The Third Asian Roundtable on Corporate Governance
Singapore, 4th – 6th April 2001

"The Role of Boards and Stakeholders in Corporate Governance"

Country Paper for Singapore

Associate Professor Victor CS Yeo
Head, Division of Business Law
Nanyang Business School
Nanyang Technological University
acsyeo@ntu.edu.sg

Associate Professor Pearlie MC Koh
Nanyang Business School
Nanyang Technological University
amckoh@ntu.edu.sg

THE ROLE OF THE BOARD – REGULATORY ENVIRONMENT AND BOARD PRACTICE IN SINGAPORE*

INTRODUCTION

The Board of Directors plays a pivotal role in corporate governance. The duties imposed on directors, the choice of Board members, Board composition, the interaction between members, the roles and responsibilities that the Board as a whole and individual members undertake etc all have a significant impact on the efficacy of the Board in fulfilling its functions. This paper discusses the regulatory environment within which Boards of listed companies in Singapore operate. It summarises the duties, roles and responsibilities imposed on and undertaken by Boards and directors in Singapore and highlights key aspects of Board processes and practices.

THE GENERAL LEGAL FRAMEWORK GOVERNING DIRECTORS

Overview

Companies in Singapore are regulated in part by the common law, and in part by the Companies Act (Cap 50)[1]. In addition, listed companies are subject to such pronouncements of the Singapore Exchange as are found in the Listing Manual. Whilst the Manual does not have legislative force, the Securities Industry Act (Cap 289) makes it obligatory for listed companies to comply with its provisions and other exchange rules. Compliance is enforced by means of an appropriate injunction applied for by the Monetary Authority of Singapore or by the Singapore Exchange.[2]

The Companies Act requires every company to have a Board of directors. This is an implicit rather than an explicit requirement as the Act presumes the existence of a Board. Singapore companies operate on a unitary board system. The regulatory framework does not provide for a supervisory board or committee that undertakes the role of monitoring the directors. Supervision of the Board is essentially left to shareholders and, to some extent, regulatory bodies, creditors and other interested parties.

What the Act prescribes is the formal legal model, one that envisages the Board being involved in the day-to-day management of the company's business and making decisions collectively. In practice, the Boards of most large public listed companies play a supervisory rather than a managerial role, setting broad policy decisions. Extensive powers are often delegated to one or more managing directors, the chief executive officer and to other senior executives. This fact is implicitly recognised

* This paper was written specifically for the OECD Third Asian Roundtable on Corporate Governance, "The Role of Boards and Stakeholders in Corporate Governance", Singapore 4th – 6th April 2001. The authors have focused their discussion on the list of issues indicated in the "Guidelines for Country Papers" furnished by the OECD.

[1] Unless indicated otherwise, all sections referred to in this paper pertain to the Singapore Companies Act (Cap 50).

[2] See s 20 of the Securities Industry Act: a person aggrieved by a listed company's failure to comply with the Listing Rules is also given the standing to apply for an injunction under this section.

under the regulatory regime of the Companies Act as it includes, in its definition of the term "officer", not only the directors of the company and the company secretary, but also other persons employed in an executive or managerial position[3]. The Act imposes statutory duties and obligations on not just directors but on other officers as well, thus ensuring that non-director executives are also subject to the same statutory standards expected of directors in relation to specified matters[4].

Directors

The term "director" is defined in the Singapore Companies Act as including any person, who occupies the position of a director, by whatever name called. Hence, anyone who purports to act as a director, whether or not formally appointed, will be deemed a director in law. Also included in the definition is what is often referred to as a "shadow" director. This would be a person in accordance with whose directions or instructions the directors of the company are accustomed to act. A controlling shareholder who is able to exert such influence that the Board is accustomed to complying with his instructions would most likely be classified as a "shadow" director.

The term "executive director" is not defined for general purposes in the Act. For the purposes of the appointment of an audit committee, the Act defines a "non-executive director" as a director who is not an employee of and does not hold any other office of profit in, the company[5] in conjunction with his office of director and his membership of an audit committee. By implication, executive directors are directors who, in conjunction with their office as directors, hold an office of profit in the company or are employed in an executive capacity by the company.

The Companies Act requires that every company incorporated in Singapore is to have at least 2 directors, one of whom must be ordinarily resident in Singapore. The term "ordinarily resident" is not defined in the Act. It would be reasonable to presume that residence with an element of continuity is required. Reference to the Singapore Income Tax Act (Cap 134) may be instructive. The Income Tax Act defines 'resident in Singapore' as residing in Singapore in the preceding year, except for reasonable temporary absences. Persons who are physically present or employed in Singapore for at least 183 days during that year are considered resident.

Qualifications

In Singapore, only natural persons can be appointed to the Board of directors (s 145(2)).[6] The law does not prescribe any other minimum positive qualification beyond the requirement that the appointee be of full age and capacity. This refers to a person who has attained the majority age, which is 21 years in Singapore. In the case of public companies and their subsidiaries, a person who is of or over the age of 70

[3] 'Officer' is defined in s 4 as including any director or secretary or a person employed in an executive capacity by the company.
[4] See, for example, ss 157, 339 & 340 of the Companies Act.
[5] Including any subsidiary or associated company of the company (s 201B(10)).
[6] This, however, does not preclude corporate bodies from being "deemed" as "shadow directors" under the s 4 definition of "directors". This is relevant for the purposes of establishing whether directors are in breach of their statutory duties.

cannot act as a director or be appointed as a director. The general meeting may, however, by a resolution passed by at least a 75% majority, vote that such a person be appointed or re-appointed. The appointment is to last only until the company's next annual general meeting (s 153).

The Companies Act does not stipulate that directors of a company must hold shares in the company. The articles of the company may however require that the directors obtain a certain number of shares in order to qualify as directors. Where such a provision is present, the Act requires the directors to obtain their share qualification within 2 months after their appointment or such shorter period as is fixed by the articles (s 147).

Whilst the legislation does not require positive qualifications for a person to be appointed as a director, it does stipulate certain circumstances in which persons who are regarded as unsuitable are disqualified from acting as directors of and being involved in the management of a company. The disqualification provisions are summarised in **Table 1** below:

Table 1 – Circumstances giving rise to disqualification

Section	Circumstances giving rise to disqualification	Duration
148	Bankruptcy, whether in Singapore or elsewhere	Duration of bankruptcy unless leave of court or official assignee is obtained
149	On a disqualification order being made on the application of the Minster for Finance or the Official Receiver against directors of companies that have become insolvent and who are found by the court to be unfit to act as directors	5 years from date of order
154	• Where a person is convicted of an offence involving fraud or dishonesty punishable with imprisonment for three months or more. • Disqualification pursuant to an order of court where a person has been convicted of any offence in connection with the formation or management of a company.	5 years from date of conviction or date of release from prison
155	A person who has been persistently in default (as defined in the Act) in relation to relevant requirements of the Act	5 years from date of latest conviction or order unless leave of court obtained

Appointment, retirement and removal

The first 2 directors of a company incorporated in Singapore must be named in the memorandum or articles of association (s 145(3)). The Act does not prescribe the manner in which subsequent directors are to be appointed. Appointments must be made in accordance with the company's articles of association. These, however, differ from company to company. Most companies provide for appointment to be by a resolution at a general meeting. Some companies permit the Board to make

subsequent appointments. For example, the "default" articles[7] allow the Board to fill casual vacancies or to appoint additional directors provided the total number of directors do not exceed that prescribed by the articles. Any director so appointed holds office only until the next AGM when he is eligible for re-election. It is also not uncommon to find articles allowing selected parties (usually major shareholders) to "nominate" specified persons to act as directors and subsequently have their nominees appointed as directors.

