

# Legal Update

## Enhancements to SGX's Powers

12 August 2021

On 6 August 2020, the Singapore Exchange Securities Trading Limited ("**SGX**") conducted a public consultation and invited feedback on the proposed changes to the SGX Listing Rules (Mainboard) ("**Mainboard Rules**") and SGX Listing Rules (Catalist) ("**Catalist Rules**") (collectively, the "**Listing Rules**"), which include, amongst others, enhancements to SGX's enforcement framework and whistleblowing regime. The proposed changes garnered considerable feedback from market participants.

On 24 June 2021, SGX published its responses to comments on the public consultation ("**Response Paper**") with the amendments to the Listing Rules taking effect on 1 August 2021.

Of particular interest is the enhancements to the administrative and enforcement powers of Singapore Exchange Regulation ("**SGX RegCo**") in relation to the appointment of directors and executive officers ("**Key Personnel**") of issuers. These enhanced powers include, amongst others, the power to require the resignation of the Key Personnel from an existing position.

In this legal update, we examine the enhanced powers of SGX RegCo with a focus on the appointment of Key Personnel.



### Enhancements to SGX RegCo's Administrative Powers

#### Requirement of SGX RegCo's Approval

Previously, an issuer was required to obtain the approval of SGX RegCo for the appointment of a Key Personnel under certain circumstances, namely where the issuer is the subject of an investigation into the affairs of the issuer by a special auditor or a regulatory or enforcement agency<sup>1</sup>.

Following the amendments to the Listing Rules, SGX RegCo may require an issuer to obtain its prior approval for the appointment and re-appointment of Key Personnel if the issuer is the subject of an investigation into the affairs of the issuer by a special auditor or an independent reviewer appointed by the issuer and/or the SGX or a regulatory or enforcement agency<sup>2</sup>. This addresses the technical issue where the term "independent reviewer" may be used in place of the term "special auditor" to ensure that the substance of the rule is preserved.

SGX also clarified in the Response Paper that "investigation" has the plain meaning of the word.

As for internal review initiated by the issuer's board of directors, SGX RegCo will consider whether it is appropriate to exercise its powers on a case-by-case basis if such internal review leads to the conduct of a special audit or an independent review. The general principle is that if the objective of the special audit or independent review is to determine whether there are any irregularities or improprieties by the issuer, its directors or key management in connection with the affairs of the issuer, SGX RegCo may exercise its power under the rule regardless of the party appointing the special auditor or independent reviewer.

#### Objections to the appointment of Key Personnel

Previously, SGX RegCo was already empowered to object to the appointment of Key Personnel in any issuer for a period not exceeding 3 years<sup>3</sup>. However, these powers were only exercisable under certain

<sup>1</sup> Rule 720(3) of the Mainboard Rules; Rule 720(2) of the Catalist Rules.

<sup>2</sup> Rule 720(3)(a) of the Mainboard Rules; Rule 720(2)(a) of the Catalist Rules.

<sup>3</sup> Rule 1405(1)(e) of the Mainboard Rules; Rule 305(1)(d) of the Catalist Rules.

circumstances, specifically where the Key Personnel had refused to extended cooperation to SGX or where the Key Personnel has wilfully contravened any relevant laws, rules and regulations, in other words where the behaviour of the Key Personnel is in question.

Under the amended Listing Rules, SGX RegCo's power to object to the appointment of Key Personnel has been extended to include: (a) re-appointments of Key Personnel; and (b) where the Key Personnel is being investigated, or is the subject of proceedings for breach of any relevant laws, regulations and rules<sup>4</sup>.

SGX has explained in the Response Paper that the specific power to object to an appointment or re-appointment of a Key Personnel who is being investigated or is the subject of proceedings for the breach of such laws, regulations and rules<sup>5</sup>, will be triggered when the individual is (i) arrested (with or without bail) and/or charged for an offence; or (ii) not contactable or has absconded, or is wanted by the regulatory authorities for cooperation and investigations<sup>6</sup>.

SGX RegCo has also clarified in the amended Listing Rules that "relevant laws, rules and regulations" relate to fraud, dishonesty, the securities or futures industry, corruption or breaches of fiduciary duties, in Singapore or elsewhere and that "rules" will include rules of any professional or regulatory bodies.

Another important point is the removal of the requirement for wilfulness. This suggests that SGX RegCo in its exercise of its power to object to any appointment or reappointment, may not consider, as a central theme to its enforcement, the intention of the Key Personnel.



## Enhancements to SGX RegCo's Enforcement Powers

Over and above the administrative powers mentioned in the preceding section, SGX RegCo is also empowered with a set of enforcement powers to enforce compliance with the Listing Rules. It should be noted that these enforcement powers are not circumscribed by any condition so long as the purpose is to enforce compliance with the Listing Rules, unlike some of the administrative powers such as the power to require SGX RegCo's approval before the appointment of a Key Personnel<sup>7</sup> or the power to object to the appointment of a Key Personnel<sup>8</sup>.

