meeting after January 15, 2014, or

October 31, 2014. The charter is now required to include certain enumerated responsibilities of the compensation committee, so even Nasdaq companies that already have a formal written charter will need to review the charter for compliance with the new requirements. For a Nasdaq-listed company that has not yet established a formal committee by July 1, 2013, the independent directors must undertake the new responsibilities and authority by that date.

Reminder For Upcoming Proxy Season: Disclosure Of Conflicts Of Interests of Compensation Consultants: New Item 407(e)(3)(iv) of Regulation S-K requires all companies subject to the proxy rules to disclose conflicts of interest of any compensation consultant in any proxy statement for an annual or special shareholders meeting at which directors are to be elected occurring on or after January 1, 2013.

The new listing standards implement Rule 10C-1 of the Securities Exchange Act of 1934.[2] For more details on the SEC's rules implementing new Item 407(e)(3)(iv) of Regulation S-K and adopting Exchange Act Rule 10C-1, see our Alert available at http://www.weil.com/news/pubdetail.aspx?pub=10918.

Compensation Committee Independence

Supplementing the existing listing requirements that members of the compensation committee be independent, the NYSE and Nasdaq listing standards now also require that the board of directors take into account two factors enumerated in Exchange Act Section 10C-1(b)(1) in determining whether a director is eligible for service on the compensation committee.[3] It is here that the stock exchanges' standards differ.

NYSE and Nasdaq have not specifically defined terms such as "affiliate" or "indirect" acceptance of compensation, for the purposes of assessing the enhanced independence standards for compensation committee members. Absent further guidance from the stock exchanges, listed companies will likely look to Exchange Act Rule 10A-3, which sets forth the independence criteria for members of the audit committee. Indeed, Nasdaq fully embraced one of the audit committee criteria for its new bright line test.[6]

Under the new listing standards, the board must consider whether a director is affiliated with[7] the company (other than by reason of serving as a director) in order to determine whether such director is eligible to serve on the compensation committee. In contrast, Exchange Act Rule 10A-3 automatically disqualifies an affiliated director from service on the audit committee. The stock exchanges have noted that significant share ownership or affiliation with a significant stockholder will not be a bar to a finding of independence for compensation committee members.[8] Therefore, a designee of a significant stockholder, who may not qualify for service on the audit committee, may still qualify for service on the compensation committee.[9]

Cure Period For Compensation Committee Independence. The listing standards provide for a new cure period for noncompliance with the compensation committee independence standards.

Assessing Compensation Adviser Independence

Perhaps the most challenging of the new listing standards is the requirement, implementing Exchange Act Rule 10C-1(b)(4), that the compensation committee of a listed company may select or obtain advice from a compensation consultant, legal counsel or other adviser (collectively, Advisers) only after taking into consideration six enumerated factors. Advisers are

NYSE	NASDAQ
• If a company fails to comply with the new independence standards for compensation committee members because a member of the compensation committee ceases to be independent for reasons outside of the member's reasonable control, that member may remain on the compensation committee until the earlier of (1) the next annual shareholders meeting or (2) one year from the occurrence of the event that caused the member to no longer be independent; provided that a majority of the members on the compensation committee continue to be independent.	• If a company fails to comply with the new independence standards for compensation committee members due to one vacancy, or one compensation committee member ceasing to be independent due to circumstances beyond the member's reasonable control, the company must regain compliance by the earlier of (1) the next annual shareholders meeting or (2) one year from the occurrence of the event that caused the failure to comply; provided, however, that it will have at least 180 days to cure noncompliance (even if the annual meeting occurs sooner).
• The NYSE does not provide for a cure period in the case of a vacancy.	• Nasdaq requires immediate notice of noncompliance with the listing standards.
• The NYSE requires prompt notice of noncompliance with the listing standards	• Nasdaq's existing rule that permits one non-independent director on a compensation committee composed of at least three members in limited and exceptional circumstances remains substantially unchanged and applies for a director who fails to meet the enhanced standards.[10]

not required to be independent, and both stock exchanges' standards expressly provide that the compensation committee may select or receive advice from an Adviser that is not independent, but only after taking into consideration the six factors. The new listing standards do not require disclosure of the result of the independence analysis.

The compensation committee must consider the following six independence factors in their totality (no single factor is determinative):

- the provision of other services to the company by the firm that employs the adviser;
- the amount of fees received from the company by the firm that employs the adviser, as a percentage of the total revenue of the firm that employs the adviser;
- the policies and procedures of the firm that employs the adviser that are designed to prevent conflicts of interest;
- any business or personal relationship of the adviser with a member of the compensation committee;
- any stock of the company owned by the adviser; and
- any business or personal relationship of the adviser or the firm employing the adviser with an executive officer of the company.

As examples of relationships that would fall under the sixth factor, the SEC cited situations where the CEO and the Adviser have a familial relationship or where the CEO and the Adviser (or the Adviser's employer) are business partners.[11] While not made explicit, presumably the same examples would apply to the fourth factor concerning relationships between the Adviser and a member of the compensation committee.

The NYSE requires that the compensation committee consider all factors relevant to the Adviser's independence from management, including the six factors. Nasdaq has determined that consideration of only the six factors is adequate to elicit broad and sufficient information to enable the committee to make the appropriate determination. None of the six factors have materiality qualifiers or quantitative thresholds, and therefore a committee will need to exercise judgment and may want to develop its own guidelines.

