IoDSA FAQs
Non-independent Chairman of Board
Frequently Asked Questions

Independence of the Chairman of the Board

1. What are the legal and governance requirements regarding the independence of the Chairman?

   The concept of Chairman of the board is a general governance requirement rather than a legal requirement, and as such the Companies Act is silent on this.

   In terms of governance best practice, however, Principle 2.16 of King III requires the board to elect a Chairman of the board who is an independent non-executive director. The Chairman should be appointed by the board every year after carefully monitoring his independence as well as any factors that may impair his independence. Any factor affecting the independence of the Chairman should be weighed against the positive factor of the continuity of the Chairman. A company may have sound business reasons for appointing a Chairman who does not meet all the criteria for independence or being nonexecutive, and should be prepared to justify this decision.

2. How will you know if the Chairman is independent or not?

   King III, Chapter 2, paragraph 67 contains independence criteria. However, independence of directors is in essence a state of mind, and although these independence criteria provide useful guidance, these independence criteria are external criteria that serve as an indication of how likely or unlikely it will be that the director will act in an independent manner. It is however, not the complete answer to assessing directors’ independence.

   Paragraph 66 of the Report summarises it well: An independent director should be independent in character and judgement and there should be no relationships or circumstances which are likely to affect, or could appear to affect this independence. Independence is the absence of undue influence and bias which can be affected by the intensity of the relationship between the director and the company rather than any particular fact such as length of service or age.

   Important to note also, that independent non-executive directors should be independent in fact and in perception of a reasonably informed outsider. Although independence of mind is essential, perceptions of independence are also important.

   The independence criteria in paragraph 67 should therefore not be used as a strict formula for the board to determine a director’s independence or lack thereof, but rather the board should use their judgment in determining this.

3. What are the advantages of appointing an independent Chairman?

   The independent Chairman can become a new driver of systemic change, ensuring that the board properly executes its expanded responsibilities – to challenge management, to oversee more complex compliance and to monitor execution of the business plan.

   An independent Chairman ensures that all voices have a fair hearing; helps maintain continuity during times of management change; can play an effective role as mediator and can assist the CEO with difficult public relations issues.

4. What can compensate for a non-independent Chairman being appointed?

   King III recommends in Chapter 2 that the Chairman of the board should be independent and free of conflicts of interest at appointment, failing which, the board should appoint a lead independent nonexecutive director (LID). Appointing a LID can assist the board to deal with actual or perceived conflicts of interest.

5. What is the implication for listed companies?

   The JSE listings requirements, paragraph 3.84 stipulates that issuers must comply with certain specific requirements concerning corporate governance and issuers do not have the option of explaining any noncompliance. It should be understood that although the King Code is generally adopted on an “apply or explain” basis, these provisions require mandatory compliance and as must be adhered to.

   One such mandatory requirement relating to the Chairman is the following.

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<th>Principle</th>
<th>JSE Guidance</th>
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<td>The Chairman must either be an independent director or the issuer must appoint a lead independent director as defined in the King Code.</td>
<td>A lead independent director must be appointed in the case where an executive Chairman is appointed or where the Chairman is not independent or conflicted.</td>
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6. By whom is the LID appointed and what are the appointment requirements?

Annually, the board of directors will select an independent director to serve as the lead independent director. The role of the LID and deputy Chairman, if one is appointed, may be combined.

The appointment of the lead independent director becomes effective and he/she starts serving actively in this capacity where the Chairman is absent or not able to perform his duties for whatsoever reason or where independence of the Chairman of the board is questionable or impaired.

7. How long does the LID appointment last?

The term of the LID’s appointment will depend on the circumstances of the company and could either be an ongoing appointment or one of limited duration for so long as the actual or perceived lack of independence or conflict of interest of the Chairman endures.

8. What are the role and responsibilities of the LID?

The main function of a LID is to provide leadership and advice to the board when the Chairman has a conflict of interest, without detracting from the authority of the Chairman. The LID should at all times be aware that the role is that of support to the Chairman and board and not in any way to undermine the authority of the Chairman.

The LID, once the appointment becomes effective, performs the functions as necessary to fulfil his role, including the following:

- Presiding at all meetings of the board at which the Chairman is not present or where the Chairman is conflicted, including any sessions of the independent directors;
- Calling meetings of the independent directors where necessary;
- Serving as principal liaison between the independent directors and the Chairman;
- Performing all such functions that cannot be performed by the Chairman due to his/her absence or the existence of a conflict of interest;
- Chairing the board meetings which deal with the succession of the Chairman and the Chairman’s performance appraisal;
- Liaising with major shareholders if requested by the board in circumstances or transactions in which the Chairman is conflicted; and
- Performing other duties that the board of directors may from time to time delegate.

9. What should be disclosed?

If the board appoints a Chairman who is a non-executive director but is not independent or is an executive director, this should be disclosed in the integrated report, together with the reasons and justifications for the appointment; as well as the mitigating controls in place, i.e. the existence of a lead independent director.

10. Where can I find more information?