It is also a common practice to provide for the rotational retirement of some of the directors (usually one-third) at every annual general meeting. Retiring directors can be re-appointed and the articles usually provide for the automatic reappointment of the retiring director in the absence of an alternative election. It is not permissible, in the case of directors in public companies, to elect 2 or more persons as directors in a single resolution unless a resolution that such a motion be made is unanimously agreed to (s 150). This restriction does not apply where the appointment is made by a ballot or poll.

Directors of listed companies often serve for an unspecified number of terms. In a survey of listed companies commissioned by the Singapore Institute of Directors[8] ("the SID 2000 survey"), it was found that on average, the companies surveyed had Chairmen who have served on their Boards for between 8 - 9 years whilst the non-executive directors had served between 7 - 8 years. It is necessary, however, for listed companies to have articles that provide for elections every year and for the retirement of all directors (except the managing director) at least once in three years[9]. Where managing directors are appointed for fixed terms, the term should not exceed five years. Other than this, there is generally no distinction between the appointment and retirement of executive and non-executive directors.

The articles of association will also usually specify the manner in which directors may be removed from the Board. It is common for the articles to provide for the power of the general meeting to remove directors before the end of their term. The shareholders of public companies are also given statutory powers to remove directors by ordinary resolution notwithstanding anything to the contrary in the articles or in the directors' service contracts (s152). This provision recognises, to some degree, the ultimate control of the shareholders in public companies, even where shareholders would normally have surrendered effective managerial control to the Board.[10]

---

[7] Table A in the Fourth Schedule. Section 36 provides for the application of Table A, where there are no registered articles and where there are, in so far as these do not exclude or modify the provisions in Table A. The Listing Manual also requires all listed companies to have, as part of their articles, the provisions set out in Appendix 5 of the Manual.

[8] *Singapore Board of Directors Survey 2000*, Singapore Institute of Directors & Egon Zehnder International, September 2000. The survey involved sending questionnaires to the Chairmen of 391 SGX listed companies. 102 responses were obtained providing information on a total of 692 directors (421 Non-Executive Directors and 275 Executive Directors). The responses came from companies that were representative of all major industrial sectors of varying sizes. Since the data found in this survey is the latest and most comprehensive to-date on many of the issues discussed here, a significant portion of the results of the survey will be quoted in the rest of this paper.

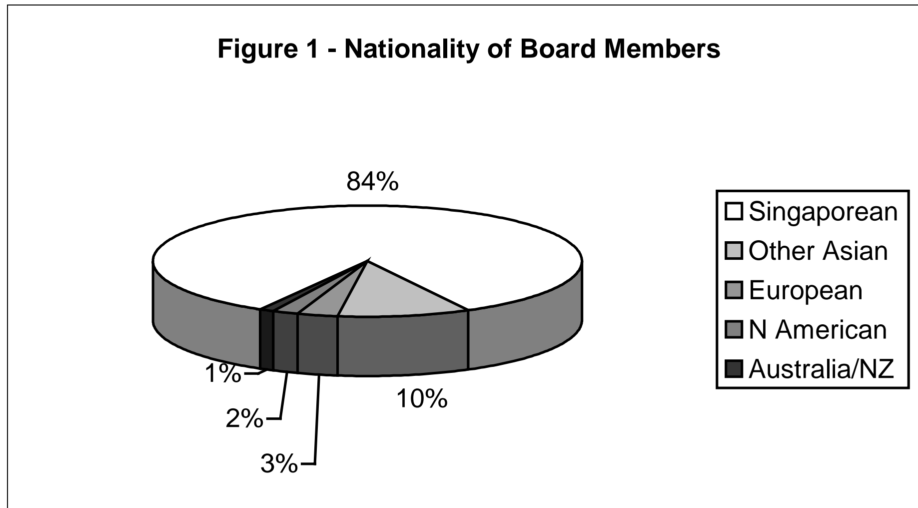
[9] Listing Manual, Appendix 5, Paragraph 9.6.

[10] Removal in exercise of the right under the articles or the statutory right may or may not constitute breach of a director's service contract with the company. The ultimate cost of removal (including payment of a golden handshake) may turn out to be very large indeed. It would then be for the company to decide if the desirability of removal justifies the costs incurred.

COMPOSITION OF THE BOARD

Board composition and selection criteria

There is significant variance as to the composition of Boards of listed companies. Data from the SID 2000 survey shows that the majority of directors (84%) are Singaporean. There is also a significant number (10%) who are from other Asian countries. A relatively small percentage are of Western origin. (See **Figure 1**)



Source: Singapore Board of Directors Survey 2000

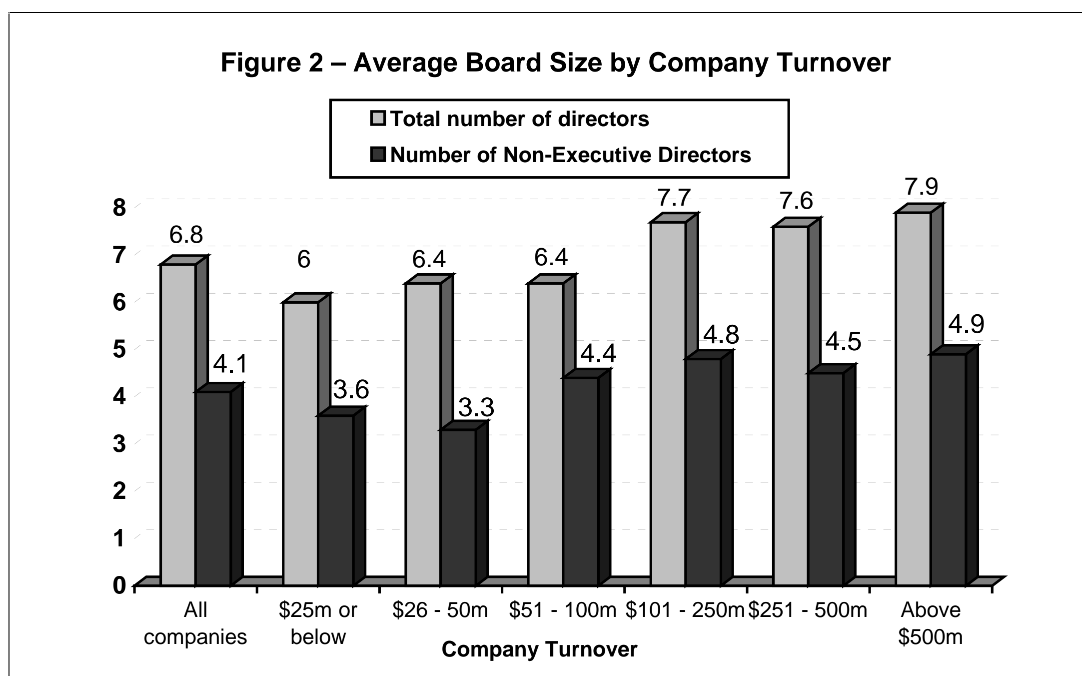
Another finding of the SID 2000 survey was that Board sizes range from between 4 to 14 members. The average size of the Board stood at 6.8. As would be expected, the survey indicated that the total Board size is higher for larger companies, with the number averaging about 8 directors for companies with a turnover of more than S$100 million. The survey also found that the average ratio of non-executive directors and executive directors on the Board stood at 4:3. (See **Figure 2**)