The independence assessment must be conducted for any Adviser that provides advice to the compensation committee. Consequently, for example, an assessment is required for an Adviser that is retained by management but provides advice to the compensation committee and for an Adviser that provides advice to the compensation committee on director compensation.[12] The listing standards only specifically exclude from the independence assessment (1) in-house legal counsel and (2) Advisers that act in a role limited to (a) consulting on broad-based plans that are generally applicable to all salaried employees or (b) providing information that is either not customized for the company or that is customized based on parameters that are not developed by the Adviser, and about which the Adviser does not provide advice.[13]

The new listing standards do not specify what it means to obtain advice from an Adviser. The NYSE stated that the independence of any outside legal counsel, including the company's regular securities and tax counsel, must be evaluated prior to their being selected by or providing advice to the compensation committee.14 However, it is not clear whether an independence assessment of the company's outside legal counsel is required if such outside legal counsel only provides advice to the company's legal department and has no direct contact with the compensation committee regarding the advice. Absent further guidance from the stock exchanges, committees and Advisers are left to use their reasonable judgment.

In addition, transitional issues exist regarding the timing of an assessment for Advisers already engaged by or providing advice to the compensation committee. We recommend that the compensation committee conduct, by July 1, 2013, an independence assessment of any Adviser retained by the committee or from whom it has received (or expects to receive) advice for the 2013 fiscal year. We also recommend that minutes reflect that the appropriate assessment has been conducted by the compensation committee. The SEC indicates that it anticipates that compensation committees will conduct the independence assessment at least annually.[15]

Reminder: New Proxy Disclosure Required Of Conflicts Of Interests With Compensation Consultants. While listed companies are not required to disclose the results of the compensation committee's evaluation of Adviser independence, new Item 407(e)(3)(iv) of Regulation S-K requires all companies subject to the proxy rules (whether or not listed on an exchange) to disclose conflicts of interest of any compensation consultant (but not legal counsel or other advisers) who had any role in determining or recommending the amount or form of executive or director compensation during the last completed fiscal year. In evaluating whether a conflict of interests exists, the compensation committee must consider the same six factors identified above concerning the independence of all Advisers. The disclosure, if needed, must be included in any proxy statement for an annual or special meeting at which directors are to be elected occurring on or after January 1, 2013. For more details about new Item 407(e)(3)(iv) of Regulation S-K, see our Alert available at http://www.weil.com/news/pubdetail.aspx?pub=10918.

Compensation Committee Responsibility And Authority Over Advisers: New Charter Requirements

The new listing standards require that the compensation committee have

certain responsibilities and authority over Advisers. Both stock exchanges require that the compensation committee charter include the following responsibilities and authority:

- the sole discretion to retain or obtain the advice of any Adviser;
- the direct responsibility for the appointment, compensation and oversight of the work of any Adviser retained by the compensation committee;
- a requirement that the company provide appropriate funding, as determined by the compensation committee, for the payment of reasonable compensation to any Adviser retained by the compensation committee; and
- the responsibility, prior to selecting or receiving advice from any Adviser, to evaluate the independence of such Adviser as discussed above.

Nasdaq Compensation Committee And Charter Requirements

Nasdaq will now require that all equity-listed companies have a compensation committee consisting of at least two directors that are independent under the current listing standards and that also qualify to serve on the compensation committee under the new enhanced standards summarized above.[16] In addition, the compensation committee will be required to adopt a formal written charter which must specify:

- the scope of the committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements;
- the committee's responsibility for determining, or recommending to the board for determination, the compensation of the CEO and all other executive officers of the company;
- that the CEO may not be present during voting or deliberations on his or her compensation; and
- the specific committee responsibilities and authority over Advisers (see above).

The compensation committee will need to review and reassess its charter annually.[17] While many Nasdaq companies already have formal compensation committees and written charters, they will need to revise the charter to reflect the responsibilities and authority now specifically required to be enumerated in the charter.

Effective Dates

The effective dates for the new listing standards are as follows:

By July 1, 2013:

- Assess Adviser independence.
- Revise compensation committee charter to include compensation committee responsibility and authority over Advisers.

By the earlier of the first annual meeting after January 15, 2014, or October 31, 2014:

- Compensation committee members must meet the enhanced independence standards.
- Nasdaq companies that do not have a compensation committee or formal written charter must have them in place (but note the committee or independent directors acting in lieu thereof must possess the expanded responsibility and authority over advisers by July 1, 2013).

A Nasdaq-listed company is required to certify, within 30 days after the applicable implementation deadline, that it has complied with the new listing standards related to compensation committees.[18] There is no new NYSE certification requirement, but NYSE companies continue to be required to provide annual, and sometimes interim, written affirmations certifying compliance with the NYSE corporate governance listing standards.

Exemptions And Phase-In Periods

The new listing standards do not apply to companies that only have debt securities listed on an exchange. In addition, the following exemption and phase-in periods apply:

Controlled Companies And Others. Existing stock exchange exemptions that apply to controlled companies, asset-backed issuers, cooperatives, limited partnerships, companies in bankruptcy and registered investment companies will continue under the NYSE and Nasdaq listing rules relating to the new compensation committee requirements.[19]

Foreign Private Issuers. As is currently the case, a foreign private issuer may follow its home country practices regarding compensation committee matters. Existing listing standards already require disclosure of any significant ways in which the corporate governance standards differ from those required of US companies, but Nasdaq will now also require a foreign private issuer to disclose why it does not have an independent compensation committee. Phase-in periods continue to be available under the NYSE listing standards for a foreign private issuer that ceases to qualify as such.

Smaller Reporting Companies. Smaller reporting companies are exempt from the enhanced independence standards for compensation committee members and from the committee responsibility to assess Adviser independence. However, smaller reporting companies will be subject to new listing rules relating to the responsibilities and authority of the compensation committee (other than evaluating Adviser independence). Phase-in periods are available under the NYSE and Nasdaq for a smaller reporting company that ceases to qualify as such.

- Nasdaq-listed smaller reporting companies may adopt a board resolution that specifies the compensation committee's responsibilities in lieu of adopting a formal written compensation committee charter. Such companies are also exempt from the requirement to review the compensation committee charter (or board resolutions) on an annual basis.

