Trust us, we are really independent

Singapore's corporate world provides many examples of questionable independence. The rules need tightening, BY MAK YUEN TEE

N OCT 14, Chew Yi Hong and Ann He released the Governance In

daex for Trusts (GfT) 2020. In assessing the 45 trusts covered, we re-designated 14 independent directors (IDs) in 11 trusts from independent to non-independent due to their tenure having exceeded nine years or their relationship with the sponsor, controlling unitholder or related com-

canies of the manager. These 14 IDs were among the 76 independent directors of the trusts.

Another 19 trusts received demerit points for IDs having other relationships, such as lawyers serving as IDs while their firms provided legal services to the trust, the manager or related companies. It is therefore crucial for IDs to avoid other relationships other than being a director of the manager/trustee manager.

Under the regulations for real estate in-

vestment trusts (REITs) and business trusts (BTs), the board can deem a director independent even if the director has relationship

specified by these regulations for de-

termining his independence.

There are only minor exceptions. One is that a director of a REIT manager cannot be deemed by the board to be independent after nine years. Regulations are meant to be prescriptive and clear. Allowing the board to deem a director as independent even without any review by the regulator under-

mines the effectiveness of these regulations.

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EAGLE HOSPITALITY TRUST

We saw that recently at Eagle Hospitality Trust (EHT), where ID Carl Gabriel Florian Stubbie was not re-elected by the sponsoring, who indirectly owns EHT's manager. Un-

Stubbie had no say in Mr Stubbie's removal and he had strong support from the board. With the dispute between the sponsors and manager, it was not surprising that he was not re-elected.

Incongruously, in an article posted on our website on July 1 based primarily on informa-

tion disclosed in EHT's prospectus, it had questioned whether Stubbie was truly in-

dependent in the first place. He joined Jones Lang LaSalle Property Consultants (LLPC) in 2016. It pointed out that in May 2019 - the same month when EHT was listed - and LLPC's four subsidiaries in the US was the "independent market research consultant" which produced a 19-page report that the independent director, Mr Stubbie. The fees paid for this work were not dis-

closed, but would undoubtedly have been substantial.

Mr Stubbie joined EHT as an ID in August 2018. While his employment relationship at LLPC and the appointment of its fellow sub-

sidary as the market research consultant were both disclosed in the prospectus, the prospec-

tus was silent on whether this was considered in determining his independ-

ence.

He would presumably have been in dis-

cussions about joining LLPC as he was dis-

cussing the role of EHT's independent director.

The responsibilities would include re-

viewing the prospectus and the market

research consultant's report. He would be in a position to question the work done by the subsidiary of the company he was about to join as a senior executive.

SABINA REIT

Compliance with the letter of the rules for BTs in the same trust in determining a director as independent was also in the spot-

light recently at the manager of Sabina REIT. On Sept 22, posted an article on my website, questioning the re-designation of Ng Shiin Lian from non-independent to independent. The day before, Sabina had issued a be-

st adendum to its 2019 annual report (released on April 7) to justify the re-designa-

tion.

Ng is the chair of the Nominating and Remuneration Committee (NRC), which, among other responsibilities, "determines the independence of directors". In the ad-

endum, Sabina said that she recused her-

herself from the determination of her independ-

ence. This does not remove concerns about her independence.

On Oct 5, Sabina issued a six-page re-

sponse to my article, giving reasons she could be considered independent. Some of the concerns I had raised were that she had spent 4.5 per cent indirect stake in the manager to the current controlling share-

holder of the manager, and she had previ-

ously been an executive director (ED) for more than six years, before rejoining the board and then re-designated to ID.

The response provided justifications that can be summed up as follows: the rules are not strictly applicable to her circum-

stances; where they may be, compliance is voluntary; the NRC and board had con-

sidered it; and the regulations allow the board to deem her as independent anyway.

The response does not address the per-

ception that she may be or feel obliged to support the current controlling shareholder of the manager, especially as there were no details about the sale price and how it was determined, which I had raised.

Sabina also did not address my ques-

tions about the search process that was un-

derway, and why she was specifically se-

lected from among all possible candidates in the market.

The concern about IDs is arguably even worse for listed companies with whose rules of the rules relating to director independ-

ence are in the Code of Corporate Gover-

nance, which is based on "comply or ex-

plain". With certain relationships now moved to the listing rules, observance of the letter in certain areas would un-

doubtedly improve, but the spirit would likely remain lacking.

LONG TENURE

We also have many companies navigating around the guidelines on tenure. Take the case of Suntec Holdings. Two independent directors who have served on the board for 19 years are on the nominating committee (NC), including one who is NC chairman, with the group managing director being the third NC member.

The company said that the NC had under-

taken a rigorous review and considered the recommendations in the 2018 Code in de-

termining that the two long-serving direct-

ors are still independent. Part of the justifi-

cation was that they are "valuable to the Group in terms of their experience and knowledge in finance, understanding of the precision components business and the markets notwithstanding their long tenure".

The company also said "the Board consi-

ders continuity and stability of the Board important. However, the company has been making losses for the past seven years (excluding discontinued operations). I guess it is possible that without the long-

serving directors, it could have been worse.

In this case, each of the two long-serving directors would presumably have taken over running themselves, while the other long-serving director and the MD had "rigor-

ously reviewed" the ID who had just " rigor-

ously reviewed" his. Presumably, both IDs will later "rigorously review" their performance and remuneration of the group MD too.

It gets worse because, according to Suntec's annual reports, a firm in which the "Independent chairman has a substantial financial interest in had been providing ad-

visory and consultancy services worth $588,000 to $591,249, a year from FY2006 to FY2017. That adds up to nearly $3.5 mil-

lion to the two long-serving IDs on the NC – so he was "a director with no independence" and having a long and substantial busi-

ness relationship with the company.

OTHER COUNTRIES

Other countries also take different ap-

proaches for director independence. Coun-

tries like Hong Kong, Malaysia and US in-

clude all or most of the criteria for determin-

ing independence in the listing rules, while also requiring the NC to assess inde-

pendence. This means that any deviation from those criteria is a deviation from the list-

ing requirements.

In HK, the listing rules say that the ex-

change will take into account the factors re-

lating to independence included in these rules when assessing the independence of directors, and state that independence is more likely to be questioned by the Ex-

change than the NC. They are caught by one of those factors. IDs are required to submit a written confirmation to the Exchange, which must state their independence on each of the factors listed in the rules.

The factors for determining independ-

ence in the HK listing rules are also on the checklist of such jurisdictions as Singa-

apore. For example, it is common here for partners of law firms to be serving as IDs while their firms provide legal services to the companies.

Even if the quantum of fees exceed $200,000 (which is now in the Practice Guid-

ance of the Code), we see cases where the director is deemed independent. In HK, the listing rules state that, regardless of quantum, will result in a director to be deemed as non-independent. Directors on HK boards have confirmed with me this is a strict standard.

Other countries have introduced two-tier voting for IDs, under which such directors are elected by a vote of all shareholders and a vote of only minority shareholders. This applies regardless of the tenure of the IDs, the country, or the national listing rules, with the latter requiring it for premium list-

ing. Sweden is considering a similar practice.

Singapore needs to improve the imple-

mentation of director independence if it is going to arrest the erosion of trust in inde-

pendent directors.

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