Different Boards are made up of members with varying forms and levels of expertise. A variety of factors influence the selection of new Board members. Important selection criteria include experience as a senior company manager or partner in a relevant professional firm and possession of knowledge of finance or law. Also important are factors such as previous experience as a company director, possession of knowledge of the company's existing business and knowledge of a specialised business area. The members of the Board of directors, in particular the Chairman, were found to be very influential in the ultimate decision whether to appoint or not. In the consultation paper prepared by the Corporate Governance Committee[11], a Code of Corporate Governance ("the proposed Code")[12] was proposed, in which it was suggested that Boards should comprise directors who as a group provide core competencies such as accounting or finance, business or management experience,

[11] This is one of three private-sector-led committees set up by the Ministry of Finance (MOF), the Monetary Authority of Singapore (MAS) and the Attorney-General's Chambers to review the corporate regulatory framework, disclosure standards and corporate governance in Singapore.

[12] The Code and the recommendations are, at the time of the writing of this paper, being reviewed by the authorities. The Consultation Paper and the Proposed Code are available for viewing at MAS website.

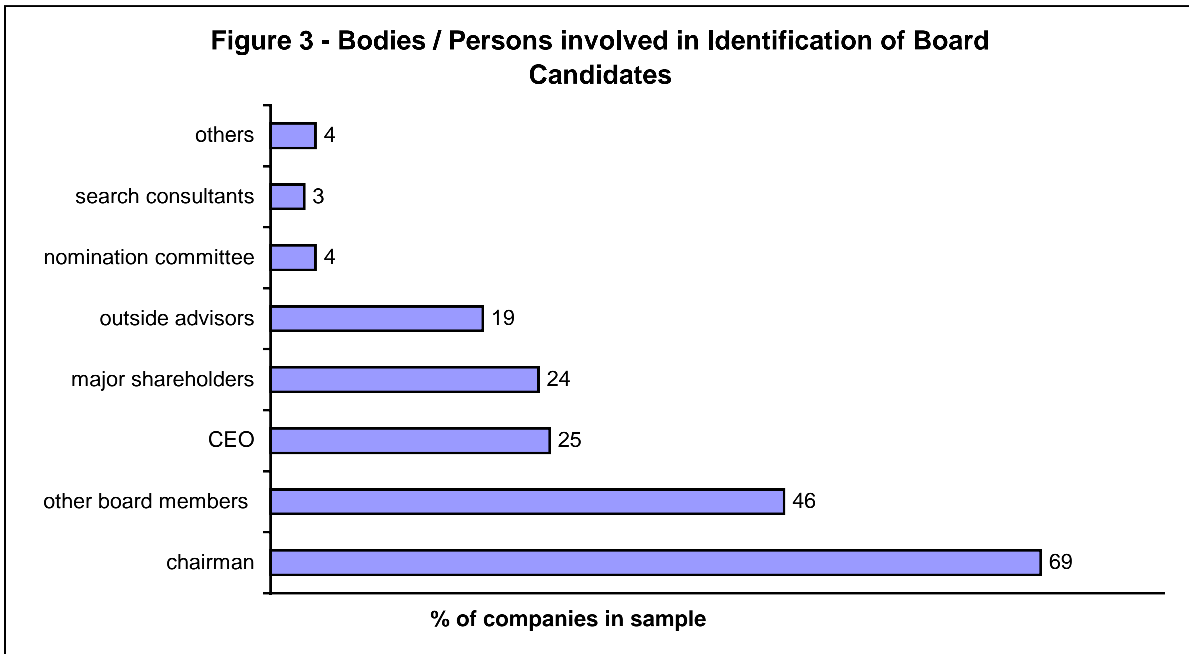
industry knowledge, strategic planning experience and customer-based experience or knowledge[13].



Source: Singapore Board of Directors Survey 2000

New directors are mainly selected based on their experience and knowledge. The Chairman identifies Board candidates in the majority of appointments. In the SID 2000 survey, the chairman helped identify the candidate in 69% of the most recent appointments of the companies surveyed. The other Board members did identification in 46% of the appointments. However, only a small minority (16%) of the listed companies formalises the way in which they identify suitable candidates by drawing up a candidate or job specification in advance. Where a job specification is prepared, it was found that the Board members, in particular the chairman and the Chief Executive, are most influential in drawing up the specifications. Identification of suitable candidates made by a nomination committee is found in only 4% of the listed companies who responded to the survey. (See **Figure 3**). The proposed Code recommends that all companies should establish Nominating Committees to make recommendations to the Board on all board appointments. The purpose behind the suggestion is to make the process of board appointments transparent and provide for the assessment of the effectiveness of the Board and of individual Board members.

[13] Proposed Code, Board Matters, Guidance note 2.3.



Source: Singapore Board of Directors Survey 2000

Independent Directors

The presence of a strong independent element on the Board is recognised as being an important corporate governance mechanism. There is, however, no legal requirement for companies to have "independent directors" although there is a related requirement vis-à-vis audit committees (see discussion below on Audit Committees"). The need to have a strong independent element on the Board was one of the issues raised by the Corporate Governance Committee and covered in the proposed Code. The Committee recommended that independent directors make up at least one-third of the Board. The rationale for the recommendation is that such independent Board members play an important role especially in areas where the interests of management, the company and shareholders diverge, such as executive remuneration, corporate control and the audit function.

A distinction is generally made between Non-executive Directors and Independent Directors. A non-executive director may not necessarily be factually "independent". "Independence" is not defined in the legislation. The proposed Code attempts to provide some guidance[14]. An independent director is defined as "one who has no relationship with the company or its affiliates that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgement with a view to the best interests of the company". Four examples of relationships which would deem a director not to be independent are given. They are:

1. A director being employed by the company or any of its affiliates for the current year or any of the past three years;
2. A director accepting any compensation from the company or any of its affiliates other than compensation for Board service for the current year or any of the past three years;

[14] "Board Matters", Principle 2, Guidance Notes 2.1.

3. A director being a member of the immediate family of an individual who is, or has been in any of the past three years, employed by the company or any of its affiliates as an executive officer; or
4. A director being a partner in, or a significant shareholder with 5% or more in shareholdings, or an executive officer of, any for-profit business organisation to which the company made, or from which the company received, significant payments in any of the past three years. Payments for transactions exceeding, in aggregate, $200,000 are deemed significant.

THE RESPONSIBILITIES OF THE BOARD

General Board Responsibilities

It is generally accepted that the main responsibility of the Board is to set, establish and implement broad policies in line with the basic objectives outlined in the company's memorandum and articles of association[15]. The Board is also responsible for the appointment of the key executive positions of the company and is expected to supervise these persons and to review their performance and remuneration. Being fiduciaries of the company, Board members are tasked with safeguarding the assets of the company and are required to periodically report to shareholders the status of the company's affairs. In addition to these general duties, most Board members also sit on one or more Board committees. These committees perform specific roles and functions (see discussion below under "Board Committees"). In the SID 2000 survey, views of Chairmen of listed companies regarding whether Board directors fully understood their roles and responsibilities were sought - 97% of the 102 Chairmen who responded either strongly agreed (43%) or agreed (54%) that directors did understand their roles and responsibilities. 3% remained neutral on the question.