IPO Companies. A company that lists equity in conjunction with its initial public offering is subject to all of the new listing standards, but it may take advantage of existing phase-in rules.[20]

Emerging Growth Companies. No specific exemptions are available for emerging growth companies.[21]

How To Prepare

- **Determine Whether Any Disclosure For Compensation Consultant Conflicts Of Interests Is Required.**

  Companies should already be working with their compensation consultants to collect the necessary information to determine whether the consultant's work raises any conflicts of interests based on the six factors enumerated in new Item 407(e)(3)(iv) of Regulation S-K (the same factors to be used to assess Adviser independence). Disclosure of any conflicts of interests is required in any proxy statement for an annual or special meeting of shareholders at which directors are to be elected. Also see below regarding D&O Questionnaire update.

- **Conduct An Independence Assessment Of Advisers.**

  - Determine Which Advisers Need An Independence Assessment. Companies should work with compensation consultants, outside legal counsel and other advisers to determine whether an independence assessment will be required.

  - Gather Information. Companies should be gathering necessary information from compensation consultants, outside legal counsel and other advisers, as well as directors and executive officers to enable the compensation committee to assess the independence of Advisers. Also see below regarding D&O Questionnaire update.

  - Assess Independence. The compensation committee should make an independence assessment with respect to existing Advisers by July 1, 2013. This assessment should be conducted at least annually thereafter and with respect to any new Adviser retained by the compensation committee or from whom the committee obtains advice.

- **Consider Adopting Adviser Retention Procedures.**

  Compensation committees should consider establishing specific procedures for compensation committees to follow prior to retaining or receiving advice from Advisers so as to ensure that the six independence factors are considered. Compensation committees may also consider obtaining representations and agreements from Advisers addressing the six factors, as applicable, in engagement letters.

- **Revise Compensation Committee Charter.**

  NYSE and Nasdaq-listed companies will need to revise their charters (or, in the case of some Nasdaq companies, establish one) to include certain enumerated responsibilities and authority specified in the new listing standards (to the extent not already included in the charter), including the compensation committee's responsibility to evaluate the independence of its Advisers. NYSE-listed companies should implement any necessary changes by July 1, 2013. Nadsaq-listed companies must provide the compensation committee with the required responsibilities and authority by July 1, 2013, but need not establish a formal compensation committee with a written charter until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014. Although not technically required by the listing standards to be included in the charter, companies may wish to expressly provide in the charter that the compensation committee conduct the adviser independence analysis at least annually. In revising the charter, companies may wish to also address the enhanced standards for compensation committee members. Companies should take the opportunity to conduct an overall review of the compensation committee charter and the committee's responsibilities set forth in the charter.

- **Revisit Compensation Committee Composition.**

  Compensation committee members are already subject to general independence requirements under the listing standards. However, it is possible that some directors who may have been considered independent for compensation committee purposes under the general independence requirements will no longer qualify under the enhanced listing standards. Listed companies should review the composition of their compensation committees and consider whether the nominating committee and board of directors need to evaluate any additional relationships. All compensation committee members must meet the enhanced independence test by the earlier of the first annual meeting after January 15, 2014, or October 31, 2014. Also see below regarding D&O Questionnaire update.

- **Update D&O Questionnaires For 2013 And beyond.**

  - D&O questionnaires should be updated to capture information about business or personal relationships with compensation consultants

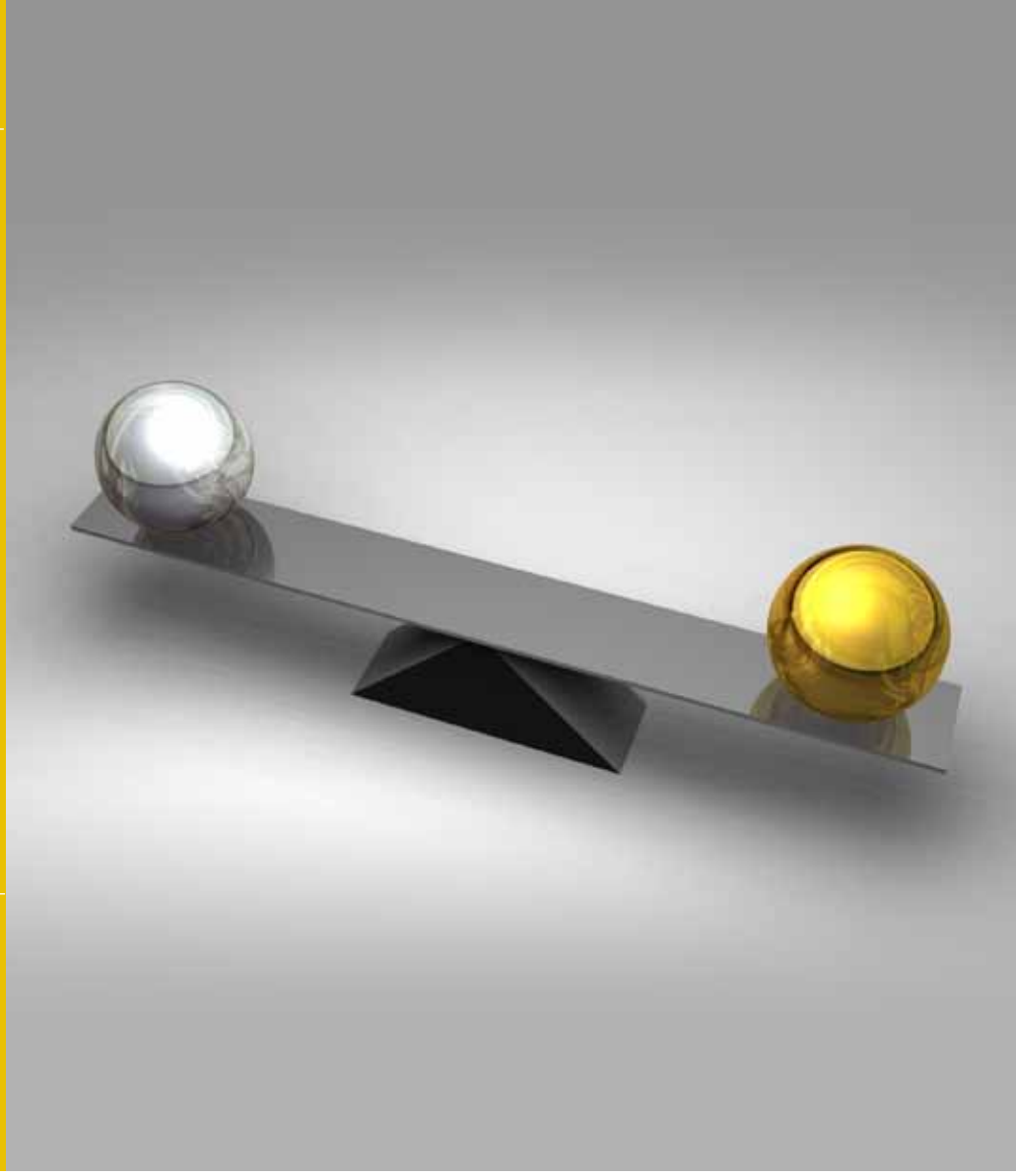
to assess whether disclosure of conflicts of interests under new Item 407(e)(3)(iv) of Regulation S-K is required. For example, the questionnaire should elicit responses regarding (1) business or personal relationships of the compensation consultant with a member of the compensation committee and (2) business or personal relationships of the compensation consultant or the firm employing the consultant with any executive officer of the company.

