

**Being:** SPX Guidance Note

**For:** Independent Directors

**Last Updated:** 10<sup>th</sup> January, 2020

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## **INTRODUCTION**

As per the South Pacific Stock Exchange (SPX) Listing Rules Section 63, the board composition of all listed entities must comprise of at least one third independent directors.

### **Need For a Guidance Note**

The rules do not have a procedure which can be followed when the SPX decides the independence of directors. This notice therefore would provide a practical guideline which needs to be followed by listed entities and SPX when dealing with the issue of independent directors to ensure the protection of the market as a whole.

## **GUIDANCE NOTES FOR DETERMINING INDEPENDENCE OF DIRECTORS**

### **Independent Directors**

The presence of independent directors on the board is widely considered as a means of protecting the interest of shareholders and other stakeholders. An independent director should have a good understanding of the responsibilities required by this position and if need be, undergo training.

### **Independence Tests**

An independent director is independent of management and free of any business or other relationship that could materially interfere with – or could reasonably be perceived to materially interfere with – the exercise of their unfettered and independent judgment.

An independent director is a non-executive director (i.e. is not a member of management) and:

1. is not a substantial shareholder of the company or an officer of, or otherwise associated directly with, a substantial shareholder of the company;
2. within the last three years has not been employed in an executive capacity by the company or another group member, or been a director after ceasing to hold any such employment;
3. within the last three years has not been a principal of a material professional adviser or a material consultant to the company or another group member, or an employee materially associated with the service provided;
4. is not a material supplier or customer of the company or other group member, or an officer of or otherwise associated directly or indirectly with a material supplier or customer;
5. has no material contractual relationship with the company or another group member other than as a director of the company;
6. has not served on the board for a period which could, or could reasonably be perceived to, materially interfere with the director's ability to act in the best interests of the company;
7. is free from any interest and any business or other relationship which could, or could reasonably be perceived to, materially interfere with the director's ability to act in the best interests of the company.

Family ties and cross-directorships may be relevant in considering interests and relationships which may compromise independence, and should be disclosed by directors to the board.

In order to tighten the definition of "independent director" for purposes of these standards:

1. No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed entity (directly or as a partner, shareholder or officer of an organization that has a relationship with the company).

**Commentary:** It is not possible to anticipate or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to "listed company" would include any parent or subsidiary in a consolidated group with the listed company). Accordingly, it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, as the concern is independence from management, the Exchange does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

2. In addition, a director is not independent if:
  - The director is, or has been within the last three years, an employee of the listed entity, or an immediate family member is, or has been within the last three years, an executive officer, of the listed company.

**Commentary:** Employment as an interim Chairman or CEO or other executive officer shall not disqualify a director from being considered independent following that employment.

- The director is a current partner or employee of a firm that is the listed company's internal or external auditor; the director has an immediate family member who is a current partner of such a firm; the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.

**General Commentary:** An "immediate family member" includes a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone who shares such person's home.

In addition, references to the "listed entity" or "company" include any parent or subsidiary in a consolidated group with the listed entity or such other company as is relevant to any determination under the independent standards.

### **Initial Assessment of Independence by Listed Company**

All listed company Board of Directors must assess the independence of a proposed director as per the criteria stipulated under "Independence Tests" above. The listed company must then complete the *Declaration for Initial Assessment of Independence* contained in *Appendix A* of this Guidance Note and submit to SPX immediately. The Declaration must be signed by the Chairperson of the listed company Board and one other director of the listed company. The market announcement regarding the successful appointment of the

independent director must only be released by the listed company once SPX accepts the Declaration made by the listed company.

### **Independent Decision-Making**

All directors should bring an independent judgment to bear in decision-making. To facilitate this, there should be a procedure agreed by the board for directors to take independent professional advice if necessary, at the company's expense. Non-executive directors should consider the benefits of conferring regularly at scheduled sessions without management present. Their discussions can be facilitated by the chairperson or lead independent director.

To empower non-management directors to serve as a more effective check on management, the non-management directors of each listed company must meet at regularly scheduled executive sessions without management.

Regular scheduling of such meetings is important not only to foster better communication among non-management directors, but also to prevent any negative inference from attaching to the calling of executive sessions.

In order that all interested parties (not just shareholders) may be able to make their concerns known to the independent directors, a listed company must also disclose a method for such parties to communicate directly with the independent directors.

### **Disclosure of Independence**

The board should regularly assess the independence of each director in light of interests disclosed by them. For this, each independent director should provide to the board all relevant information.

The board should state its reasons if it considers a director to be independent notwithstanding the existence of relationships listed above. In this context, it is important for the board to consider materiality thresholds from the perspective of both the company and its directors, and to disclose these.

The tenure of each director is important to an assessment of independence. Where the independent status of a director is lost, this should be immediately disclosed to the market.