The amount of time spent on the various responsibilities entrusted to the Board of directors differs from company to company. There are no statistics currently available on the proportion of time devoted to the different activities of the Board. All listed companies, however, have full Board meetings at least twice a year that are convened primarily to prepare and discuss the contents of the half-year and full-year financial reports. The time in such meetings is devoted mainly to considering the reports in detail and to ensure compliance with reporting requirements. In particular, much effort is taken to ensure that the commentary on the current year and future prospects of the company, which is one of the mandated matters to be included in the report, is accurate and not misleading. The majority of the time spent at other full Board meetings deal primarily with strategic planning and monitoring activities. Save for some companies (particularly those in the banking sector[16]), relatively less time is devoted to remuneration and nomination matters. This is expected to change should the proposed Code be accepted and implemented, as there is significant emphasis on

---

[15] For a summary of the role that Directors in Singapore are expected to play, see paragraphs 3-100 & 9-300, Singapore Institute of Directors Members' Handbook, CCH, 2000 (CD-Rom).

[16] The banking sector is presently undergoing substantial regulatory reform and restructuring. One of the reforms relates to the use of nominating committees for the appointment of directors. See MAS Notice no 622, Nominating Committees and Appointment of Directors and Chief Executives of Singapore Incorporated Banks, 17 July 1999.

nomination and remuneration matters in the Code[17]. Board disclosures are seldom discussed formally at Board meetings as well unless the matter relates to a major transaction that falls under the purview of disclosures mandated by the SGX Listing Manual. Instead, it is the general practice to deal with general disclosures by way of 'circulation'[18] and thereafter summarily dispose of the matter at meetings.

Directors' duties

Directors' duties may be imposed either pursuant to a contract that the director has with the company or by operation of law. Many directors do not have formal contracts with their companies specifically pertaining to their duties as directors. Letters of appointment, where given, do generally lay down broadly the roles and responsibilities expected of the directors in addition to the tenure of the appointment and the remuneration and benefits of the office.

Directors' duties that are imposed by operation of law are founded on a combination of statutes and case law and may be classified in many different ways. In the context of this paper, we shall discuss directors' duties in relation to the:

- duties of skill, care and diligence;
- fiduciary duties; and
- administrative duties

Duties of Skill, Care and Diligence

Directors are expected to perform their duties with reasonable skill, care and diligence. This duty may be traced to the landmark English case of *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 507. The three broad propositions of what is expected of a director in relation to these duties are as follows:

a. A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.
b. A director is not bound to give continuous attention to the company's affairs, i.e. his duties are of an intermittent nature.
c. A director is entitled to trust an official to perform such duties as can be properly entrusted to him in accordance with the articles.

It may be seen from proposition (a) that the standard laid down by the case in relation to a director's duty to exhibit reasonable skill in the performance of his duties is of a rather 'subjective' nature. The rationale for this relates to the argument that, since it is the shareholders who appoint the directors, they should bear the consequences of any lack of aptitude and ability on the part of the director in running the company.

Directors are also required to act with reasonable care in the discharge of their duties. They are not, however, obliged to act with any more care in the affairs of the company than they would take in the conduct of their own affairs. This also suggests the adoption of a standard that may be subject to the knowledge, skill and experience

[17] See "Remuneration Matters" in the proposed Code.

[18] This refers to the practice of circulating resolutions (usually of a procedural nature) to each Board member for their individual approval without calling for a formal meeting. Most companies have articles that allow for the dispensation of meetings in circumstances where there is unanimous approval of resolutions.

that the directors in question possess. With the development of securities markets and the growing recognition of the office of a director as that of a 'professional office', a more stringent test may be preferred in today's corporate environment. Developments in the UK and Australia indicate a movement towards the imposition of an objective standard on directors in this regard. The law should not only have regard to the directors' actual abilities. It should also measure their performance against what may be reasonably expected of a person carrying out the same functions as are carried out by them in relation to the company[19]. It is suggested that the law in Singapore is likely to adopt the approach taken in these other jurisdictions.

In addition to the principles laid down by the *City Equitable* case, s 157(1) of Singapore's Companies Act specifically places an obligation on directors to use reasonable diligence in the discharge of the duties of their office. Breach of this duty exposes the director to both civil liability and penal sanctions[20].

Fiduciary duties

Directors, by virtue of their positions of power and control over corporate assets and affairs, are regarded as fiduciaries of the company. They therefore owe the following fiduciary duties to the company[21]:

- the duty to act "in good faith and in the best interests of the company";
- the duty not to fetter their discretion;
- the duty to avoid conflicts or potential conflicts of interests;
- the duty not to make "secret" profits out of one's position as a director; and
- the duty to utilise directorial powers for proper purposes.

<u>Duty of "good faith"</u>

Case law imposes a general duty on fiduciaries to act in "good faith' in the best interests of the company. This duty is essentially one of loyalty and honesty. It is reflected in s157(1) of the Companies Act as the duty to "at all times act honestly…in the discharge of his duties". Directors are expected to make decisions that they reasonably believe to be in the best interests of the company[22], either as an entity in itself, or as a collective body of shareholders, both present and future. They are required to balance the short-term interests of profitability with the long-term viability of the business. The Court does not usually attempt to assess the commercial soundness of the directors' decisions in absence of evidence to suggest dishonesty or gross negligence. The duty to act in good faith would be fulfilled if it were shown that an honest and intelligent person, in the position of the directors of the relevant company, would have reasonably believed that the act undertaken was for the benefit of the company.

Strict common law rules inherited from the UK suggest that the interests of the company's shareholders are paramount in determining what constitutes the "interests of the company". This has been slightly modified in the context of the Companies Act

---

[19] See, for example, *Re D'jan of London Ltd*, [1994] 1 BCLC 561 and s 214(4) of the UK Insolvency Act and *AWA Ltd v Daniels* (1992) 10 ACLC 933.

[20] For a recent illustration of the application of the section, see *Jurong Readymix Concrete Pte Ltd v Kaki Bukit Industrial Park Pte Ltd*, [2000] 4 SLR 723.

[21] Again, there are many ways by which such duties are discussed and classified. The approach taken here is intended to give the reader a quick overview of the major aspects of a director's fiduciary duties and is not totally comprehensive.

[22] See *Kea Holdings Pte Ltd & Anor v Gan Boon Hock* [2000] 3 SLR 129.

and directors are permitted to have regard to the interests of the company's employees in exercising their powers (s159(a)). Directors also owe a statutory duty to creditors not to engage in fraudulent or wrongful trading[23] (ss 340 and 339(3)). In addition, the Singapore courts have also taken a practical view of the matter in the light of modern-day corporate practice and have acknowledged the need to allow directors, in limited circumstances, to take into account the interests of the corporate group as well[24]. What is left unclear is the extent to which directors are permitted to take into account the interests of society (eg vis-à-vis social, environmental and charitable[25] issues). It is generally assumed that directors are permitted to do so and many companies in Singapore actively engage in activities that benefit society as a whole. Nevertheless, the duty to shareholders remains of paramount importance.