- Companies may wish to revise their D&O questionnaires now to capture information about business or personal relationships with any Adviser to the compensation committee so as to identify any problematic relationships in advance of the July 1, 2013 effective date of the Adviser independence assessment standard.
- Companies may wish to revise their D&O questionnaires to include, for compensation committee members, questions similar to those asked of audit committee members relating to the source of the compensation committee member's compensation and affiliate status so as to identify any problematic relationships in advance of the effective date of the compensation committee independence standard, which will apply on the earlier of the first annual meeting after January 15, 2014, or October 31, 2014. ■

Endnotes

1. *The NYSE SEC Order is available at http://www.sec.gov/rules/sro/nyse/2013/34-68639.pdf. The Nasdaq SEC Order is available at http://www.sec.gov/rules/sro/nasdaq/2013/34-68640.pdf. NYSE Amendment No. 3 was filed on January 8, 2013 and is available at http://www.nyse.com/nysenotices/nyse/rule-filings/pdf;jsessionid=ABF26779DEF9F177F1E862A98C8963CD?file_no=SR-NYSE-2012-49&seqnum=5). Nasdaq Amendment No. 2 was filed on January 4, 2013 and is available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2012/SR-NASDAQ-2012-109_Amendment_2.pdf).*
2. *See SEC Release No. 33-9330, Listing Standards for Compensation Committees, available at http://www.sec.gov/rules/final/2012/33-9330.pdf (the Adopting Release).*
3. *In addition to evaluating independence under applicable listing rules, boards of directors typically also evaluate whether compensation committee members qualify as "non-employee" director under Exchange Act Section 16 and as "outside director" under Section 162(m) of the Internal Revenue Code.*
4. *The NYSE has not specifically defined "compensatory fees" for the purposes of new NYSE Section 303A.02(a)(ii). NYSE companies will likely look to the definition of compensatory fees in Exchange Act Rule 10A-3(b)(1)(ii)(A) relating to the independence of audit committee members. See note 5 for Nasdaq's definition of compensatory fees, which parallels the definition in Rule 10A-3(b)(1)(ii)(A).*
5. *Compensatory fees do not include: (1) fees received as a member of the compensation committee, the board of directors or any other board committee; or (2) the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the company (provided that such compensation is not contingent in any way on continued service). See Nasdaq Rule 5605(d)(2)(A).*
6. *Nasdaq noted that "there is no compelling justification to have different standards for audit and compensation committee members" with respect to this factor. See Nasdaq SEC Order at 8.*
7. *In general, a factual determination based on a consideration of all relevant facts and circumstances is required to conclude whether a director is "affiliated with" the company, any of its subsidiaries or any affiliates of such subsidiaries. While not specifically defined in the new NYSE or Nasdaq listing standards, it is generally understood that a person "affiliated with" a specified person means any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the specified person. The term "control" in this context generally means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. Under the "affiliated person" prong of Rule 10A-3, a director of a listed company will not be considered independent for audit committee purposes if he or she is (a) an executive officer of an affiliate; (b) a director who is also an employee of an affiliate; (c) a general partner of an affiliate; or (d) a managing member of an affiliate. Rule 10A-3 also contains a safe harbor: a person will be deemed not to be in control of a specified person if the person (1) is not the beneficial owner, directly or indirectly, of more than 10% of any class of voting equity securities of the specified person and (2) is not an executive officer of the specified person.*
8. *The NYSE noted that it does "not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company." See NYSE Proposed Rule at 6-7 available at http://www.nyse.com/nysenotices/nyse/rule-filings/pdf;jsessionid=ABF26779DEF9F177F1E862A98C8963CD?file_no=SR-NYSE-2012-49&seqnum=1. Commentary to the NYSE's listing standards focus the inquiry on whether the affiliate relationship places the director under the direct or indirect control of the company or its senior management. Nasdaq noted that "it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program." See Nasdaq Proposed Rule at 17, 53-54 available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2012/SR-NASDAQ-2012-109.pdf.*
9. *However, an issue often arises as to whether a designee of significant stockholder will also qualify as a "non-employee" director under Exchange Act Rule 16b-3, which disqualifies directors who receive compensation, directly or indirectly, from the company or a parent.*
10. *See Nasdaq Rule 5605(d)(3). A company that relies on this exception must disclose either on or through the company's website or in the proxy statement for the next annual meeting subsequent to such determination (or, if the company does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for determination. A member appointed under this exception may not serve longer than two years.*
11. *See Adopting Release at 39-40.*
12. *The rule does not apply to a committee that addresses director independence, but not employee compensation, so it appears that the typical governance committee would not be subject to the enhanced compensation committee independence standards.*
13. *These exceptions parallel the existing exception to Item 407(e)(3)(iii) of Regulation S-K, which requires disclosure of compensation consultants with any role in determining or recommending the amount and form of a company's executive or director compensation.*
14. *See NYSE SEC Order at 31.*
15. *See NYSE SEC Order at 49.*
16. *Accordingly, Nasdaq will become more aligned with the NYSE, which currently requires companies to have a standing compensation committee and a written committee charter.*
17. *The NYSE does not require an annual assessment of the compensation committee charter.*
18. *See Exhibit 3 to Nasdaq's Amendment No. 1 for Form of Certification (available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2012/SR-NASDAQ-2012-109_Amendment_1.pdf).*
19. *See NYSE Section 303A.00; Nasdaq Rule 5615(a). A controlled company is a listed company in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company.*
20. *The NYSE's existing transition periods continue to be available to: (1) companies listing in connection with an initial public offering or that did not have a class of common stock registered under the Exchange Act prior to the listing date; (2) companies listing in connection with a spin-off or carve-out transactions; (3) companies listing upon emergence from bankruptcy; (4) companies that cease to qualify as a controlled company; (5) companies ceasing to qualify as a foreign private issuer; and (6) companies transferring from other markets. See NYSE Section 303A.00. Nasdaq's existing transition periods continue to be available to: (1) companies listing in connection with an initial public offering; (2) companies listing upon emergence from bankruptcy; (3) companies that cease to qualify as a controlled company; and (4) companies transferring from other markets. See Nasdaq Rule 5616(b).*
21. *An emerging growth company is defined as an issuer that had total annual gross revenues of less than $1 billion during its most recently completed fiscal year. See Section 2(a)(19) of the Securities Act; Section 3(a)(80) of the Exchange Act.*

