

SINGAPORE INSTITUTE OF DIRECTORS

STATEMENT OF GOOD PRACTICE

TENURE AND TERMINATION OF BOARD APPOINTMENTS

This Statement has been superseded by the Board Guide.

Introduction

The tenure of a director's appointment is generally governed by a company's articles of association. However, for public companies and their subsidiaries, sec 153 of the Companies Act provides that, notwithstanding anything in such a company's memorandum and articles of association, a person of or over the age of 70 may only be appointed or re-appointed pursuant to an ordinary resolution passed at an annual general meeting of the company. The appointment will be up to the next annual general meeting of the company. Also, the SGX Listing Rules mandate that all listed companies have articles which provide that where a managing director or a person holding an equivalent position is appointed for a fixed term, the term shall not exceed five years.

There is no other general legal requirement governing the length of a director's tenure or the number of terms that a director may hold office. The Singapore Code of Corporate Governance has nevertheless suggested that all directors submit themselves for re-nomination and re-election at regular intervals, and at least once every three years.

It is important for boards to understand the merits and dangers associated with permitting long tenures for board members or in having directors serve multiple terms.

On the one hand, it is recognized that a reasonably long period of service would confer on directors a deeper understanding of the company's business resulting in more effective contribution on the part of the directors concerned. It would also give directors the opportunity to see out long term strategic plans and provide for more stable corporate direction and culture.

On the other hand, board entrenchment has the danger of causing directors to be less responsive to new ideas and innovation. The bonds built over the years with each other and with management may also result in directors losing some of their effectiveness and objectivity.

Having regard to the different requirements of different companies and the distinctiveness of the character of individual directors as well as the uniqueness of the interaction that exists on boards in general, the SID makes no recommendation on what would constitute the most appropriate length of service of for members. What is critical, however, is that boards have proper director nomination, appointment and appraisal procedures and processes in place. In implementing these procedures and processes, boards should bear in mind the risks associated with entrenchment and manage these risks accordingly. In doing so, boards should maintain a balanced membership in terms of experience and knowledge of the company's business and the industry in which it operates as well as in terms of independence and objectivity.

A person's tenure of directorship may come to an end in any of the following ways:

- retirement;
- resignation on the part of the director;
- removal of the director;
- vacation of office under other circumstances provided for in the company's articles;
- in the case of public companies and their subsidiaries, at the annual general meeting commencing next upon the director attaining the age of 70.

It is incumbent upon directors to carry out their duties right up to the time that they cease to be directors. They should also be aware that they remain liable (subject to any time limitations prescribed by law) for acts, omissions and decisions made during the term of their office.

Termination of Directorship

1. Retirement

Retirement normally takes place in accordance with the provisions of the company's articles of association. It may also take effect upon the expiration of any specified term for which the director has been appointed.

The usual provisions found in the articles of association of companies provide for the following:

- at least one-third (or the number nearest to but not greater than one-third in cases where the number of directors is not a multiple of three) shall retire from office at each general meeting;
- the following persons are normally not subject to rotation
 - the managing director,
 - directors who are nominated onto the board by persons who are given a specific right to make such nomination either under the articles or a contract;
- the retiring directors shall include any director who is due to retire at the meeting by reason of age either pursuant to the articles or, in the case of public companies and their subsidiaries, upon the director having attained the age of 70 prior to the meeting (see discussion in paragraph 5 below). Retiring directors shall also include directors who wish to retire and not seek re-election; and

- where the number of directors retiring for the reasons mentioned in the preceding paragraph are less than the required one-third, further directors to retire shall be those who are subject to retirement by rotation and who have been longest in office since their last re-election.

As a matter of good practice, it is recommended that all companies consider adopting articles to similar effect.

2. Resignation

A corollary consequence to the principle that no director may be appointed as such without his consent is that directors are generally free to resign from office. The only exception is where the director's resignation will leave the company with no director who is ordinarily resident in Singapore, in which case, any purported attempt at resignation will be invalid (sec 145(5) of the Companies Act).

