Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

SEC-OGC Opinion No. 14-36
04 December 2014
Re: Minimum Number of Independent Directors; Articles of Incorporation

Ms. Nimfa Balmes-Pastrana
Vice President, **FIRST METRO INVESTMENT CORPORATION**
45[TH] Flr., G.T. Tower International,
Ayala Ave. cor. H.V. Dela Costa St.,
Makati City

Dear Madam;

This refers to your letter of 14 July 2014 requesting for a confirmation of your opinion on the interpretation of the rules of the Commission and the Bangko Sentral ng Pilipinas (BSP) on the number of independent directors for entities supervised by the said agencies, in relation to First Metro Investment Corporation (FMIC).

At the onset, it should be noted that, pursuant to Section 5.6 of SEC Memorandum Circular No. 15, Series of 2003[1], the Commission shall refrain from the interpretation of BSP Circular No. 749 dated 27 February 2012 and BSP Memorandum No M-2012-032 dated 05 July 2012 which were mentioned in your letter-request.

In your query, you quoted Article VI of FMIC's Articles of Incorporation (AoI) as well as the Commission's relevant circulars.

Article VI of the AoI of FMIC provides that:

> "Sixth – That the number of directors of said corporation shall be eleven (11) including two (2) independent directors and that the name, citizenship, and residences of the first directors who are to serve until their successors are elected and qualified as provided by the By-Laws"

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[1] "5. As a matter of policy, the Commission shall refrain from rendering opinion in the following:

> 5.1 xxx
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> 5.6 Requests which involve interpretation of administrative rules and issuances of other government agencies considering that it is the promulgating agencies which are competent to undertake such construction by reason of their knowledge of the specific intent and extent of application of the subject issuances; xxx"

SEC Memorandum Circular No. 16, series of 2002, states as follows:

"All companies are encouraged to have independent directors. However, issuers of registered securities and public companies are required to have at least two (2) independent directors or at least 20% of its board size, whichever is the lesser. Provided further that said companies may choose to have more independent directors in their boards than as above required."

SEC Memorandum Circular No. 6, series of 2009, the "Revised Code of Corporate Governance", provides that:

"All companies covered by this Code[2] shall have at least two (2) independent directors or such number of independent directors that constitutes twenty percent (20%) of the members of the Board, whichever is lesser, but in no case less than two (2). All other companies are encouraged to have independent directors in their boards."

The language used in the above-quoted provisions of the SEC Memorandum Circulars is clear as to the required number of independent directors. The rules in relation to the number of independent directors in the Board of Directors (BoD) can be stated as follows:

1) The number of independent directors in the BoD of a concerned entity must be at least two (2) or such number of directors equivalent to twenty percent (20%) of the entire board, whichever is lesser.

   In short, the number of independent directors can never be less than two (2) even if two (2) is more than twenty percent (20%) of the entire board.

2) The number of independent directors of a corporation may go over the minimum requirement provided by law.

As to your query on whether Article VI of FMCI's AoI is properly interpreted not to limit the number of independent directors to two (2), we concur.

A reading of the AoI provision of FMIC provides that:

1) There should be 11 regular directors,
2) Including 2 independent directors

[2] This applies to "registered corporations and to branches of subsidiaries of foreign corporation operating in the Philippines that (a) sell equity and/or debt securities to the public that are required to be registered with the Commission, or (b) have assets in excess of Fifty Million Pesos and at least two hundred (200) stockholders who own at least one hundred (100) shares each of equity securities, or (c) whose equity securities are listed on an Exchange; or (d) are grantees of secondary licenses from the Commission".

Admittedly, there is an ambiguity in the subject provision, thus the need for it to be properly construed.

Pivotal to the discussion is the interpretation of the word "including" and whether or not the use of the word "including" pertaining to the additional independent directors, FMIC limited the number to two (2).

Words have to be taken in their natural, plain and obvious meaning. "Including", in ordinary parlance means "with," or "inclusive of". It does not necessarily impose or designate a limit. Hence, when the AoI states "including two (2) independent directors" it does not say that the corporation can only have two (2) independent directors. Instead, it sets a minimum. The corporation, in this case, must have at least two (2) independent directors but may have more at its option.

Circumstances under which the amendment to the AoI was undertaken should also be considered. The amendment to Article 6 of the AoI of FMIC dated 08 June 2004 providing for independent directors[3] to be part of the BoD for the first time since their last amendment dated 21 June 2001, was obviously pursuant to and after SEC Memorandum Circular No. 16, series of 2002 came into effect. FMIC adopted words which it believed was compliant with the said regulation, especially as regards the minimum number of independent directors and the possibility of having more in the BoD.

Moreover, a check with available records show the intention to have "at least two (2) independent directors," and not merely two (2), as made explicit in Article III, Section 3, paragraph 2 of the Amended By-Laws of FMIC approved by this Commission also on 08 June 2004 quoted hereunder:

> "Section 3. Number, Tenure and Qualification – (a) The number of Directors of the Corporation shall be Nine (9). Each Director must be a registered shareholder of record. Each Directors (sic) shall hold office until the next annual meeting of shareholder (sic) and until his successor shall have been elected and qualified.
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> At least two (2) independent directors (underscoring ours), who are neither regular directors, officers, substantial stockholders or relatives up to the third degree of consanguinity and affinity of directors, officers, or substantial stockholders of the Corporation shall be elected in accordance with the rules and regulations of the Securities and Exchange Commission on the nomination and election of independent directors.xxx"

Thus, 1) construing the word "including" and taking in its natural and plain meaning, and 2) considering the contemporaneous circumstances under which the subject provision was adopted, we opine that the clear intention of FMIC when it amended Article 6 of its AoI

[3] The number of directors has been subsequently increased to 11 (eleven) in an amendment of the AoI of FMIC approved on 11 September 2007.

in 2004 stating therein "that the number of directors of said corporation shall be nine (9) including two (2) independent directors" is to provide a minimum number of independent directors in conformity with SEC Memorandum Circular No. 16, series of 2002.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[4] If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,

CAMILO S. CORREA
General Counsel

[4] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.