



Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

9 August 2018

SEC-OGC Opinion No. 18-13

RE: Effectivity of Memorandum
Circular No. 16, Series of 2002;
Chairman as Independent director.

ATTY. BRICCIO JOSEPH C. BOHOLST

Corporate Secretary and Compliance Officer
City Sports Club Cebu, Inc.
Cardinal Rosales Avenue
Cebu Business Park, Cebu City

Dear Atty. Boholst:

This refers to your letter dated 21 September 2016 requesting for an opinion on whether the Commission's Memorandum Circular No. 16, Series of 2002 (hereinafter referred to as "*MC No. 16*") is still in force or whether it is a violation of MC No. 16 when one (1) of the only two elected independent directors of a corporation with seven directors becomes Chairman of the corporation to which he is an independent director.

With regard to the first query, MC No. 16 is still in force and effect. The provisions of MC No. 16 are embodied in Section 38 of the Securities and Regulations Code, to wit:

"Section 38. *Independent directors.* – Any corporation with a class of equity securities listed for trading on an Exchange or with assets in excess of Fifty million pesos (P50,000,000.00) and having two hundred (200) or more holders, at least of two hundred (200) of which are holding at least one hundred (100) shares of a class of its equity securities or which has sold a class of equity securities to the public pursuant to an effective registration statement in compliance with Section 12 hereof shall have at least two (2) independent directors or such independent directors shall constitute at least twenty percent (20%) of the members of such board whichever is the lesser. For this purpose, an "independent director" shall mean a

person other than an officer or employee of the corporation, its parent or subsidiaries, or any other individual having a relationship with the corporation, which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.”¹

In addition, the 2015 Implementing Rules and Regulations of the Securities and Regulations Code² likewise embodies the same contents as MC No. 16 and Section 38 of the Securities and Regulations Code.

Moreover, since there are no other issuances by the Commission declaring that MC No. 16 is no longer effective, the presumption is that it is still in force and effect.

With regard to the second query, Section II, Paragraph D of MC No. 16 provides:

“II. DEFINITION

xxx

D. No person enumerated under Section II (5) of the Code of Corporate Governance shall qualify as an independent director. He shall likewise be disqualified during his tenure under the following instances or causes:

- i. He becomes an officer or employee of the corporation where he is such member of the board of directors/trustees, or becomes any of the persons enumerated under letter (A) hereof;

xxx”³

The Director of the Corporate Governance and Finance Department, in a Memorandum addressed to the Office of the General Counsel, stated that: *“[i]n corporate governance, the general rule is that the CEO is an officer of the corporation while the Chairman of the Board is not. Hence, a Chairman who does not hold any executive position and is not involved in the day-to-day operations of the company is not considered an officer of the company.”*⁴

¹ The Securities Regulation Code [THE SECURITIES REGULATION CODE], Republic Act No. 8799, Section 38 (2000).

² 2015 Implementing Rules and Regulations of the Securities and Regulation Code, Republic Act No. 8799, Title IX, Rule 38.

³ SEC Memorandum Circular 2002-16, Section II, Paragraph D.

⁴ Memorandum from the Corporate Governance and Finance Department to the Office of the General Counsel (21 November 2016).

Moreover, in the same Memorandum, it was likewise opined that:

"xxx [I]nternationally recognized good corporate governance practice recommends that the Chairman of the Board be an independent director and that the position be held by a separate individual other than the CEO. As such, an independent director who becomes Chairman of the Board is actually consistent with recognized good practice and does not violate SEC Memorandum Circular No. 16, Series of 2002 and Rule 38 of the Securities and Regulation Code."⁵

Since a Chairman is generally not considered as an officer lest he holds an executive position and is involved in day-to-day operations, then an independent director of a corporation who becomes the Chairman of the corporation, of which he is an independent director, is not in violation of MC No. 16.

It shall be understood that the foregoing opinion is based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the courts, or upon the Commission in other cases of similar or dissimilar circumstances.⁶ If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.


CAMILO S. CORREA
General Counsel

⁵ *Id.*

⁶ SEC Memorandum Circular 2003-15, No. 7.