Where a director wishes to resign, he must comply with the procedures provided for under the company's articles. The usual practice is to require the director to send a written notice of resignation to the company's registered office. The notice should be addressed to the company's board of directors and takes effect upon being received by the company at its registered office. The resignation need not be accepted by the board for it to be effective.

In addition, the company will have to lodge a prescribed notice of the director's vacation of office (whether by resignation or otherwise) with the Registrar within one month of a person ceasing to be a director of the company. Directors who resign should satisfy themselves that this has been done, failing which they should take the necessary steps to notify the Registrar of their resignation.

The decision to resign from office is one that should not be taken lightly. Directors should understand that expertise and experience are not easily replaceable. It is also possible that their resignation may be taken negatively against the company and affect stakeholder confidence in the company. They should therefore take every step to try to manage the situation and should only resort to resigning as a last resort.

Where it is decided to proceed with the resignation, directors should consider carefully whether the reasons should be made known to shareholders. Difficult issues involving loyalty to the company and confidentiality of company information can arise. There may also be situations where directors may need to consider the implications of statements that they make, particularly if they concern the conduct of their fellow directors. It would be prudent to seek legal advice in such situations.

The following situations either taken alone or in combination may warrant resignation:

- major conflicts of interest;
- concern over the position of the company;
- serious dissent with fellow board members;

- loss of confidence in the director's ability to serve on the board;
- personal reasons.

2.1 **Major conflicts of interest:** A serious continuing conflict of interest that cannot be resolved may warrant resignation.

The procedures and best practices relating to directors' conflicts of interest are discussed in greater detail under the Statement of Good Practice for Conflicts of Interest (*[to cite reference no.]*). These procedures should be adhered to at first instance. Resignation should be contemplated where the conflict is of a nature such that:

- there is a likelihood for the company to be prejudiced as a result; or
- the director is unable to act effectively in the interests of the company and in the performance of his duties as a result of the conflict.

Prior to resigning on this ground, directors should discuss the matter with the Chairman or the chairman of the Nominating Committee who will then decide whether the matter should be brought to the attention of the board.

2.2 **Concern over the position of the company:** There may be circumstances where directors believe that the company is engaging in or about to engage in activity that may expose it to civil or criminal liability or in activities that expose the company to financial or other risks that should not be pursued. Having regard to the potential personal liability that directors may face in such situations and the potential adverse effect that this may have on their reputations, they may decide that resigning from the company may be the most appropriate course of action.

Directors should, however, keep in mind the fact that their duties require them to act in the company's best interests. Where such circumstances arise, directors should:

- bring their concerns to the attention of the board;
- seek to convince fellow board members of the dangers of proceeding with or carrying on with the activity;
- where possible, seek independent professional advice on the matter;

At times, the success of a particular course of action may depend on the company continuing to enjoy the confidence of its creditors and customers. The resignation of a director under these circumstances may be a critical factor that destroys that confidence and perhaps bring about the very result that the director wishes to avoid.

A high degree of responsibility and use of judgement on the part of directors is called upon in situations of this nature.

2.3 **Serious Dissent with Fellow Board Members:** Directors are expected not to fetter their discretion in acting in the interests of the company. They bring their individual expertise to the board, and with this, their own views. It can be expected therefore that there will be instances where fellow directors do not agree with each other on important matters. Some

directors may be prompted by such disagreements to resign, especially where the disagreement results in a deadlock situation or where it is of such a nature so as to impair the progress of the company.

Be that as it may, directors who feel strongly enough about a matter or matters with which fellow directors disagree so much so as to consider resignation should first pursue all other options open to them to resolve such differences. Such steps could include:

- making the extent of the dissent, the reasons for the dissent and its possible consequences clear to the board as a means to influence its decision;
- asking for additional external independent professional advice on the matter;
- asking that the decision be postponed to a later date to allow time for further consideration and discussion;
- tabling a statement of dissent and having the dissent minuted.

