What do we "EXPECT" from the Board?

What is the performance indicator of the Board? (Continued from the last issue)

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The core elements of Fiduciary Duties are Duty of Loyalty and Duty of Care.

Who can find a "tool" to indicate the magnitude of the director's "loyalty"?

Who can find a "tool" to measure how well directors perform their duty of "care"?

"Loyalty" and "Care" are subjective qualifications when it comes to expectations toward the Board of Directors.

...What can be "proof" of director's performance that can "concretely" be demonstrated?

A concrete example are seen in precedent Supreme Court Judgment on the Board of Directors. The "degree of loyalty" and "care sufficiency" are the keys.

How to prove the director's "Duty of Care"?

The "director's" Duty of Care can be proven from the moment he/she is appointed to the board and through subsequent performances as "the company's representative".

<u>Director Checklist before assuming directorship</u>

a. Has the director studied minutes of shareholders' meetings and Board meetings before assuming the role of director?

   Why minutes of shareholders' meetings are essential for "new director"?

   By studying previous "resolutions" of agenda considered in previous shareholders' meetings, "director" will be able to learn about "key resolutions" from the meetings such as capital reduction (particularly the main reason e.g.to write-off accumulated loss), capital increase (particularly the main reason e.g. for capital restructuring), merger, Memorandum of Association amendment, company's regulations amendment.

The new director should study "minutes of shareholders' meeting" of the meetings that have been held back in up to 5 years. A company usually holds one annual shareholders' meeting each year except in the particular year that urgent issue occurs and it is required by law to hold an extraordinary shareholders' meeting to resolve the issue. These key issues collected from the minutes in the past will help the "new director" understand the company's background and allow them to evaluate "direction" and "future" of the company.

Why Minutes of Board meetings are essential for "new director"?

"Resolutions" of previous Board meetings will help the "new director" understand past key actions taken by the Board such as opening of bank accounts, land acquisition or sale, land lease registration, bank loans, guarantee, joint venture deal, and divestment of key assets.

b. Has the director studied the company's financial statements to learn about business characteristics and performance in the past?

Why financial statements are essential for "new director"?

"Balance sheet" (the fundamental equation: Assets = Liabilities + Equity) reflects "asset" size of a company as well as types of assets it owns i.e. land, building, factory, machine, vehicle (which are tangible assets) as well as trade receivables (which are intangible assets) such as leasing right, client database, distribution channels, software etc. Modern companies, especially startups, usually kick off as an asset light company. They usually do not invest in assets with high value but rather keep cash within the company as much and as long as possible. They would rather focus on the performances shown in the "profit & loss statements".

In addition to the assets, liabilities in the balance sheet reflect the company's "financial credit". Bank creditors and trade creditors also indicate "business creditability" of the company or creditors would not grant such loans or trade credit. The "balance sheet" also demonstrates insolvency status or wealth and "capital accumulation" of the owners through retained earnings. Besides, the balance sheet can be used to evaluate the company's net book value.

"Profit & loss statement" (the equation: Revenues – Expenses = Profit or Loss) can help director understand the company's "profitability" and cost control. For further in-depth understanding, the director can analyze the company's "key revenue stream" and non-operating profit to prepare "forward-looking" assessment for the future. In some cases, key revenue stream has been on a downtrend but the company still manages to gain profit as it has over the years sold "land", which is non-performing asset, to feed the overall operations. This company will soon be categorized as "unsustainable" business if it does not quickly fix its problems.

"Cash Flow Statement" (Cash Flow: In & Out) can help director understand the company's "ability to manage cash flow". Some businesses are considered as Cash Cows booking revenues in cash.

We can fairly assume that they tend to have low risk of having "bad debt" as it principally takes cash and thus not much of "trade receivables" in the financial statements. Among them are restaurants (Minor / S&P/ MK / ZEN/ Café Amazon / Black Canyon) and convenient stores (7-Eleven / Family Mart / Lawson / CJ Supermarket / Super Cheap) etc. Many of these companies also register "Prepaid Cash" through membership or Advanced Cash Card even before customers actually purchase goods or services. (Do director knows that prepaid cash in these forms are not treated as "taxable income" but rather as "company creditors" until they actually purchase goods or services?). Lessons from the past suggested that ability to keep "cash" within the company for the longest time could help it "survive" with sustainability.

c. Has the director studied company objectives, Memorandum of Association, company regulations?

The company's objectives are the "legal scope" that provide "what the company can do". A company is not able to undertake actions that are not stipulated in the "company's objectives" such as providing guarantee for other companies (see examples in the previous article).

The Memorandum of Association is an official document required by law to lay out the "organization", "company structure", and "company composition" including company name, location, objectives, capital, types of shares (ordinary shares and preferred shares).

Company regulations are like "corporate rules" in conducting shareholders' meeting, determination of shareholders' different rights (should there be any preferred shares), recapitalization, capital write-down, determination of Board structure, Board meeting, dividend payment and company seal (if any).

Studying these "company documents" before hands will help "director" perform their compliance roles as a professional director lifting the company to Corporate Governance Zone above minimum legal requirement.

Believe it or not, Corporate Governance: CG does affect "stock valuation" and "corporate valuation". Investors (funds) usually invest in stocks with robust CG standard because they are transparent, accountable and they are known to take care of all stakeholders.

d. Has the director studied the Board members in advance?

Studying the "identities" of "fellow members" in the Board will help director understand their "characters", expertise and specialization, distinction, and BOD variety for director value maximization. The Board may consist of experts in many fields with various experiences i.e. strategic planning, financial strategy, accounting, legal, international trade, marketing, network, etc.

Knowing the Board member enable the "BOD Teamwork" both in business growth cycle and decline cycle. Besides, some expert directors "may" use this information in Director Replacement planning in preparation for director succession.

e. Has the director studied the company's Key Man or Key Position in advance?

The director should know the "keyman" of the company to understand the "capability in putting BOD policy into implementation, especially those in "key positions" like C-Level (CEO / CFO / COO / CTO / etc.) Other specialized "key positions" include those in Business Development, Finance, Accounting, Legal, Marketing, Technical, Human Resources, etc.

Understanding "KEY MAN" of the company will help the Board establish effective operating teamwork to accommodate policies from the Board and turn them into implementation. It also provides "two-way perspectives", both "Top-Down" and "Bottom-Up", and two-way communications in both policy maker and implementation levels.

f. Has the director studied image, branding, marketing CSR prospect of the company before assuming directorship?

Studying and probing information concerning image and reputation of the company will enable the director to understand basic "corporate culture" that reflects through goods, services, staffs, customers, suppliers, and news related to the company.

This set of information will help the director determine if he/she fits with the company with such "corporate characters". If not, will they agree to be "director" of the company? If they have already assumed directors

The "new director" can find most of the information to study in advance from relevant government agencies i.e. financial statements and company information from the Ministry of Commerce and the information on the Board on internet.

This information will prepare "director" before assuming directorship and help them perform their duties effectively. Moreover, it also creates "safeguard" for the director should any "damage" and "lawsuit" emerge. The director can proudly use the "proof of care" as protection and safe harbor. More importantly, this Director Checklist is far more effective than D & O Insurance, which consists of numerous "limitations of liabilities".

In the next article, we will provide Director's Guide for the "proof of care" while performing as "corporate director". We will also discuss "how to prove director's loyalty" as well as several case studies.