




Dear Mr Sid

## Re: Joining a controversial board

I don't know whether to feel excited, grateful, or very afraid. A university classmate, now the CEO and executive director of a substantial listed company in energy, has asked me to join her board.

I know and love the energy industry. I am an engineer by background. I am also a huge advocate of renewable energy, which she said the company is pivoting towards. My profile on boards and within the industry is pretty good (even if I do say so myself), so I can certainly understand why she reached out to me.

And the timing works out well. I am stepping down from two other listed boards within the next few months and will have time to devote to this.

The thing is this: three of the independent directors (two of whom have been on the board for more than 12 years) have just resigned. They did so quite publicly, too, citing differences of opinion with the executive chairman on his business direction and investment decisions. I will replace one of them. Two other candidates are being approached.

I asked the CEO what happened. She explained the fundamental disagreements on a legacy coal mine in Australia and a recent windmills investment in China. Both are going downhill, dragging down the company's financials.

Further, the company is on the hook for support guarantees it made on the recent acquisition.

I think the situation is salvageable if we apply the board's collective expertise to the situation calmly and objectively. The good news is that, according to the CEO, the chairman (also her elder brother), who has a reputation for being domineering, is now open to implementing a majority board decision to divest or further invest. They are hiring consultants to review and recommend the way forward.

She wants me to play a leading role in the restructuring strategy. I suppose, with all due modesty, they believe that I will bring some credibility, gravitas and independence to the process.

But I worry about my fiduciary duties and personal legal liability if the investments continue to bleed despite our best efforts. Now that this issue is out in the mainstream media, we will likely be under greater scrutiny.

So, Mr Sid, is this a good opportunity, or not, for me to join this board?

Yours sincerely,

To-Join-or-Not-To-Join

Dear To-Join-or-Not-To-Join

I can see your dilemma.

You have an opportunity to join a substantive listed board, in an industry that you understand, enjoy, and can contribute significantly to. Moreover, the timing suits you well as you would be moving from one listed board to another.

The offer reflects your good standing and experience.

On the other hand, this is not a regular board transition. You are among three joining to replace directors who have left with negative views of the board and its two investments. Yet, there might not have been board vacancies without that situation, as even the long-serving directors would have likely stayed. And if matters work out, your standing could be further enhanced.

### Liability

But your concern is that the two investments may not pan out, and you have to bear legal liability for them. I would not be overly concerned about this.

Since the two investments were made before your tenure on the board, you can only be

held responsible for what to do about the investments after you join the board, and there will not be any liability on your part for the initial decisions to invest.

To be sure, you have fiduciary duties, ranging from acting in the company's best interest to not being negligent, and avoiding conflict of interests. And, as you are aware, you are exposed to criminal and civil penalties for breach of director duties.

You should also be assured that the courts do not generally hold directors to account for poor business judgements. It is par for the course for boards to make business decisions that could turn out well or badly – with hindsight.

Of course, the caveat is that a director's decisions must be made in good faith and with due care, skill and diligence. The law requires that the standard of due care and diligence be that of a reasonable director in the same position, while the standard of skill is what the director already has.

Therefore, as long as you take your director duties seriously and act honestly, you should not be too concerned with legal liability for poor outcomes of the two (or other) investments. That said, it is always wise to

ensure that the company provides you with the necessary director and officer (D&O) insurance and indemnity in the discharge of your director duties.

However, there is one liability that you should be concerned with – reputational damage. An association with a board with poor governance or catastrophic business decisions could impact the incumbent directors' standing and stature, and the likelihood of future board positions. It may be for that reason that the departing directors have so publicly aired their disagreement with the investment decisions. You should assess the extent to which you might face a similar situation and how you can avoid it if you join the board.

#### Truly independent director

The fundamental question is: Will you, and can you, be a truly independent director? That is a question that investors and the public will be asking, given that the current situation is in the public eye. More importantly, that is a question that you should ask yourself in coming to a decision on whether to join the board.

In answering this question, you need to determine what the board dynamics will likely be. In this regard, you should engage with the following:

- The board chairman
- The CEO
- The other directors on the board
- The incoming directors

#### The board chairman

The most crucial person in this equation is the chairman. You said that he is known to be domineering, and the departing directors

have pointed to him as the reason for leaving the board.

If you have not met him, you certainly should. In your discussions with him, you should assess how aligned he is with the CEO's representations of future board interactions and the two investments, specifically:

- How supportive would he be of constructive contention and differing points of views on the board?
- Whether he would go with the majority board's view on the two investments, even if they end up being different from his initial direction and preference?

#### The CEO

Your main interactions have been with the CEO. She is critical to the day-to-day running of the company. She is instrumental for its success. You should determine whether she will be able to deliver on what she said she would set out to do, and to do it well.

And since the board chairman is also her brother, it would be useful if you resolved the question of whether her priority in board decision-making is to be a good sibling or a good CEO.

#### Existing board directors

You have not mentioned the other directors of the existing board. You should meet with each separately to get a feel for their current thinking on the two investments, and how they function and interact in the boardroom.

It would also be useful to connect with the three directors who have resigned, for a more complete picture of the business issues and board dynamics. As a matter of courtesy, you

should inform the CEO of this intent. She and the chairman should value such a desire as indicative of your diligence and independence.

#### New directors

The new directors joining are most likely going to be your allies in ensuring a balanced and constructive board. Therefore, it would be useful for you to meet them to ensure that you all understand each other's perspectives, interests and values.

Depending on what stage of the director search process they are in, it may not be practical for you to meet the new directors before you make your decision. If you are unable to meet them before you decide, you can offer to meet them after you have, so that they can know who they could be working with.

#### Making the call

Ultimately, whether joining this board is a good opportunity or a poisoned chalice is a call you have to make.

On the basis that you consider the two investments to be tenable, subject to some clear thinking with cool heads, it is now a matter of whether you believe that you can function effectively as an independent director under the circumstances.

Yours sincerely



Mr Sid ■

## Who is Mr Sid?



Mr Sid is a meek, mild-mannered geek who resides in the deep recesses of the reference archives of the Singapore Institute of Directors.

Burrowed among his favourite *Corporate Governance Guides for Boards in Singapore*, he relishes answering members' questions on corporate governance and directorship matters. But when the questions are too difficult, he transforms into Super SID, and flies out to his super network of boardroom *kakis* to find the answers.

### Mr Sid's References (for this question)

#### Board Guide

Section 5.2: General Duties of Directors  
Section 5.11: The Independent Director  
Section 5.17: Director Liabilities  
Section 6.2: Board Dynamics  
Section 6.5: The CEO

#### Boardroom Matters

Vol 1, Chapter 16: "To Be or Not To Be – An Independent Director?" by Mike Gray  
Vol 1, Chapter 24: "Should Failing to Act Diligently be a Crime To Be or Not To Be – An Independent Director?" by Adrian Chan  
Vol 3, Chapter 4: "Will the Truly Independent Director Please Stand Up?" by Willie Cheng  
November 2018: "Can Directors Who Procure a Company's Breach be Liable" by Lee Kim Shin  
June 2019: "Preparing for an Independent Director-Led Board" by Victor C S Yeo

#### SID Directors Bulletin

2021 Q2: "Trusting in the Independence of Independent Directors" by Mak Yuen Teen

#### SID Courses

Listed Entity Director Module 1 – LED Essentials  
Listed Entity Director Module 2 – Board Dynamics