In some circumstances, it may be desirable for the chairman to take the initiative in helping to resolve the situation by suggesting one or more of these courses of action.

Again, a high level of responsibility and use of judgement is necessary.

- 2.4 **Loss of confidence in the directors ability to serve on the board:** If a situation arises where it becomes apparent that either a majority of shareholders or a majority of other board members has lost confidence in the director's ability to serve on the board, then the director should seriously consider voluntarily resigning from the board.

In cases where there is loss of confidence on the part of members, the director concerned as well as the rest of the board should take active steps to determine the cause of this loss of confidence and to see whether the concerns of members may be adequately addressed. The mere existence of criticism leveled against a director does not, of itself, necessarily mean that resignation is warranted.

Where directors have obviously performed inadequately, or if circumstances exist which would clearly affect the trust that members place in the board (such as where a director acts in a manner so as to cause doubt to be cast on his integrity), directors should be informed, ideally through the chairman, of how they are regarded. It would not be unreasonable in these situations for the directors to be asked to take whatever steps they consider would serve the best interests of the company.

- 2.5 **Personal reasons:** From time to time, directors may face situations where it may not be reasonable to expect them to continue serving on the board. These may include matters such as ill-health, increased family and work commitments etc. Resignation may be appropriate under these circumstances and in fact, may be in the interests of the company. Directors should, however, refrain from using personal reasons as an excuse for opting out of an uncomfortable situation where the company's interests might best be served by the director remaining in office.

3. Removal by Shareholders

The articles of a company should generally provide shareholders with the right to remove directors from their office by ordinary resolution. In the case of public companies, this right is given force of law notwithstanding any provision in such a company's memorandum or articles of association (sec 152(1) of the Companies Act). Should shareholders wish to remove directors under section 152 of the Companies Act, the procedures outlined in the section must be adhered to.

In any case where the matter of removal by shareholders arises, it is recommended that the board seek professional assistance to ensure that the correct procedures are followed. Written reasons for the proposal to remove the director should be given to the director and the shareholders. The director concerned should be given adequate time and opportunity to respond. The director's response should also be given to all the shareholders. The shareholders should also have adequate time to consider the matter prior to the meeting at which the resolution for the removal is sought to be passed.

It should be noted that directors should, as a general rule, not be permitted to remove one of their number without referring the matter to shareholders. This prohibition is also given force of law in the case of public companies (sec 152(8) of the Companies Act).

4. Vacation of office under other circumstances provided for under the articles

It is usual for companies to provide in their articles of association for situations whereby a director's office will be automatically vacated. Common provisions include:

- where a director becomes disqualified from acting as such under the provisions of the Companies Act;
- where a receiving order is made against the director or if he makes any arrangement under the Bankruptcy Act or compounds with his creditors generally;
- where the director becomes of unsound mind or dies;
- where the director absents himself without leave from meetings for a specified period.

All directors should be familiar with the provisions in the company's articles that govern vacation of office. They should also be apprised of whether or not they or their fellow directors fall or are in the process of falling within any of the situations provided for and should inform the Chairman accordingly.

5. Vacancy upon a director attaining the age of 70

Under section 153 of the Companies Act, the office of a director of a public company or its subsidiary will become vacant at the conclusion of the annual general meeting commencing next after he attains the age of 70 years. Such a person may be re-appointed or authorised to continue as director of the company until the next annual general meeting where there is an ordinary resolution passed permitting this.

A director of a public company or its subsidiary should inform his fellow directors in advance of his attaining the age of 70. This will provide fellow directors (and where there is a nominating committee, the nominating committee) with the opportunity to consider whether it is in the best interest of the company to recommend an extension of the director's appointment at the next annual general meeting and to make contingency plans should his appointment not be approved by shareholders.

In all cases where changes of directors occur, it is the company's obligation under section 173 of the Companies Act to update the register of directors kept by the company and to notify the Registrar of the change.

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