



# The things independent directors do for shareholders

Their struggle to be perceived to be independent is likely to continue. **BY MAK YUEN TEEN AND CHEW YI HONG**

**I**NDEPENDENT directors serve as an important check and balance in companies. While they owe fiduciary duties to the company like other directors, they play a special role in safeguarding the interests of minority shareholders.

Following the latest review of the Code of Corporate Governance in Singapore, such directors will not be considered independent after nine years, unless approved by a two-tier vote by shareholders from January 2022.

Tests for independence based on family and employment relationships will be in the listing rules from January next year. Other relationships have been moved to practice guidance that is not subject to the "comply or explain" requirement, but appropriate disclosures of these relationships should be made where they exist.

The definition of an "independent director" has also been enhanced, but ultimately, it is not how independent directors are defined but what they do that matters.

## GAYLIN HOLDINGS

On March 13, private equity fund ShawKwei & Partners completed a US\$100 million investment into the beleaguered offshore and marine services firm, Gaylin Holdings. Three independent directors were brought in by the new controlling shareholder.

Lim Shook Kong is a director of SCHMID Singapore Pte Ltd, and Alan John Hargreaves is an advisor of ShawKwei and a director of Beyonics Pte Ltd. SCHMID and Beyonics are portfolio companies of ShawKwei. Mr Lim and Mr Hargreaves were also appointed by ShawKwei to the board of Chosen, prior to its delisting from the SGX after ShawKwei bought out Chosen.

The third independent director, David Wood Hudson, is also an advisor of ShawKwei. In the case of Mr Hargreaves and Mr Hudson, the fact that they are advisors to ShawKwei was only disclosed in the annual report and not at the time of their appointment – although to be clear, the SGX appointment template only requires the disclosure of familial relationship with any director and/or substantial shareholder, not other relationships.

Gaylin said that the appointment of Mr Hargreaves and Mr Hudson complied with the 2012 Code guideline that independent directors should make up at least half the board where the chairman is not independent. Gaylin has an executive chairman.

The extent of the business relationships the directors have with ShawKwei is not clear. However, the appointment of some of these directors to the portfolio companies of the private equity fund dating back to at least 2015 would suggest that they have close business relationships with the fund outside of Gaylin.

Gaylin is now proposing to acquire Amos International Holdings, which is almost 70 per cent owned by the ShawKwei group. This is regarded as an interested-person transaction and a major transaction to be approved by independent shareholders. The independent directors are put in a position of approving the consideration; accepting a condition that there will be no downward adjustment to the consideration if the unaudited net asset value (NAV) at completion date turned out to be lower than the unaudited NAV at a date more than a month before the entry into the sale and purchase agreement (SPA); assessing Gaylin's rights and position under the SPA; and opining that the acquisition is on normal commercial terms and not prejudicial to the interests of the company and its minority shareholders.

Can they really be perceived to be independent in doing all that?

## WHEELLOCK PROPERTIES

Wheellock Properties (Singapore) is the subject of a voluntary offer at \$2.10 per share by Wheellock and Company, the parent company listed in Hong Kong. The offer was made on July 19 and the offer document posted out to shareholders on Aug 10. On July 26, it announced the sale of 5,000 shares in the open market at between \$2.15 and \$2.16 by the aunt of a director of the company.

On Aug 24, the independent financial adviser (IFA) stated that the \$2.10 offer was "fair and reasonable, but not compelling and are not prejudicial to the interests of minority shareholders", which was later clarified to mean just "fair and reasonable".

The recommending directors concurred with the IFA's advice and recommended that shareholders accept the offer, unless they are able to obtain a price higher than the offer price on the open market, taking into account all brokerage commissions or transactions costs in connection with open-market transactions.

However, the directors did not heed their own advice. On Aug 27, David Lim Tik En, an independent director, accepted the offer at \$2.10 for his 20,000 shares when over 7.6 million shares traded in the open market at between \$2.18 and \$2.21 that day. Tan Bee Kim, a senior executive director considered independent for the purposes of the offer, quickly followed on Aug 31 by tendering her 30,000 shares, while Richard Li Lap Fung, an independent director, tendered his 2,000 shares on Sept 7. The market traded between \$2.15 and \$2.19 and \$2.15 and \$2.18 respectively on those days.

While the directors may say that the difference between tendering to the offeror and selling on the market is not material to them, their actions do not match their recommendation to shareholders and may create a perception that they felt obligated to support the offeror. To be clear, the directors had declared their intentions to accept the offer in the circular.

To look at the issue from another perspective, the three recommending directors tendered all their shareholdings in the company, while the offeror received only 1.37 per cent out of the 23.79 per cent that it did not hold as at Sept 7. In this case, the aunt of the director who sold her shares to the market seems to be acting more independently of the offeror.

