Dear Mr Sid

Re: Let It Be a "None-Year Rule"

This so-called "nine-year rule" is driving me crazy.

I am an ID and chair of the NC of a small SGX-listed company. Our board has five directors, of whom three are IDs. The chairman is non-executive but non-independent (he's the controlling shareholder), hence the need for a majority of IDs. The other non-independent director is the CEO.

The nub of the problem is that I will hit the nine-year term limit at the coming AGM in April 2023. I am keen to stay on, and both the chairman and CEO want me to stay. But I have to go through a two-tier voting process to deem my continued independence. It will be embarrassing for the company and me if I don't make it.

To be honest, I'm irritated and dismayed by this nine-year rule. What's it for anyway? Is it to ensure support for minority shareholders or turnover of directors, or space for more women? And, what makes a director reliably independent at eight years and eleven months, but culpably conflicted at nine years and one month?

In fact, I would argue that it takes a while to understand a company and its issues, and directors are at their most effective at around… well… nine years – just when they are being thrown out! Instead of retaining all that corporate memory and wisdom, you have new directors who would be a pushover for management trickery and deception.

Adding to our aggravation is the way the rules keep changing. Independence is a state of mind, and who else knows best if a director is truly independent but their fellow directors? So, why not stick to the rigorous board review in the old Corporate Governance Code?

Since SID represents the directorship community and knows the regulators, could you lobby SGX to drop this nine-year rule, or at least go back to the old requirement for a rigorous review and trust the board to do the right thing?

Yours sincerely,

Termed-Out-But-Still-Committed

Dear Termed-Out-But-Still-Committed

Yes, the nine-year rule has been a controversial one. And perhaps it has been contentious because the rule and its implementation sought to satisfy too many governance principles and points of view.

Governance principles

The nine-year rule seeks to effect two important tenets of good governance: director independence and board renewal.

Independent directors are needed to bring some level of objectivity to board decision-making. Even though a director may start off being objective and independent-minded, the risk is that, with time, they develop relationships with management and the substantive shareholders that impair their independent perspective.

Sure, independence is a state of mind. But in the absence of being able to know what is in a director's head, most corporate governance regimes use proxies (such as blood relations, money ties, and time in this case) to deem the (lack of) independence of a director – at least circumstances that could pose a conflict of interest to a director's independence.

Whether it should be nine years or some other period, it is a matter of where to draw a line in the sand. This is no different than establishing the eligible age for drinking, smoking, voting, etc, at 18, 21, etc. Nine years was probably selected because it is a typical three-year term renewed twice.

The nine-year rule also seeks to achieve board renewal. Of course, those like you who are particularly valuable can continue after nine years as a non-independent non-executive director (NI-NED). However, as you point out, there are rules around the minimum proportion of IDs, preventing a company from having too many non-independent directors. Specifically, a board needs to have at least one-third IDs [SGX Mainboard Rule 210(5)(c) and Catalist Rule 406(3)(c)] or majority IDs when the chair is not independent [Code Provision 2.2].

So, to answer your question on the purpose of the nine-year rule:

- Yes, it is for director independence (though not necessarily to support minority shareholders).
- Yes, it is for board renewal (with some flexibility to retain valuable long-serving directors).
- No, it is not explicitly for gender diversity (although this can be a side benefit when directors are being replaced).

Implementation issues

Unfortunately, the rule as it stands has not been very effective. And that is partly because the regulators had compromised in seeking to satisfy directors such as yourself who argue for the rule to be moderated.

To recap its history: the nine-year rule was introduced in the Code of Corporate Governance in 2012. But it allowed a long-serving director (one with more than nine years on the board) to be deemed independent following "a particularly rigorous review" of their independence by the board.

Guess what? Six years later, the *Singapore Directorship Report* 2018 revealed that more than 55 per cent of entities listed over nine years had at least one long-serving ID, involving a total of 37 per cent of all such directors. Both percentages were not an improvement from 2014, when SID and SGX published the first *Singapore Directorship Report*. The annual report disclosures of boards' "rigorous" reviews were often lengthy but meaningless boilerplates.