Preserving Balance In Corporate Governance



By Ira M. Millstein, Senior Partner
Holly J. Gregory, Partner and
Rebecca C. Grapsas, Associate
Weil, Gotshal & Manges LLP

Overview

In our annual missive last year, we wrote about the need to restore trust in our system of corporate governance generally and in relations between boards of directors and shareholders specifically. We continue to be troubled by the tensions that have developed over roles and responsibilities in the corporate governance framework for public companies. The board's fundamental mandate under state law – to "manage and direct" the operations of the company – is under pressure, facilitated by federal regulation that gives shareholders advisory votes on subjects where they do not have decision rights either under corporate law or charter. Some tensions between boards and shareholders are inherent in our governance system and are healthy. While we are concerned about further escalation, we do not view the current relationship between boards and shareholders as akin to a battle, let alone a revolution, as some media rhetoric about a "shareholder spring" might suggest. However, we do believe that boards and shareholders should work to smooth away excesses on both sides to ensure a framework in which decisions can be made in the best interests of the company and its varied body of shareholders.

Board

On the board side, directors need to remain mindful that shareholders have legitimate interests in the governance of the company and this includes communicating their concerns to the board, whether via shareholder proposal or some other method of engagement. To be able to assess and check shareholder concerns, boards also need to know who the company's shareholders are and appreciate that their interests are not monolithic. Shareholders who seek change are neither necessarily seeking changes that are harmful or undermine the board's responsibilities, nor are they necessarily seeking changes that are in the company's best interests. Boards must discern, in each particular situation, whether a shareholder is seeking to promote interests that are broadly in keeping with the company's long-term interests and the interests of other shareholders.

In this regard it is particularly helpful for boards to understand who the company's shareholders are as well as their investment strategies and other interests. Are they long-term shareholders or short-term traders? Are they acting in accordance with fiduciary duties owed to beneficiaries? Are they interested in a particular political or social agenda? Are they using a particular issue to push for other changes? This information is key not only in engagement with shareholders but also in exploring how to better communicate corporate strategies to attract the type of long-term shareholders that most companies want. Columbia Law School is in the process of studying a "topography" of investors and their respective interests which should be helpful to boards in this endeavor.

Shareholder

On the shareholder side, shareholders need to appreciate that while their views are important and valuable – and should be taken into account in board decision-making – companies cannot be managed efficiently by shareholder referendum. In the past year two books by prominent academics – Professors Lynn Stout and Stephen Bainbridge – have emphasized this point, and we recommend these books as worth reading.

On the board side, directors need to remain mindful that shareholders have legitimate interests in the governance of the company and this includes communicating their concerns to the board, whether via shareholder proposal or some other method of engagement. To be able to assess and check shareholder concerns, boards also need to know who the company's shareholders are and appreciate that their interests are not monolithic.

Shareholders also need to think for themselves with respect to how they are going to vote on matters presented to them. Precatory or advisory votes are important in giving shareholders a voice with respect to subjects on which they have legitimate interests but generally lack decision rights, such as executive compensation. In practice, such votes have had beneficial impact in increasing the dialogue and engagement between shareholders and boards. The non-binding nature of votes on precatory proposals underscores that boards should consider the vote outcome but not be bound to take the advised action if directors believe that an alternate course is in the best interests of the company. (Boards in such circumstances should take special care to communicate why an alternative course is preferable.)

Shareholders should be especially wary of proxy advisor policies that threaten to make precatory proposals that receive a majority of votes cast effectively compulsory, thereby shifting decision-making power from boards to shareholders. The rapid rise of powerful proxy advisors is the unforeseen – and yet to be addressed (by the SEC) – accelerant in the increasing tensions between boards and shareholders. All too often, shareholders are delegating their voting power to third parties whose business model depends on both attaining ever more influence through the growth of shareholder rights and making voting recommendations on a low cost basis. This leads to continual expansion of the governance practices that the proxy advisors advocate and an over-reliance on rigid corporate governance prescriptions on a one-size-fits-all basis. The coordinating impact and rigid influence of the proxy advisory firms risk upsetting the delicate balance between board and shareholder responsibilities – and may undermine the ability of boards to govern effectively.