## SINGAPORE SHIPPING CORPORATION

In Singapore Shipping's 2016 annual report, the chairman's message said the external auditor had informed management that a change in accounting policy for recognising charter income was required. This followed a new partner-in-charge taking over under the mandatory five-year partner rotation. That same year, its audit and risk management committee (ARMC) took the view that it was timely to seek a change in external auditor. The incumbent auditor was thus "not invited to seek re-appointment at the forthcoming AGM". The company said this was in line with its "ongoing good corporate governance initiatives".

The company devoted two pages in the annual report for an interview with the ARMC chairman. In that interview, Tan Guong Ching, the independent ARMC chair, gave a 142-word exposition about why the company was changing its external auditor and the factors it considered.

That same year, the ARMC at Stamford Land, which has the same controlling shareholder as Singapore Shipping, also decided that it was timely to seek a change in external auditor. In an interview published in the annual report, independent ARMC chair at Stamford Land Douglas Owen Chester also explained why the company was changing its auditor and the factors that were considered. Other than the period that the auditor had been with the company ("since 2009" in Mr Chester's interview compared to "for more than a decade" in Mr Tan's interview), the expositions relating to the change in external auditor provided by both ARMC chairmen were identical, word for word.

Since the ARMC in each company is supposed to independently evaluate the external auditor and recommend the appointment or re-appointment of the external auditor (as stated in the corporate governance

statements of the two companies), it is surprising that both ARMCs decided at the same time that it was time to change the external auditor. Shareholders may also find it puzzling that the two independent directors chairing the ARMCs, with different experience and background, could come up with almost 140 words that are identical word-for-word in their interviews.

## CH OFFSHORE

In April 2017, Falcon Energy Group (FEG) disposed of a 21.83 per cent stake in CH Offshore (CHO), retaining a 64.91 per cent stake. FEG's stake in CHO was built up to 86.71 per cent as recently as February 2015, following a voluntary unconditional offer. FEG even increased its original offer price from S\$0.495 to S\$0.55.

Between Oct 6, 2016 and March 17, 2017, CHO lent FEG S\$1.5 million and US\$3 million at an interest rate of 4.3 per cent per annum. The aggregate amount of US\$5.099 million (including other transactions) was disclosed by the company as interested-person transactions under Chapter 9 of the Listing Rulebook.

The company disclosed that "the Relevant Transactions were carried out on an arm's length basis and on normal commercial terms". The reason for the loan was stated to be for the latter to "meet short-term liquidity requirement and ensure the long-term success of the overall 'FEG & CHO' Group".

The audit committee (AC), comprising George Thia Peng Heok (independent AC chairman), Tan Kian Huay (independent director) and Tan Sooh Whye (non-independent director), said: "The audit committee of the Company has reviewed the terms of the Relevant Transactions. The Audit Committee and the Board of Directors are of the view that the Relevant Transactions were entered into on an arm's length basis and on normal commercial terms that were not prejudicial to the interests of the Company as well as its minority shareholders."

Based on the financials of FEG, it is evident that it was under pressure, given the troubles in the oil and gas sector. The disposed stake (at a price of S\$0.13 per share compared to the offer price of S\$0.55 per share just two years ago) resulted in a loss of disposal of US\$39.37 million, perhaps a sign that FEG was desperately trying to raise funds. FEG said that the S\$20 million raised would be used for repayment of existing borrowings, working capital and other general funding requirements of FEG.

FEG appointed a consultant in May 2017 to carry out a business review and held four informal noteholders' meetings between June 2017 and August 2017 to explore options relating to the impending maturity of its S\$50 million notes. In August 2017, the company's wholly-owned subsidiaries received writs of summons and statements of claim from its banker for some US\$20 million, with interest and costs, for breach of its banking facilities. While the company succeeded in extending the maturity of its notes, its auditor issued a Qualified Opinion and indicated the existence of material uncertainties relating to going concern. As at June 30, 2017, FEG reported a net capital deficiency of US\$100.5 million.

The AC's statement warrants scrutiny by minority shareholders as CHO itself had borrowing costs of between 4.5 per cent and 5.5 per cent per annum but lent to FEG at just 4.3 per cent per annum. Should the loan be considered to be on "normal commercial terms that were not prejudicial to the interests of the company as well as its minority shareholders"?

In its annual report published this month, CHO reported that for the financial year ended June 30, it had made an allowance for non-trade debts of US\$4.48 million due from FEG and related companies. In July, FEG disposed of a 52.72 per cent stake in CHO to Baker Technology as it continues its fight to stay afloat.

The above cases suggest that the struggle for independent directors to be perceived to be independent continues. Until such time that the appointment of independent directors is subject to separate approval by minority shareholders, as some countries now require, the struggle is likely to continue no matter how we fine-tune the criteria for determining director independence. Meanwhile, shareholders and regulators need to be alert to what some independent directors may do to minority shareholders.

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