### **Periodic Assessment of Independence by Listed Company**

All listed company Board of Directors must periodically assess the independence of all the independent directors serving on the listed company Board as per the criteria stipulated under "Independence Tests" above. This periodic assessment, at a minimum, must be carried out once annually. The listed company must then complete the ***Declaration for Periodic Assessment of Independence*** contained in ***Appendix B*** of this Guidance Note and submit to SPX as soon as the Declaration is signed or no later than three (3) months after the end of the annual accounting period of the listed company. The Declaration must be signed by the Chairperson of the listed company Board and one other director of the listed company.

### **NON COMPLIANCE WITH INDEPENDENT DIRECTORS REQUIREMENT**

Where SPX determines that a listed company is not compliant with the Independent Director's requirement as stipulated in Section 63 of the SPX Listing Rules, the following measures will be adopted:

1. A notice shall be sent by the SPX to the listed company which would:
  - a. highlight the non-compliance matter; and
  - b. provide an agreeable stipulated timeframe within which to comply with the independent directors' requirement.
2. If the listed company remains non-compliant with the Independent Directors' requirement, then the SPX shall:
  - a. impose a total fine of \$2,500 on the listed company; and
  - b. require the listed company to release a market announcement which would state that the company is non-compliant with the independent directors' requirement and inform the market of the corrective steps the company will undertake to comply with the requirement.
3. If the listed company still remains non-compliant with the Independent Directors' requirement after the SPX has taken the aforementioned steps, then the SPX will refer this matter to the SPX Compliance Committee which will then take any necessary actions to ensure compliance.

#### **GUIDELINE REVIEW**

This guideline must be reviewed every two years from the guideline implementation date **or earlier if required.**

#### **GUIDELINE IMPLEMENTATION**

This guideline is implemented and effective from 1<sup>st</sup> day of January 2017.

## Appendix A

### Declaration for Initial Assessment of Independence

1. In line with the SPX Listing Rules, the Board of (*Company Name and Code*) is required to appoint one third independent directors to its Board.
2. As per the definition and criteria included in the SPX Guidance Note for Independent Directors, the Board of (*Company Code*) confirm the following:
  - That (*Names of Independent Directors*) have provided a written consent to act as Independent Director(s) on the (*Company Code*) Board and that he/she understands his/her appointment is in the capacity of a Non-Executive and Independent Director as required under the Reserve Bank of Fiji and South Pacific Stock Exchange rules and regulations.
  - That (*Names of Independent Directors*) qualifies as Independent Director(s) as he/she has no material relationship with (*Company Code*) as a listed company (directly or as a partner, shareholder or officer of an organization that has a relationship with (*Company Code*)).
  - That (*Names of Independent Directors*) is/are independent of management and free of any business or other relationship that could materially interfere with – or could reasonably be perceived to materially interfere with – the exercise of their unfettered and independent judgment.
  - That (*Names of Independent Directors*) is/are non-executive director (i.e. is not a member of management) and:
    - i. is not a substantial shareholder of the company or an officer of, or otherwise associated directly with, a substantial shareholder of the company;
    - ii. within the last three years has not been employed in an executive capacity by the company or another group member, or been a director after ceasing to hold any such employment;
    - iii. within the last three years has not been a principal of a material professional adviser or a material consultant to the company or another group member, or an employee materially associated with the service provided;
    - iv. is not a material supplier or customer of the company or other group member, or an officer of or otherwise associated directly or indirectly with a material supplier or customer;
    - v. has no material contractual relationship with the company or another group member other than as a director of the company;
    - vi. has not served on the board for a period which could, or could reasonably be perceived to, materially interfere with the director's ability to act in the best interests of the company; and
    - vii. is free from any interest and any business or other relationship which could, or could reasonably be perceived to, materially interfere with the director's ability to act in the best interests of the company.

Declared at \_\_\_\_\_, this \_\_\_\_\_ Day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
(Chairperson)

\_\_\_\_\_  
(Director)

**Appendix B**  
**Declaration for Periodic Assessment of Independence**

The Board of *(Company Name and Code)*, hereby confirms that we have reviewed our assessment of independence for the following directors:

1. *(Name of Independent Director 1)*;
2. *(Name of Independent Director 2)*; and
3. *(Name of Independent Director 3)*.

Based on the review of our assessment, we hereby confirm that there are no changes in the independence status of the aforementioned director(s) since the last filing to the South Pacific Stock Exchange on Independent Directors.

We undertake to immediately disclose to the market if any of the aforementioned director loses his/her independence before the next filing is due to the South Pacific Stock Exchange to the extent that the independent director provides the relevant information to the *(Company Code)* Board for making an assessment of independence.

Declared at \_\_\_\_\_, this \_\_\_\_\_ Day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
*(Chairperson)*

\_\_\_\_\_  
*(Director)*