Duty not to fetter discretion

Directors are expected to actively apply their minds to matters concerning the company so as to fulfil their duty to act in the best interests of the company. They cannot be said to be doing this if they bind or fetter themselves from freely exercising their discretion in relation to corporate matters. Directors are therefore not permitted to agree to vote or act in accordance with the directions of another person. This presents some practical problems in the local context in relation to nominee directors. Many such persons are employees or agents of their sponsors and are sometimes expected to take instructions from their employers in relation to their responsibilities as directors. A practical approach has also been taken towards this predicament. While nominee directors are not permitted to place the interest of their sponsors above those of the company of which they are directors, it is nevertheless permissible for such nominees to take into account the interests of their sponsors so long as there is no conflict of interest arising between the company and the sponsor.

Duty to avoid conflicts of interests

Directors should not place themselves in situations where their personal interests may conflict with their duties without proper disclosure of these interests to the company. An instance that may give rise to such conflict is where directors either directly contract with the company or have an interest in contracts that the company enters into. Another conflict situation arises where directors are involved in the management of businesses that are in potential competition with the company's business or where they are in some other way associated with the competing business. Such conflicts must be disclosed to the company. The Companies Act specifically requires directors to disclose, at a meeting of the directors of the company, any interests that they may have in contracts or proposed contracts that the company enters into (s 156(1)). Similar disclosures must be made should the directors hold any office or possess any property whereby duties or interests may be created in conflict with their duties or interests as directors of the company (s 156(5))[26]. The interests of a director's family

[23] It has been argued, however, that the wrongful trading provisions currently do not afford adequate protection to creditors. For a detailed discussion of these issues, see Victor Yeo and Joyce Lee, "Insolvent trading – A comparative and economic approach", (1999) 10 Australian Journal of Corporations Law, 216.

[24] See, for example, *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313.

[25] Although s 23 of the Companies Act explicitly provides companies with the power to make patriotic and charitable donations, it is still an open issue as to whether directors have to exercise these powers 'in the interests of the company' as well.

[26] For a recent example of the application of these sections, see *Yeo Geok Seng v PP*, [2000] 1 SLR 195.

are to be treated as an interest of the director under these provisions. Failure to make such disclosure would make the director liable for an offence. This disclosure is to be recorded in the minutes of the meeting at which the disclosure is made.

In addition, case law requires that conflicts of interests be disclosed to members at a shareholders' meeting. Any action that directors wish to take in relation to such conflict must generally also be approved by the shareholders. It is recognised that this may be administratively burdensome, particularly if the matters are in respect of contracts of insignificant amounts and which are entered into pursuant to the ordinary business of the company. Some companies attempt to get round this problem by means of a provision in their articles of association that essentially waives the need for disclosure at shareholders' meetings where adequate disclosure has already been made to the Board. Although the practicality of such an article is unlikely to be questioned, its validity has yet to be tested in the Singapore courts[27].

Apart from the legal disclosure requirements outlined above, directors of listed companies are obliged to ensure that the disclosure obligations laid down in the SGX Listing Manual are complied with where relevant. The Manual mandates the making of public announcements and the seeking of shareholders approvals for specified transactions and activities[28]. There are also specific provisions in the Companies Act that are intended to deal specifically with potential conflict scenarios. For example, companies (other than exempt private companies) are generally prohibited from making loans to their directors or directors of related companies or from assisting these directors in obtaining loans by furnishing guarantees or security on their behalf (s162). Similar prohibitions apply in relation to loans or assistance to companies in which the lender's director or directors have a significant (20% or more) stake (s163).

<u>Duty not to make "secret profits"</u>

As fiduciaries of the company's assets, directors are not allowed to profit from their position without the company's approval. Breach of this rule exposes the directors to liability to "account" for such profit to the company by handing the profits over to the company's coffers. Clear illustrations of such activity would be the acceptance of bribes and secret commissions. Such actions may also possibly come within the ambit of the Prevention of Corruption Act.

Another form of profiting from one's position as director is through the taking up of a business opportunity that becomes available through the company. The 'usurping' of such an opportunity is prohibited. The duty not to take advantage of such an opportunity must be observed even where the company is itself unable to take advantage of the opportunity. It persists even after the directors have resigned from their office[29], particularly where it may be shown that the resignation was prompted by the desire to take advantage of the opportunity[30]. The consent of the company must be sought before a director can exploit the opportunity for his own benefit.

---

[27] Such articles are, however, widely thought to be valid. It is observed that Chapter 9A of the Listing Manual implicitly does away with the common law disclosure requirement for transactions that are below 'Threshold 1' value.

[28] See, in particular, Chapters 9 – 12 of the Listing Manual.

[29] *Hytech Builders Pte Ltd v Tan Eng Leong & Anor* [1995] 2 SLR 795.

[30] See *Personal Automation Mart Pte Ltd v Tan Swe Sang*, Suit No 777 of 1999 (unreported decision of the High Court of Singapore).

Section 157(2) of the Companies Act is also relevant here. That section prohibits directors from making improper use of information acquired by virtue of their position as such to gain an advantage for themselves or for any other person or to cause detriment to the company. Both criminal and civil sanctions are envisaged under the section. Insider trading provisions found under s103 of the Securities Industry Act are premised on the same principle.

Duty to Act for Proper Purpose

Finally, directors must use the powers entrusted to them for the purposes associated with the entrustment and not for any ancillary purpose. Thus, for example, the power to issue shares must be utilised for the purposes of raising capital and not to effect a resultant shift in the concentration of voting power to specific members. The good and honest intentions of the directors and the beneficial effects of any action taken are irrelevant in deciding whether directors have utilised their powers for proper purposes.

Administrative duties

In addition to the above, the Companies Act prescribes an array of administrative duties that fall within the ambit of a director's responsibilities. These include general duties of disclosure (s165); the proper keeping of accounting records (s199); the preparation of financial statements for the purpose of the company's annual general meeting (s201); and the proper calling and conduct of company meetings (ss 174 & 175). Directors may also be taken to task should the company be in breach of any obligations imposed by the Companies Act and the Listing Manual of the SGX.

Consequences of breach of duty.

Where directors are in breach of their "Common law" duties, they are liable to pay damages to the company for any consequential loss suffered by the company. Where they profit from the breach, they are required to account for the profit by paying it over to the company. It is also open for an injunction to be taken out should it be found that directors are about to act in breach of their duties or outside the objects or powers of the company[31]. Similar remedies are provided for by legislation in relation to some of the legislative duties owed[32]. In addition, most sections that impose administrative or substantive duties on directors have fines and incarceration as possible criminal sanctions. There is also a 'default' general penalty provision (maximum fine of $1000) to deal with breaches for which sanctions have not been expressly provided (s 407). Finally, it is possible for directors to be disqualified from holding office as such or from taking part in the management of any corporation if they are adjudged guilty of specified breaches[33].

Where the breach results in a right to civil action, it is generally open to the company to waive the breach and not pursue the matter, the only exceptions being where the breach consists of an act that is outside the company's capacity or where the directors, being in control of the company, excuse themselves in a manner that gives rise to a

[31] See s 25 of the Companies Act.
[32] See, for example, s157(3).
[33] S 154. This is in addition to other circumstances that may result in disqualification.

"fraud on the minority"[34]. It is also open to the directors to make an application to the court for relief against a civil claim if they can show that they acted honestly and reasonably in the circumstances (s 391). This relief is at the discretion of the court and is not available in cases of criminal prosecution[35].

