
Corporate Governance and the Board:**The Value of Independent Assessments of Culture, Conduct and Accountability**

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INTRODUCTION

In the context of mergers and acquisitions, obtaining a fairness opinion (which provides an independent analysis of potential transactions) is a standard practice for a corporation's board of directors (the "**Board**"). For significant transactions, a Board will sometimes obtain multiple fairness opinions. According to an article published by Ernst & Young:

When contemplating a proposed transaction, directors are exposed to the risk of personal liability and the potential to destroy shareholder value. To mitigate these risks and better serve shareholders, board members seek the protection and insights that a robust fairness opinion provides.¹

In terms of directors discharging their duties properly, is corporate governance not as important as a big transaction?

Perhaps that question cannot be answered in the abstract. What is certain is that (i) directors have a fiduciary duty to shareholders with respect to all issues faced by a corporation or financial institution ("**FI**") and (ii) the Monetary Authority of Singapore (the "**MAS**") has said that it has been "intensifying our supervisory focus on FI's culture and conduct"² in order to achieve "(a) ethical business practices that safeguard customers' interests and ensure fair treatment and (b) prudent risk-taking behaviour and robust risk management that support FIs' safety and soundness,"³ and (iii) an example of this increase emphasis is the MAS's recent publication of both the [Guidelines on Individual Accountability and Conduct](#) (the "**IAC Guidelines**")⁴ and the [Information Paper on Culture and Conduct Practices of Financial Institutions](#) (the "**Information Paper**").

REQUIRED ASSESSMENTS

There are various guidelines regarding corporate governance and risk that apply to FIs in Singapore.⁵ The IAC Guidelines and the Information Paper collectively set out 14 outcomes that FIs are expected to achieve. In order to achieve the five outcomes set forth in the IAC Guidelines,⁶ the MAS has set out a three-pronged approach⁷ pursuant to which a FI should:

- assess whether it meets the outcomes ("**Step 1**");
- adopt appropriate measures; ("**Step 2**") and
- regularly review the effectiveness and adequacy of the measures taken ("**Step 3**" and, together with Step 1, the "**Assessments**").

While the IAC Guidelines do not have the force of law, the degree of observance by a FI may impact the MAS' overall risk assessment of the FI, including the quality of its board and senior management oversight, governance, internal controls and risk management. As a result, we believe this three-pronged approach should be implemented by all FIs in a manner commensurate with the nature, size and complexity of their operations.

¹ See "[Four critical questions when obtaining a fairness opinion](#)" (27 March 2019)

² See Paragraph 2 of the [MAS Information Paper on Incentive Structures in the Banking Industry](#) (March 2019).

³ See Paragraph 2 of the IAC Guidelines.

⁴ For a summary of the IAC Guidelines, click [here](#).

⁵ For details, please see our knowledge library on risk and corporate governance [here](#).

⁶ We believe this methodology is also applicable to the nine outcomes set forth in the Information Paper.

⁷ See [Infographic on Guidelines on Individual Accountability and Conduct](#).

REASONS TO DO THE ASSESSMENTS IN-HOUSE

There is no requirement for the Assessments to be performed by a third party. We must also acknowledge the financial conflict of interest we have in recommending that a FI engages an external consultant. In addition, internal staff may understand a FI's culture and processes better and may be able to offer a more efficient, and arguably more effective, review than a third party can offer.

REASONS TO ENGAGE AN INDEPENDENT PARTY TO DO THE ASSESSMENTS

We believe there are numerous benefits to hiring an independent party to conduct the Assessments.

External consultants will bring a fresh pair of eyes to the FI

The IAC Guidelines and the Information Paper are not revolutionary. Many FIs will reasonably believe that they have been achieving the Outcomes historically. However, the IAC Guidelines and the Information Paper reflect the increased regulatory focus on culture and conduct. As a result, we believe looking at these issues with a fresh pair of eyes can be helpful.

External consultants will benefit from conducting multiple Assessments for a range of clients

We believe this experience will give external consultants a better sense of best practices across the financial services industry, as well as exposure to a range of issues and solutions that can be useful context for each subsequent Assessment conducted.

External consultants can be more candid in their findings since they are not full-time employees.

For illustrative purposes, imagine a situation in which two senior managers do not get along and the discord bleeds into the governance of the FI. We believe this situation is quite common in FIs that have matrix reporting structures whereby mid-level employees may receive inconsistent instructions relating to work matters. We believe an external consultant is more likely to flag such issues candidly than an employee of the FI who may work with the relevant senior managers every day.

External advice can improve the decision-making ability of directors and mitigate their risk of personal liability

Receipt of external advice has the potential to improve the board's decision-making ability by providing directors with insights into the matter being considered. With respect to corporate governance, failure to satisfy regulatory expectations and requirements can have a material and adverse effect on a FI, and thus destroy shareholder value. External advice also mitigates risk of personal liability for directors as it is key evidence of a FI's Board upholding its fiduciary duty of due care.

OUR METHODOLOGY

In conducting the Assessments or consulting on Step 2, our end-product is intended to be considered by the Board, which is ultimately responsible for ensuring the outcomes under the IAC Guidelines and the Information Paper are achieved. Our Assessments are benchmarked against the specific guidance and good practices mentioned in the IAC Guidelines and the Information Paper.

Our approach⁸ is fundamentally grounded in the experience of our senior team that conducts the Assessments. Our team includes personnel who have been employed as senior managers of regulated FIs, including roles as CEO, COO, Head of Oversight and Control, General Counsel and Head of Compliance. We emphasize the need to have simple processes that a FI can understand and follow, as human error and execution risk are two of the biggest risks that a FI faces.

CONCLUSION

In the Information Paper, the MAS explained its approach towards culture and conduct. The MAS wrote: "The [financial services industry] must go beyond doing what is permitted legally, to doing what is **right and ethical**." Later, the MAS listed all of the actions it can take to "achieve a deterrence

⁸ For further information about our approach, click [here](#).

effect” regarding lapses in risk management, misconduct, regulatory breaches or offences, including revoking a FI’s license and referring cases to the Attorney’s General Chambers for criminal prosecution. We believe this commentary reflects how seriously the MAS wants FIs to take these subjects.

HOLLAND & MARIE

[Holland & Marie](#) is a compliance, risk, C-Suite and legal solutions firm based in Singapore. We have extensive experience resolving typical compliance issues including regulatory inspections, satisfying regulatory requirements and maintaining best practices in corporate governance to navigate the rapidly changing regulatory landscape.

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