

International Corporate Governance

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The Role of Directors of a Target Company in a Public Take-over in Singapore

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This article provides an overview of the roles, duties and responsibilities of the directors of a company listed on the Singapore Exchange Securities Trading Limited (“SGX-ST”) immediately prior to and during the course of a take-over offer (the “Offer”) for the company (the “Target Company”). It is not intended to be exhaustive but identifies and summarises certain rules and regulations which have practical relevance in the day-to-day conduct of the directors in respect of the Offer.

The primary sources of the applicable rules and regulations in Singapore governing directors’ conduct immediately prior to and during the course of the Offer are:

- the Singapore Code on Take-overs and Mergers (the “Code”), which is administered by the Securities Industry Council (the “SIC”);
- the listing rules of the SGX-ST;
- in respect of SGX-ST listed companies which are incorporated in Singapore, the Companies Act (Chapter 50); and
- the Securities and Futures Act (Chapter 289) (the “SFA”).

The Code

The fiduciary duty of directors to act in the best interests of the Target Company and shareholders of the Target Company as a whole remains applicable in the period immediately prior to the Offer, when the Offer is being contemplated and during the offer period (the “Offer Period”) itself, save that the actions of the directors immediately prior to and during the course of the Offer are subject to, and in certain instances, limited by the requirements of the Code. The Offer Period commences with the announcement of the proposed or possible Offer.

Directors of the Target Company are expected to observe both the spirit of the Code, in particular the general principles upon which the Code is based, as well as the precise wording of the rules of the Code. They should in particular take note of the following general principles of the Code:

- except with the approval of its shareholders in general meeting, the board of directors of the Target Company (the “Board”) must not take any action on the affairs of the Target Company that could effectively result in the Offer being frustrated or the shareholders being denied an opportunity to decide on its merits. This principle applies in a situation where the Board believes that the Offer is imminent;
- the Board should, in the interests of its shareholders, seek competent independent advice in respect of the Offer. This principle applies in a situation where the Board is being approached with a view to the Offer being made;
- the Target Company and its advisers must not give information to some shareholders that is not made available to all shareholders. This principle does not apply to information provided in confidence by the Target Company to a bona fide potential offeror or vice versa;
- shareholders of the Target Company should be given sufficient information, advice and time to reach an informed decision on the Offer;

- any document or advertisement addressed to shareholders containing information, opinion or recommendations from the Board or its advisers should meet the highest standards of care and accuracy;
- the Board must use every endeavour to avoid the creation of a false market in the shares of the Target Company or the offeror. Statements (whether in documents, advertisements, announcements, press calls or conferences) may not be made if they might mislead shareholders or the market; and
- the directors should, in advising their shareholders, have regard to the interests of shareholders as a whole, and not to their own interests or those derived from personal or family relationships.

Advice of an Independent Financial Adviser and Recommendation of Directors

The Board has to appoint an independent financial adviser (the “IFA”) to advise the directors of the Target Company who are considered independent for the purpose of the Offer and the advice of the IFA must be included in the circular to shareholders of the Target Company (the “Offeree Circular”) which the Target Company is required to issue in connection with the Offer. The Code does not expressly set out what the IFA is expected to consider in providing its advice. As a matter of practice, the IFA will commonly focus on the financial terms of the Offer in assessing the merits of the Offer.

In addition to the advice of the IFA in the Offeree Circular, the directors of the Target Company are required to recommend in the Offeree Circular the acceptance or rejection of the Offer. All directors are required to participate in the recommendation unless they face an irreconcilable conflict of interest and have been exempted by the SIC from making the recommendation.

Responsibility of Directors for Information Sent to Shareholders or Made Publicly Available

The Code requires all the directors of the Target Company to accept responsibility for each document or advertisement addressed to shareholders and each announcement issued by the Target Company in connection with the Offer (collectively, the “Documents” and each, a “Document”). Directors of the Target Company (including any who may have delegated detailed supervision of the Documents) are required, on a joint and individual basis, to take reasonable care to ensure that the facts stated and all opinions expressed are fair and accurate and, where appropriate, no material facts have been omitted. A statement will have to appear in the Documents to the effect that the directors have taken the reasonable care required and they jointly and severally accept responsibility.

As a consequence of the responsibility assumed by directors of the Target Company for the Documents and the standard of care and accuracy required of the Documents under the Code, directors of the Target Company should ensure that each Document is adequately verified. Typically, such verification, when it concerns Documents which are particularly material in the context of the Offer, such as the Offeree Circular, will take the form of a formal verification exercise, attended to by the directors of the Target Company, relevant members of the management of the Target Company and the advisers of the Target Company.