Previously, SGX RegCo has several powers to enforce compliance with the Listing Rules<sup>9</sup>. These powers are mainly confined to private actions which are not disclosed to the public, while public enforcement actions were only exercisable by the Listing Disciplinary Committee ("LDC"). However, enforcement actions by the LDC are generally time-consuming due to the difficulty in constituting the requisite quorum of the LDC members for a hearing.

Therefore, the previous framework was inadequate for the purposes of enabling SGX RegCo to provide clear, transparent and robust outcomes for the wide range of disciplinary cases encountered.

Under the amended Listing Rules, SGX RegCo's enforcement powers will be expanded to include the following, which are categorised based on whether the sanctions are appealable.

### **Non-appealable sanctions**

- issuing a public reprimand; and
- requiring an issue to comply with conditions on activities undertaken by the issuer.

### **Appealable sanctions**

<sup>4</sup> Rule 1405(1)(d) of the Mainboard Rules; Rule 305(1)(d) of the Catalist Rules.

<sup>5</sup> Rule 1405(2)(c) of the Mainboard Rules; Rule 305(2)(c) of the Catalist Rules.

<sup>6</sup> Paragraph 3.7 of the Response Paper.

<sup>7</sup> Rule 1405(1)(d) of the Mainboard Rules; Rule 305(1)(c) of the Catalist Rules. The conditions triggering the exercise of this powers are found in Rule 720(3)(b) and Rule 720(2)(b) respectively.

<sup>8</sup> Rule 1405(1)(e) of the Mainboard Rules; Rule 305(1)(d) of the Catalist Rules; The conditions triggering the exercise of this powers are found in Rule 1405(2) and Rule 305(2) respectively.

<sup>9</sup> Rule 1405(3) of the Mainboard Rules; Rule 305(3) of the Catalist Rules.

- an order for the denial of facilities of the market, prohibiting an issuer from accessing the facilities of the market for a specified period and/or until fulfilment of specified conditions;
- the resignation of the Key Personnel from an existing position with any issuer listed on SGX; and
- an order prohibiting any issuer for a period not exceeding 3 years from appointing or re-appointing the Key Personnel.

With respect to the denial of market facilities, SGX clarified in the Response Paper that this sanction is not intended to be a delisting of the issuer – instead, it will include withholding approval of matters that require approval from SGX RegCo, such as the issuance of shares.

For the avoidance of doubt, non-appealable sanctions are still amenable to judicial review through the Singapore courts if the aggrieved parties are of the view that SGX RegCo has acted in a manner that is illegal, irrational or where there is procedural impropriety in the enforcement of SGX RegCo’s powers.



## Role of the Nominating Committee

Notwithstanding SGX RegCo’s broadened administrative powers with respect to the appointment of Key Personnel, the nominating committee (“**NC**”) of issuers should also be mindful of its responsibility of assessing the suitability of the issuer’s Key Personnel on a continuous basis, as this is one of the reasons why SGX decided not to proceed with the inclusion of the proposed suspension powers in the Listing Rules<sup>10</sup>. This is in line with the duties of the NC under the Corporate Governance Code, which provides that the NC shall, amongst others, decide if a director is able to and has been adequately carrying out his or her duties as a director of the issuer.

If a Key Personnel is involved in an ongoing investigation that does not directly concern the affairs of the issuer, the NC must still assess the suitability of the continued appointment of the Key Personnel by assessing whether the investigation is material to the issuer, and whether the investigation would affect the assessment of the character and integrity of the Key Personnel<sup>11</sup>. If the NC opines that the investigation is material to the issuer or has a bearing on the character and integrity of the Key Personnel, the issuer must announce the NC’s assessment as well as the measures put in place to safeguard against the risks associated with any continued appointment.



## What does this mean for you?

SGX RegCo has stated that the purpose of its administrative powers is for the protection of investors, by preventing individuals with questionable character and integrity from serving on the boards or management teams of issuers<sup>12</sup>.

While it remains to be seen how SGX RegCo will be wielding its enhanced administrative and enforcement powers, issuers should be aware that given SGX RegCo’s last initiative in 2018 to publish a list of errant directors and executive officers, its message to issuers seems clear. If issuers do not constitute its board or management team with the right people, SGX RegCo may very well do it for them.

Please do not hesitate to contact our team if you have any further queries.

<sup>10</sup> In the Response Paper, SGX had considered including a new administrative power requiring an issuer to suspend a Key Personnel.

<sup>11</sup> Paragraph 5.12 of Practice Note 7.1 of the Mainboard Rules; Paragraph 5.12 of Practice Note 7A of the Catalyst Rules.

<sup>12</sup> Section 5.3 of the Response Paper.

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