When the Code was revised in 2018, the need for a "particularly rigorous review" was replaced by the need for a two-tier vote of (1) All shareholders and (2) Shareholders excluding directors and CEO and their associates [SGX Mainboard Rule 210(5)(d)(iii) and Catalist Rule 406(3)(d)(iii)].

Even then, the latest *Singapore Directorship Report* 2021 showed that more than 57 per cent of entities listed over nine years had at least one long-serving ID, involving a total of 31 per cent of all such directors. Another study by Professor Victor Yeo found that over 70 per cent of long-serving IDs in 2021 were put through a two-tier vote, of which 96 per cent were successfully reappointed as IDs (see Mr SID's References).

Clearly, the spirit of the nine-year rule to achieve board renewal and director independence was not being followed.

Regulators' response

Across the world, regulators take different approaches to ID tenures.

The European Commission recommends a hard 12-year limit for its member countries, which France has adopted. The Philippines has a hard nine-year limit, India has a 10-year limit, and Malaysia will have a hard 12-year limit from June 2023.

Several others, such as the UK, Australia and Hong Kong, have "comply or explain" guidelines and rules similar to Singapore's 2008 and 2012 implementations. Meanwhile, major countries such as the US, Canada and Japan do not have guidance on the tenures of independent directors.

You suggested lobbying the regulator in Singapore. The SGX had recently solicited industry input on this topic in its Consultation Paper of October 2022. The paper noted that long-serving IDs is a concerning trend, and "there is an increasing risk that companies' boards will grow stale and their independence compromised". Thus, it is proposing a hard stop at nine years for IDs, so boards will not be able to side-step the nine-year rule. A hard nine-year limit is not new in Singapore. MAS has already imposed this on financial institutions since 2018.

Way forward

Coming to your situation, my advice is not to ignore the writing on the wall. By your upcoming AGM or the next, the nine-year rule will likely be hard coded. You should plan as if it were the case.

As such, the most viable alternative for you to remain on the board may be to increase the board size to seven by adding two new IDs. This makes a total of four IDs and three non-independent directors (the chairman, CEO and you).

Other alternatives to the board size and composition include having an ID chair the company (the requirement for IDs will be reduced to one-third) or removing one of the other non-independent directors from the board (to make way for you).

However, it is not wise to tamper with board size just to keep a director on the board. More directors would be more expensive and could be suboptimal. The board size and composition should be a function of what is needed for the board to be effective. According to the *Singapore Board of Directors Survey* 2022, the average board size has shrunk from six to five members.

You and the board should seek to understand the rationale for director independence and board renewal, and reflect on how these can be best applied to your board.

Yours sincerely

Sid

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 2.9: Independence

Nominating Committee Guide
Section 4.2 Number of Independent Directors
Section 4.4 Criteria for Independence
Section 4.5 Tenure of Independent Director
Appendix 4B, Case Study 4B-1 Determining Director Independence
Appendix 4B, Case Study 4B-2 The Nine-Year Rule for an Independent Director

Boardroom Matters
Vol 1, Chapter 20: "The Search for Independence" by Lim Chin Hu
Vol 1, Chapter 22: "The Nine-Year Rule" by David Conner
2017 February 13: "The Nine-Year Rule: Is it for Independence or Renewal" by Willie Cheng
2018 April 9: "Hardening of Nine-Year Rule" by Neo Sing Hwee
2019 May 13: "Responding Positively to the Nine-Year Rule" by Eugene Kang
2019 June 10: "Preparing for an Independent Director-Led Board" by Victor CS Yeo
2022 December 12: "Hard Limits for Independent Directors: About Time?" by Alvin Chiang

Directors Bulletin
2017 Q2: "Director Tenure: Stricter guidelines needed" by Mak Yuen Teen
2022 Q3: "Time to Reset Corporate Governance in Singapore?" by Mak Yuen Teen
2022 Q3: "Long-Serving IDs and the Nine-Year Rule" by Professor Victor Yeo

The Singapore Directorship Report 2014, 2018 and 2021
Section C: Board Tenure

The Singapore Board of Directors Survey 2015, 2019 and 2022
Section 1: Board Structure and Directorship

SGX Consultation Paper
Board Renewal and Remuneration Disclosures, 27 October 2022