Provision of Information to the Offeror(s)

In general, the Target Company is not obliged to provide information to an offeror or potential offeror. However, immediately following the announcement of the Offer, the Target Company must, on the offeror’s request, provide the offeror with information on its outstanding voting equity share capital and update the offeror on any subsequent changes during the Offer Period.

In addition, the Code requires the Target Company to provide, equally and promptly, any information, which it has given to one offeror or potential offeror, to any other bona fide offeror or potential offeror, upon request by such offeror, which is required to specify the questions to which it requires answers. This requirement under the Code deals with the right of a competing offeror to have the same information as provided to the first offeror and does not alter the position that the Target Company is generally under no obligation to provide information to the first offeror. The foregoing requirement will usually apply when there has been a public announcement of the existence of the offeror or potential offeror to which information has been given.

As a competing offeror or potential offeror may formally seek information from the Target Company, the Target Company and its advisers should keep a record of the information which has been provided to the first offeror.

Announcements and Confidentiality

Before an approach is made to the Board, the obligation to make an announcement rests primarily with the offeror. Following an approach to the Board, such primary responsibility shifts to the Board. The Code sets out the circumstances in which an announcement must be made, including when the Board is notified of an intention to make a possible Offer from a serious source. In such a situation, irrespective of whether the Board views the possible Offer favourably or otherwise, it must inform its shareholders without delay. The Board must issue a paid press notice or, where the offeror has published a paid press notice, an announcement.

SGX-ST may separately demand that the Target Company make an announcement under the listing rules of SGX-ST, if the Target Company is subject of rumour or speculation about a possible offer, or if there is undue movement in the share price of the Target Company or a significant increase in the volume of share turnover.

The Code provides that there must be absolute secrecy before an announcement. All persons privy to confidential information, particularly relating to the Offer must treat that information as secret and may pass it to another person only if it is necessary to do so and if that person is made aware of the need for secrecy. No person who is privy to such information should make any recommendation to any other person about dealing in the relevant securities. All such persons must conduct themselves so as to minimise the risk of an accidental leak of information.

Meetings and Dealings with the Media

During the Offer Period, the Target Company may hold meetings with or briefings for shareholders of the Target Company, analysts or fund managers, so long as no material new information is provided and no significant new opinions are expressed. In addition, the Code requires a representative of the financial adviser to the Target Company to be present at these meetings to confirm to the SIC within the prescribed timelines whether any material new information was provided and whether any significant new opinions were expressed.

In the event any material new information is provided or significant new opinions are expressed at such a meeting, the Target Company must issue a circular giving details and bearing the directors' responsibility statement referred to above to the shareholders of the Target Company immediately afterwards.

Given the requirements of the Code in respect of such meetings or briefings, the Target Company will typically prepare the contents of such meetings or briefings (e.g., the script, presentation materials etc.) in strict consultation with its advisers to ensure that no new material information is provided or significant new opinions are expressed.

The Code requires the Target Company (including its directors and management) to take particular care not to release new information during interviews or discussions with the media, as any new information released must be provided by the Target Company to all shareholders in the form of a circular to shareholders and, where appropriate, through a paid newspaper advertisement.

In view of the requirements of the Code, the contents of any information given to the press in press conferences or otherwise are usually monitored carefully and as a practical matter, the Target Company should limit the number of people authorised to deal with the press and ensure that such authorised persons are familiar with the requirements of the Code.

Shareholdings and Dealings by Directors

Dealing in the securities of the Target Company by persons with confidential price sensitive information may constitute insider trading under the SFA, which may subject such persons to severe criminal and civil liabilities.

In addition, under the Code, any person, not being the offeror, who has confidential price sensitive information concerning an actual or a contemplated offer between the time when there is reason to suppose that an approach is contemplated and the announcement of the approach, the offer or termination of the discussions, shall not deal in the securities of the Target Company.

The Code also contains detailed rules regarding the disclosure of dealings in securities of the Target Company during the Offer Period by any of the associates of the Target Company (as defined in the Code), including directors of the Target Company. As a practical matter, the directors of the Target Company are typically advised to refrain, and to take steps to procure that the associates of the Target Company refrain, from dealings in the securities of the Target Company during the Offer Period, without consulting in advance the advisers of the Target Company.

Liability for Misleading Statements and Other Actions

In addition to the provisions in the Code to the effect that all documents issued and statements made during the course of the Offer are to be of the highest standard of accuracy, it is important to note that any misrepresentation in such documents or statements may lead to responsible parties incurring liability under general tort and contract law on misrepresentation. Further, directors of the Target Company may be subject to criminal liability under the SFA if any misrepresentation in such documents or statements amounts to market manipulation or creation of a false market.

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