We support efforts by shareholders to have their voices heard on governance matters. However, we also believe that there is – and should be – a limit to shareholder power in the interests of efficient and effective corporate decision-making. The board of directors is and should be the locus of most corporate decisions; shareholding is, after all, designed to enable passive investment participation in the company.

Shareholders should seek to replace directors when they do not perform well, but shareholders should also give directors a fair degree of deference (or rope). In particular, shareholders should carefully consider whether campaigns

to target directors due to a single disagreement about the construction of compensation or the failure to follow a particular governance practice – or even the failure to act in line with a shareholder vote on a precatory or advisory proposal – is consistent with shareholders' interests in having a decision-making body that has the fortitude to withstand short-term pressures and take a long view of what the corporation and its shareholders need.

Proxy Advisory Firms

We appreciate that proxy advisory firms may serve a useful function in summarizing information for shareholders, particularly for shareholders with a large number of investments in their portfolios and limited resources to devote to proxy analysis. Such information should be used to inform individual decisions by shareholders on company-specific issues. But shareholders must appreciate that with shareholder power comes responsibility, and this can include responsible reliance on, or delegation to, advisors.

Decisions to utilize the services that proxy advisors offer should be made on an informed basis after appropriate due diligence, especially if the shareholder is an institutional investor that owes fiduciary duties to beneficiaries. Does the proxy advisory firm have the resources to provide sophisticated, informed and tailored advice specific to individual portfolio companies, or does their business model require that they rely on fairly set voting policies that are applied across the board by junior or seasonal workers? (The SEC's interpretive release slated for release in 2013 should make for interesting reading with respect to these issues.)

Decisions to utilize the services that proxy advisors offer should be made on an informed basis after appropriate due diligence, especially if the shareholder is an institutional investor that owes fiduciary duties to beneficiaries.

Notwithstanding the broadening of federal regulation of corporate governance over the past decade, the fundamental legal responsibilities of the board, imposed by state corporate law, have not changed: The board is charged with managing and directing the affairs of the corporation. State law does not dictate with specificity how the board should carry out this mandate, but rather imposes fiduciary duties on individual directors. This allows a degree of board self-determination within the flexible fiduciary framework of prudence, good faith and loyalty. However, while board and director responsibilities have not changed in any fundamental way, from a compliance, disclosure and risk management perspective, more is expected from the boards of public companies than ever before. Boards need to meet the expanding expectations of regulators, shareholders, and the public while maintaining focus on key board responsibilities.

The corporate form enables shareholders to share in the benefits of corporate activity while limiting their potential liability to their investment. Their decision rights may be limited, but their voice and their influence is not. Of course, with power comes responsibility. If shareholders do not have the resources to become informed about a particular company and the issues that it faces, or if there are no performance issues or other red flags that would warrant special attention, it makes sense for shareholders to generally defer to the board's recommendations made in the fiduciary decision-making framework the law promotes. This essential construct of corporate law should be respected as it has served all of us well. Shareholder powers should be exercised to strengthen this construct, not create a playground for special interests.

Our economy relies on the success of our corporations, and the apportionment of governance roles and decision rights by state corporate law has been central to that success. As the ABA Task Force of the Section of Business Law Corporate Governance Committee pointed out in its Report on Delineation of Governance Roles and Responsibilities, "[m]aintaining an appropriate balance between responsibilities for corporate oversight and decision-making is critical to the corporation's capacity to serve as an engine of economic growth, job creation, and innovation." All those involved in the public corporation – shareholders, directors, managers, advisors, counsel and regulators – should ground their activity in a clear understanding of the corporate law roles defined for shareholders and boards and the reasons for those roles.

Preserving the delicate balance between board and shareholder responsibilities is vital to enable companies to maintain focus and efficiently create sustainable long-term value for shareholders, particularly in times of difficult economic conditions. ■

Keeping It In The Family: Start Planning Now Or It Could Cost You

By Darryl Wee
Executive Director
PricewaterhouseCoopers Singapore

Overview

Over 60 percent of family businesses in Singapore have indicated that they have an intention to hand over management and/or the ownership of the business to the next generation. Considering that over 86 percent of family businesses are either first or second generation businesses, successfully passing the business to the next generation is going to be a critical issue many family businesses have to face.

While the majority of these businesses say they want to carry on the tradition of keeping things in the family, many may ultimately pursue a different course — some willingly, some not.

There are various reasons for this. Heirs may be reluctant, unprepared, or unable to take the reins. There may be discord among family members about the appointed successor, as well as insufficient support from other stakeholders. The owner may receive an offer too good to refuse from a private equity firm. Or it may turn out that keeping things in the family simply isn't feasible.

"We often see cases where leaders of family businesses have discussed their thoughts on their transition but really have not spent time to develop a clear action plan" says Ng Siew Quan, a partner and leader of PwC Private Client Services.

Those that do have a plan often keep the details to themselves, to avoid conflict between family members. "That's a mistake," says Ng, "to ensure a successful transition, it is essential that there be extensive family dialogue about the future ownership and leadership of the company, since that is the only sure way the family owner can win acceptance of and support for the plan."

When should succession planning begin? "There is simply no time that's too early to plan for what will happen to the business if the owner unexpectedly dies or becomes ill," says Ng. At first,

"We often see cases where leaders of family businesses have discussed their thoughts on their transition but really have not spent time to develop a clear action plan" says Ng Siew Quan, a partner and leader of PwC Private Client Services.

the plan may be no more than a will, but as the business grows, provisions must be made for an orderly transfer of ownership. A good succession plan should evolve as circumstances change. In other words, it's not an item to cross off your checklist once you've put the details on paper. Instead, you should revisit your succession plan routinely and modify it as needed.