Enforcement of director's duties

In Singapore, the task falls, more often than not, on the regulatory authorities to take action against errant directors. Such actions are by way of criminal prosecutions. Occasionally, companies do initiate civil suits. These are usually against former directors and are in relation to the directors' negligence or situations where fraud or dishonesty is alleged. Many of such suits are initiated by liquidators upon the company's insolvency where the company's collapse is attributed to the incompetence or fraudulent conduct of the director. Civil actions by a company's shareholders against directors for misconduct are uncommon[36]. This may be attributed to the absence of a suitable mechanism for derivative actions in relation to listed companies[37]. The relatively prohibitive costs associated with commencing legal action and a non-contingent fee based legal fee structure are also contributing factors. In addition, the relatively low and dispersed shareholdings of institutional investors[38] in the local market presently results in there not being any significant active monitoring by such investors.

Some of these concerns were highlighted recently in the Corporate Finance Committee Report[39]. The Singapore government generally agreed with the recommendations put forward in the report and affirmed the need to equip investors with the legal tools for them to take civil action against errant directors instead of merely relying on the regulators. One example of efforts taken in this regard is in the recent changes to insider trading laws which provide for a more conducive framework for civil litigation[40].

Liability for misleading statements

Section 401(2) of the Companies Act makes it an offence for any person to wilfully make or authorise the making of a statement that is false or misleading in any material particular in relation to any return, report, certificate, balance-sheet or any other document required by the Act. Similarly, officers who, with intent to deceive, make or

---

[34] This phrase is commonly taken to refer to situations where persons who are in control of the company act in a manner that results in a "fraud" being perpetrated against minority shareholders. "Fraud" is used loosely in this context to refer not only to fraud at common law but also to situations where power has been abused.

[35] *Ideaglobal.com v Michael Hughes Bullington*, OS 289 of 2000, (unreported).

[36] There are, however, a relatively higher number of cases of actions for oppressive conduct taken out under s 216 of the Companies Act by minority shareholders in private companies.

[37] There are substantial hurdles associated with the common law derivative action. The main provision that deals with derivative actions in the Companies Act is s 216A, which applies only to unlisted companies. The only other provision under which such an action may possibly be brought is s 216, which caters more towards actions relating to oppression of minority shareholders.

[38] Preliminary research findings by one of the co-authors of this paper indicate that institutional shareholders collectively account for approximately 27.44% of the capital in SGX listed companies. 85% of these holdings are in relation to less than 5% of the companies' shares.

[39] *The Securities Markets Final Recommendations*, Corporate Finance Committee, Financial Review Group, MAS, 21st October 1998. See in particular paragraphs 3.4 & 5.6 of the report.

[40] See the Securities Industry (Amendment) Act 2000.

furnish or knowingly and wilfully authorise or permit the making or furnishing of any false or misleading statement or reports are guilty of an offence (s 402). Common law rules pertaining to liability for fraud or negligent misstatements may also apply in these circumstances.

Changing role of the Board

The thrust towards increasing the standard of corporate governance in local corporations in the mid-1990s has had significant impact on how Boards see themselves. While the traditional "closely-held" governance structure is still prevalent in some listed companies, there has been a gradual but marked shift towards transparency and accountability towards all shareholders. Legal and regulatory changes effected during this period have contributed much towards encouraging this change in attitude. The change may also be partly attributed to the increased presence of non-executive directors on Boards of listed companies, initiated in 1990 by the legislative requirement for listed companies to have such directors as part of an audit committee on the Board. The gradually increasing separation of the Board from executive management is also causing the Board to play a more supervisory role presently as compared to a decade ago. Acknowledgement of the importance of adopting good board practices has also resulted in more emphasis being placed on issues such as Board appointments, renewal, training and remuneration.

THE DECISION MAKING PROCESS OF THE BOARD

Division of power between the Board and Management

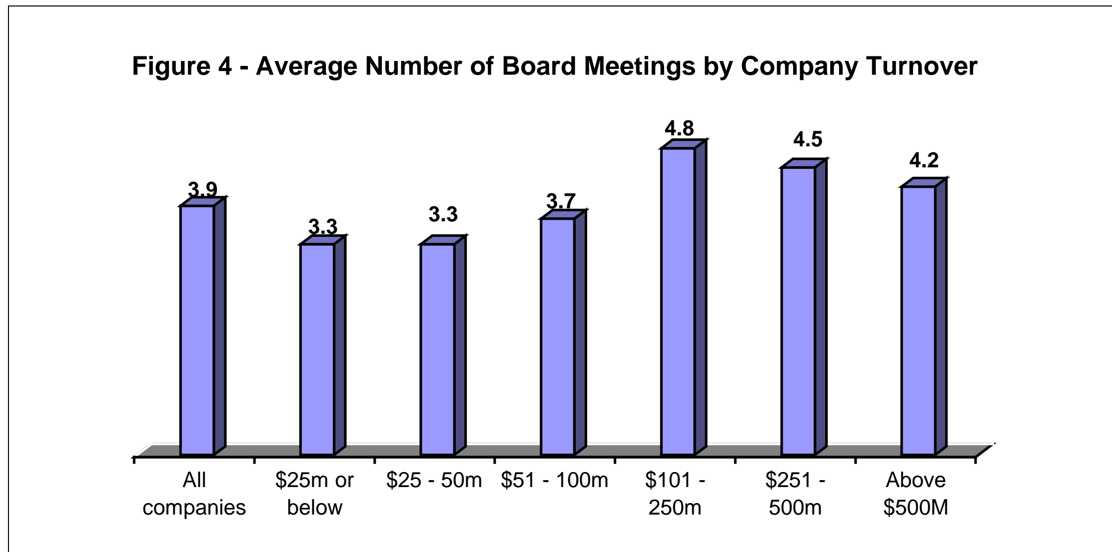
The decision-making powers of the company are generally vested in the Board pursuant to the company's articles of association. These powers of management are invariably delegated to the executive directors and other executives. The division of power between the Board and Management, however, is often not clearly demarcated. Again, there are many different practices adopted. Many companies have informal arrangements whereby matters that are not in the ordinary course of business (such as loans of significant amounts, major investments or divestments, restructuring, the opening of new product lines etc) require the consideration and approval of a full Board. It is also common for companies to furnish their executive directors with terms of references that limit their authority to commit the company to transactions and activities that involve expenditure in excess of stipulated sums. In this regard, the Listing Manual requires the scope of the borrowing powers of the Board to be expressed[41]. There are, however, still a handful of companies where the presence of a strong executive chairman reduces the significance of participation from the rest of the Board.