Here are some steps family business owners can consider taking when the goal is to keep the business in the family.

- **Confirm the feasibility of holding onto the business.** This should be the first step in the succession-planning process, and one taken well before the current leader intends to step down. Factors that go into determining feasibility range from taxation to family harmony. In close consultation with advisors, family members and senior management should carefully consider the implications of keeping the business in the family versus taking other courses of action.
- **Identify and engage the successor.** If a likely heir has emerged, years of thought and effort should go into grooming that individual for the leadership role. The successor may be a family member or an executive hired to run the company while the family retains control. In either case, the family and other key stakeholders must support the move. If a family member is the designated successor, he or she must be committed to the company before venturing too far down a separate career path. An acknowledgment of this commitment well before the current leader steps down will allow sufficient time for the successor to balance outside work experience with adequate on-the-job training in the family business.
- **Develop a formal, written succession plan.** The plan should grow out of recommendations from advisors and through discussions held in family meetings. Some very difficult matters may need to be addressed in the plan, such as compensation and earnings distribution policies. Tackling them head-on will remove uncertainty among family members, as well as among employees, customers, and other stakeholders. Inattention to these matters, on the other hand, could lead to anxiety or misunderstanding, which in turn could be detrimental to both the business and the family. People who've been included in a dialogue about the company's future are more likely to understand and ultimately support the final decision about the next leader, even if they don't agree with it at first. Family members charged with helping the business grow will have a clearer understanding of their future responsibilities. And individuals who are passed over for key positions will be more apt to pursue other career paths if they are not kept in the dark. Such individuals might otherwise forfeit potentially rewarding job opportunities outside the family business in hopes that they'll one day assume a leadership position in the company — a misperception that could lead to resentment down the line.
- **Train the successor.** A family member designated as the future leader should undergo a sufficient apprenticeship. A good and thorough apprenticeship involves rotating through a variety of upper-management positions in different business units across the company, with the chosen successor being at the table whenever important decisions are made. The period of apprenticeship varies from family to family but this is not a short 3-5 year activity. In many successful cases, the successor spends almost 10 years in the company before fully taking over. Ideally, that person will also have the opportunity to work outside the family business, attaining new knowledge, skills, and perspectives that will benefit the company. The successor will also need to obtain adequate higher education, including a sound understanding of macroeconomics. Such an understanding should help the successor connect the dots between the business and the various outside forces affecting it — e.g., spot industry trends, better anticipate potential market shifts. There are many available programmes run by institutes of higher learning, one such example is the NextGen Family Business Leaders Programme developed by INSEAD in partnership

If a likely heir has emerged, years of thought and effort should go into grooming that individual for the leadership role. The successor may be a family member or an executive hired to run the company while the family retains control. In either case, the family and other key stakeholders must support the move.

with PwC and FBN, Asia which aims to support family businesses in developing the next generation of leaders.

- **Delegate leadership and authority.** Among all the changes a succession plan demands of a business owner, this one may be the most difficult, since he or she may instinctively make all the decisions and oversee every detail. Yet future growth depends on developing not just a single leader, but a team of leaders. It's important, therefore, that the owner develop and empower people who hold (or will hold) senior management positions in the company, delegating authority and decision-making to them.
- **Rationalize compensation and distribution policies.** In their eagerness to make all family members feel that they are being treated fairly, business owners often compensate them equally. While this is a fair way to share an apple pie, it's generally considered an inequitable way to compensate those who make the greatest contributions to a company. A better practice is to compensate key-contributor family members at prevailing market rates. If the owner wishes to reward other family members who are not actively engaged in the business, he or she may want to consider assigning them equity stakes and paying dividends or profits accordingly. It may also be necessary to recruit new managers who have specialized skills essential to growing the business. This can prove difficult for some family businesses. One way for family businesses to attract top talent is to present their company as a place where prospective employees can grow as managers and individuals. Business owners may also want to consider reconstituting the board so that it includes non-family employees, key executives, and outside members, with the owner serving as board chairperson. Diversification of the board will bring new expertise, alternative perspectives, and objectivity to the company's decision- making process. When the business owner hands the reins to the new leader, the former may choose to retain the majority of the company's voting shares, enabling him or her to step back into management mode if a crisis occurs, but for the most part serving as mentor to the new leader.

A family member designated as the future leader should undergo a sufficient apprenticeship. A good and thorough apprenticeship involves rotating through a variety of upper-management positions in different business units across the company, with the chosen successor being at the table whenever important decisions are made.

In their eagerness to make all family members feel that they are being treated fairly, business owners often compensate them equally. While this is a fair way to share an apple pie, it's generally considered an inequitable way to compensate those who make the greatest contributions to a company. A better practice is to compensate key-contributor family members at prevailing market rates.

Don't forget Plan B as retaining control of the company is a dream that may not come true for all family businesses and other options need to be considered. Like everything the business owner needs to have a back up and the potential transfer of ownership outside the family should be part of the owner's thinking and planning from the very start.

The dream of founding a family business that will live on for generations may be difficult to realize, but it can be done. There are many companies operating successfully today and these accomplishments are the result of family unity, careful planning, and willingness on the part of the owners to accept and encourage change as they make way for a new generation of leaders. ■

Strategic Oversight Roundtable Breakfast Discussion

Decision Processes International ("DPI") held two breakfast talks on 10 January and 24 January 2013 respectively at Marina Mandarin Singapore. Each session was attended by about 15 senior directors. Questions such as "What is the single most important role of a Director?", "How effective are Boards in delivering to their Strategic Oversight responsibilities?" and "What help, if any, do Director's need to play a more proactive role?" were addressed at both breakfast events.

Mr David Wilkins, Partner and Mr Henrik Glarbo, Consulting Principal, both from DPI Singapore facilitated the lively roundtable discussions.

Annual Regulatory & Corporate Governance Update For Listed Company Directors

On 23 January 2013, at Raffles Hotel Singapore, participants were given a review of recent corporate governance cases in Singapore and the United Kingdom, on issues relating to directors' duties, directors' independence, shareholders' rights and shareholders' activism, and an update on key changes to securities regulations in Singapore relevant to companies listed in Singapore.

The presenters were Ms Chn'g Li Ling, Partner and Mr Lee Bagshaw, Registered Foreign Lawyer from RHTLaw Taylor Wessing LLP. Professor Walter Woon, Deputy Chairman of the Centre for International Law, NUS, Mr Irving Low, Partner, KPMG Advisory LLP in Singapore and Mr Tan Chong Huat, Managing Partner, RHTLaw Taylor Wessing LLP, made up the lively discussion panel, together with both the presenters.

Members' Networking Event

The Institute held its first Members' Networking Night of 2013 on 29 January at the Marina Mandarin Singapore's Pool Garden.

Mr Sazali Baharom, Country Manager of CIMB Islamic Banking Division of Singapore did a presentation covering the following areas:

- Current growth and opportunities in Islamic Banking: the growth trend in Islamic banking and what were the Islamic banking deals completed in 2012;
- Introduction to Islamic Banking and Finance: the history of Islamic banking and finance and the concepts used in Islamic banking;
- Benefits of Islamic banking: the benefits which customers can expect to enjoy from tapping on Islamic Banking.

The networking event was sponsored by CIMB Islamic Banking Division of Singapore. It was attended by about 38 members.

Upcoming Talks/ Courses

Upcoming Events

APRIL 2013

Wednesday, 3 April	LCD Director Programme Module 4 *Nominating Committee Essentials*
Thursday, 4 April	How Engaging Are Company Directors? *A Breakfast Presentation by HongBao Media*
Tuesday, 16 April	LCD Director Programme Module 5 *Remuneration Committee Essentials*
Friday, 19 April	EBL Module 1 *Effective Board*

MAY 2013

Friday, 17 May	EBL Module 2 *The Board & Fund Raising*
Tuesday, 28 May	LCD Director Programme Module 1 *Listed Company Director Essentials: Understanding The Regulatory Environment In Singapore: What Every Director Ought To Know*
Thursday, 30 May	EBL Module 3 *Enterprise Risk Management*

SID-SMU Executive Certificate in Directorship

Modules	Programme Dates	Assessment Date
Module 1: The Role Of Directors: Duties, Responsibilities & Legal Obligations	9 to 11 April 2013	Take-home assessment
Module 2: Assessing Strategic Performance: The Board Level View	20 to 22 March 2013	Take-home assessment
Module 3: Finance For Directors	20 to 22 May 2013	Take-home assessment

Course schedule is subject to changes. Please refer to SID website at www.sid.org.sg for the latest dates.

Welcome Aboard

January 2013

Bailey	Troy
Boston	Megan
Burns	Grant
Das	Surajit Kumar
Han	Meng Kwang
Hayler	Richard
Koh	Kew Siong Douglas
Lee	Khuay Chye
Lim	Joo Hock
Lim	Fong Li Janet
Lim	Rern Ming Geraldine
Loke	Siew Yeng
Tan	Cindy

February 2013

Chester	Doug
Choksi	Jay
Chow	Marcus
Devonshire	David
Edwards	Mark
Fitzgerald	Keith Michael
Hubert	Olivier
Koh	Boon Chye
Lee	Kheng Leong
Lim	Seong Wee
Ng	Joo Then Daniel
Odhner	Kim Anders
Peterson	Samuel
Pinsler	Leena
Sin	Chi Fai
Tan	Bong Lin

Call for articles, thoughts, snippets, etc.

The institute would like to hear from you. Send us aricles, thoughts or even short snippets of issues that you are keen on, that you want to share about, or that keeps you awake at night. It only needs to relate to directors and/or corporate governance. For articles, keep it to 1200 to 1500 words at most. Send your materials by email to the Institute at secretariat@sid.org.sg

Personal D&O Insurance

Allianz Insurance Company of Singapore Pte Ltd and Aon Singapore Pte Ltd in collaboration with the Singapore Institute of Directors (SID) have recently launched a Personal D&O Insurance program exclusive to SID members, protecting them against liability arising from their responsibilities as a director, of up to $1 million. The first group of policies has already been issued on the 15th October 2011.

Personal D&O Insurance provides similar protection as traditional D&O Insurance policies, but is taken out in the name of an individual director or officer rather than as an entire board of directors. Cover can be provided for up to three separate directorships.

Why Is It Necessary?

Personal D&O Insurance provides directors and officers with an individual, portable policy for their exclusive benefit. Such cover is relevant to all directors, and is of particular importance to the following:

- Directors of companies that do not purchase D&O Insurance.
- Directors of companies that purchase inadequate insurance, whether in terms of breadth of cover or policy limit.
- Independent directors.
- Directors who are resigning or retiring from their positions, and who seek run-off protection.
- Professionals who assume positions on client company boards.

"Independent directors are uniquely exposed to liability arising from the companies whose boards they sit, while lacking the ability to directly assure that the company purchases relevant insurance coverage to respond to these exposures," said Mr James Amberson, Regional Manager of Financial Lines for Allianz Insurance Company of Singapore. He added that the insurance program developed in collaboration with Aon and SID is a proactive response to this issue and provides directors with the opportunity to mitigate this risk for themselves.

"We are delighted to partner with Allianz and the SID in providing this innovative protection to directors in Singapore. Personal D&O Insurance provides the opportunity for directors to control the breadth and level of protection available to them," said Mr Michael Griffiths, Director of Professional Services at Aon Singapore.

Exclusive to SID Members

Personal D&O Insurance cover is available exclusively to SID members.

A $1 million Personal D&O Insurance policy covering up to three separate directorships will cost S$1,000 plus GST.

For further details please refer to the SID Website,
or call Gladys Ng at Aon Singapore on 6239 8880 or email gladys.ng@aon.com.