Board meetings and managerial reporting activity

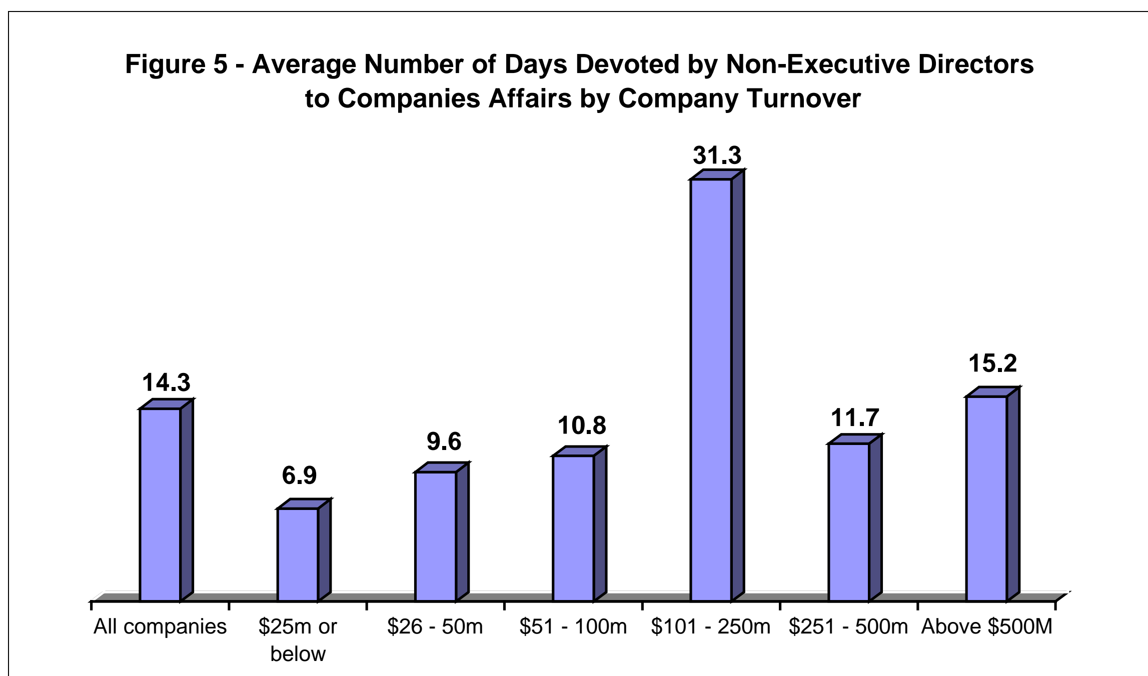
In the SID 2000 survey, its was found that, on average, Boards of listed companies met approximately 4 times a year (see **Figure 4**). The average number of days devoted by Non-Executive Directors to the company's affairs per year was 14.3 with more time generally being devoted to companies with higher dollar turnovers per year (see **Figure 5**). It is envisaged with the growing emphasis on the importance of the

[41] Listing Manual, Appendix 5.

role that such directors play in establishing good corporate governance practice, that the degree of participation is likely to increase.



Source: Singapore Board of Directors Survey 2000



Source: Singapore Board of Directors Survey 2000

Apart from the company's financial controller, the CEO and, in some instances the COO, non-director executives and managers are generally not involved in full Board meetings. Many companies have executive committees whose responsibilities are to oversee the day to day running of the company. These committees meet relatively frequently. Most managerial reporting activity takes place here. These managerial reports are minuted and subsequently circulated to the full Board for review. Where such a mechanism does not exist, managers report directly to the CEO who then has the responsibility of reporting to the Board.

Representation of other stakeholders' interests
There is no legal requirement mandating the representation of stakeholders on Boards in Singapore. Shareholders are free to choose whomever they please to sit on the Boards of their companies. They need not ensure that the interests of other stakeholders are adequately represented or protected so long as such action does not amount to oppressive conduct that may become the subject of a minority action for oppression. In practice, the guarding of the interests of other stakeholders is generally not a primary factor in deciding on Board appointments. There are many Boards, however, that have nominee directors representing either parent companies or other major shareholders and occasionally, financiers. Employees do not have any significant Board representation in Singapore companies.

Access to information
The Singapore Court of Appeal has recently held that the right of a director to inspect corporate accounts in the course of the *bona fide* performance of his duties was an absolute right[42]. In addition to the company's accounts, it is the general practice to give all directors access to any and all documents requested for by them. There is also a growing practice of consulting non-executive directors in relation to specific projects that require their particular expertise. In some companies, the practice is to periodically (usually on a quarterly basis) send management accounts to the non-executive directors. Some non-executive directors are now requesting for management accounts to be sent to them monthly. Such requests are usually acceded to where practicable. All relevant documentation pertaining to Board meetings including managerial reports, minutes of executive committee meetings etc. are also, as a matter or course, sent to all directors at least one week in advance of Board meetings.

Liability for Board decisions
Although Board actions are often taken collectively, duties imposed on directors are imposed on them individually. Liability under the common law for breach of duty can only be established by looking at the individual actions of a specific director, even where the decision was a collective one. It is therefore possible for some directors to be held liable for breach and others not liable in regard to a single collective decision. This is because of the subjective test associated with the standard required of directors[43]. For example, more is generally expected out of executive directors because of their executive connection to the company. Similarly, statutory duties are also framed to suggest individual as opposed to collective responsibility[44]. Thus, for example, even where general obligations are provided for under the Companies Act (eg the duty to keep accounting records under s 199), liability is imposed individually on "the directors or officers *responsible*" for the contravention or who are "*in default*" of compliance.

Directors also cannot be held accountable for the decisions or actions of their fellow directors. This is not to say, however, that they can sit idly by and do nothing if they are of the opinion that such a decision or action is not for the benefit of the company. They are expected to do all that they reasonably can to dissuade the rest of the

---

[42] *Wuu Khek Chiang George v ECRC Land Pte Ltd*, [1999] 3 SLR 65.
[43] See discussion above on "Directors Duties".
[44] See, for example, the duties imposed by ss 156, 157, 162 & 163 of the Act.

directors from proceeding with such action. Registering an opposing vote is also important.

Roles of Chairman and Chief Executive Officer

In the SID 2000 survey, it was found that 71% of the companies had a chairman who is also the chief executive officer (**Table 2**).

Table 2 – Profile of Chairman by Company Turnover

Profile of Chairman							
	% of companies						
	All Companies	≤$25m	$26m - $50m	$51m - $100m	$101m - $250m	$251m - $500m	> $500m
Executive	71	65	95	70	69	54	60
Non-executive	22	20	-	25	19	46	40
Others	7	15	5	5	13	-	-
Years in position	6.8	7.2	7.0	6.3	8.0	4.7	6.5

Source: Singapore Board of Directors Survey 2000

One possible explanation for this is that many of the local listed companies originated as family businesses. Share-ownership is also relatively concentrated in these companies as the founders or their successors still retain significant stakes in the companies. It has been acknowledged that this may have an impact on the governance of the company. The Committee on the Financial Aspects of Corporate Governance (the Cadbury Committee) Report (1992, UK) recommended that the offices of the chairman and the chief executive should not be held by the same person, but where they are, there should be a "strong independent element on the Board". The reason for this is that whilst the chief executive officer is charged with the day-to-day running of the company, the role of the chairman of the Board appears to be to ensure honesty and to protect the interests of the shareholders. Where these two roles are combined thus, the company loses the checks and balances, which separation theoretically provides and the likelihood of an individual having unfettered powers of decision is increased. The proposed Code contains a recommendation that these positions be separated and that a clear division of responsibilities between the CEO and the chairman be made. Companies, however, are left free to choose whether or not to separate the two roles. The recommendation is that where separation is not present, companies should appoint a lead independent director whose responsibility would be primarily to ensure that shareholders' rights are adequately protected.

BOARD COMMITTEES

As mentioned earlier, Boards are generally free to delegate their powers to committees. The only such committee mandated by legislation is the audit committee. Under recently pronounced regulations, Singapore incorporated banks are also

required to have nominating committees[45]. The need for companies to establish nominating committees and remuneration committees has also been highlighted in the Corporate Governance Committee consultation paper and the proposed Code. The types of committees usually found and the prevalence of these committees is summarised in **Table 3** below

Table 3 – Types of committees and involvement of directors

Committees	% of Companies with these committees	Average Size of Committee (Number of members)	Average Number of Board Members	
			Executive	Non-Executive
Audit Committee	100%	3.2	0.8	2.5
Share Options Committee	33%	3.3	1.5	1.8
Compensation / Remuneration Committee	28%	3.1	1.0	2.2
Strategy Committee	12%	4.3	2.3	2.1
Executive Committee	11%	3.9	2.3	1.6
Nomination Committee	7%	4.0	1.9	2.1
IT Committee	5%	4.6	2.0	2.6
Investment Committee	5%	3.6	1.6	0.9
Technology Committee	3%	3.0	3.0	0
Others	3%	3.0	1.0	2.0

Source: Singapore Board of Directors Survey 2000

Audit committees

Section 201B of the Companies Act requires every listed company to appoint an audit committee comprising at least 3 members. The audit committee is expected to function independently of the executive directors and officers and to serve as a useful channel of communication between the Board and the external auditors on matters related to the external audit.[46] The functions of the audit committee, as laid down in section 201B(5), are as follows:

1. to review:
   (i) with the auditor, the audit plan, his evaluation of the system of internal accounting controls, and his audit report;
   (ii) the assistance given by the company's officers to the auditor;
   (iii) the scope and results of the internal audit procedures; and
   (iv) the balance sheet and profit and loss account, including the consolidated balance sheet and profit and loss account where relevant, before submission to the Board of directors of the company or the holding company;
2. to nominate a person or persons as auditor; and
3. such other functions as may be agreed to by the audit committee and the Board of directors.

Members of the audit committee are appointed by the directors from amongst their number. The majority of these members cannot be executive directors of the company

[45] See above, n 16.
[46] Paragraph I (5) SGX Best Practices Guide.

or any related company (including foreign company) or relatives[47] of such an executive director. In addition, the majority must not have a relationship that would interfere with the exercise of independent judgement. The chief executive officer[48] of the listed company cannot be a member of the audit committee.

The proposed Code provides that members of the audit committee be appropriately qualified. It is recommending, with the aim of strengthening the objectivity and effectiveness of the audit committee, that at least 2 members of the committee should have accounting or related financial management expertise. However, it is left to the Board, in the exercise of its business judgment, to decide whether the appointed audit committee members have the requisite expertise.

It is provided in the Listing Manual's Best Practices Guide that the audit committee should have full access to and cooperation by the management, including internal auditors, and have full discretion to invite any director and executive officer to attend its meetings. In addition, the audit committee should be given reasonable resources to enable it to discharge its functions properly.

Compensation / Remuneration committees

A significant number of companies in Singapore have a committee that looks into the compensation of key executives of the company. Presently, there are no general guidelines on how these committees should operate. The proposed Code has recommended that remuneration committees should comprise a majority of independent non-executive directors to minimise the risk of any potential conflict of interest. The chair of such a committee should also be taken by an independent non-executive director. In addition, at least one of the members should be knowledgeable in the field of executive compensation failing which the committee should have access to independent expert advice.

Nomination Committees

Very few companies have nomination committees. The general way that most directors are appointed has been discussed earlier under "Appointment, Retirement and Removal" above. The proposed Code also deals with this issue. It proposes that companies should establish nominating committees that comprise at least 3 directors, a majority of whom, including the chairman, should be independent. There is also a recommendation for the terms of reference of the committee members to be spelt out. The function of such a committee should be to nominate or re-nominate directors having regard to their contribution and performance. In addition, they are to be tasked with the responsibility of determining the factual independence of the company's independent directors.

BOARD REMUNERATION AND TRAINING

Board remuneration

---

[47] Defined as meaning the spouse, parent, brother, sister, son, adopted son or daughter or adopted daughter.

[48] Defined in Chapter 1 of the Listing Manual as the most senior executive officer who is responsible under the immediate authority of the Board of directors for the conduct of the business of the listed company.

Listed companies are required to disclose in their annual reports the remuneration received by directors in bands of below $250,000; between $250,000 to $499,999 and above $500,000. This is to include "all forms of remuneration from the listed company and any of its subsidiaries"[49]. Fees for non-executive directors and salaries of executive directors must be by fixed sum and cannot be commission based or on a percentage of turnover[50]. Apart from their basic salary, however, it is not uncommon to find companies giving out either fixed or performance-based bonuses to their executive directors[51].

Some directors also receive incentives in the form of share options. Presently, this does not appear to be a prominent feature of a director's compensation package. Out of the 417 non-executives on whom data was collected in the SID 2000 survey, only 49 (12%) received remuneration in the form of share options. The percentage is only slightly higher (15%) for executive directors. The issue of share options pursuant to any share option scheme must comply with Practice note No. 9h of the Listing Manual. This poses some restrictions on the use of share options as a means of remuneration. For example, there are limits on the size of the scheme, the entitlement for each class of participants and the number of share available to each individual. There are also specific terms that govern the exercise of any option granted under such a scheme.

Board Training

It is widely accepted that the responsibility for ensuring that all directors receive the required training and continuous education to effectively assume and fulfil their responsibilities lies with the Board. Training should cover facets of directors' duties and responsibilities, rights and obligations as well as corporate governance best practice. Industry and company specific training may also be needed. It is the general practice for companies to take newly appointed directors through an 'orientation programme' to familiarise the director with the activities of the company as well as to introduce key personnel to them. The majority of companies, however, do not have any formalised training programme for directors. Some companies do conduct ad-hoc in-house courses or programmes for their directors while others have their directors attend courses or seminars organised by the Singapore Institute of Directors or other organisations[52].

Training has traditionally not been a major priority for Boards. This trend, however, is rapidly changing as business organisations, operations and processes become increasingly complex. Rapid changes in business practices and trends brought about by the knowledge-based economy that businesses presently operate in have also caused Boards to acknowledge the importance of keeping up with these changes. The demand for Board training is steadily growing. Organisations, such as the Singapore Institute of Directors are also gearing up to meet this demand.

---

[49] See SGX Listing Manual, Appendix 11.

[50] This is pursuant to the prescribed Articles of Association in Appendix 5 of the Listing Manual.

[51] For data on fees received by directors, see the Singapore Board of Directors Survey 2000 pp 8 – 12.

[52] Data from the Singapore Board of Directors Survey 2000 indicate that 44% of the 102 companies surveyed provide some in-house training; 39% facilitate training by sending their directors to courses organised by the Singapore Institute of Directors and 36% facilitate training by sending their directors to courses organised by other organisations.

CONCLUDING REMARKS

The legal and regulatory regime governing Boards and directors in Singapore is very much in line with those in other developed countries such as Australia, Canada and the United Kingdom. The authorities in Singapore have taken pains to keep track of developments in other countries, and where appropriate, have adopted similar practices after making suitable modifications where necessary. There has, in addition, been a recent emphasis on improving board processes and practices resulting from the push to establish the country as a key financial hub. It is anticipated that changes will ensue in the near future flowing from the studies and recommendations done and put forward by the various committees set up pursuant to recommendations made by the Corporate Finance Committee of the Financial Sector Review Group. These changes should encourage and assist Boards in Singapore to fulfil their roles in a manner that would result in their companies achieving even higher standards of corporate governance.