Republic of the Philippines
Department of Finance
Securities and Exchange Commission
PICC Secretariat Building, PICC Complex, Pasay City

COMMISSION EN BANC

IN RE: RAPPLER, INC. AND
RAPPLER HOLDINGS CORPORATION

DECISION

After due consideration, the En Banc hereby approves and adopts the findings of the Special Panel[1] in its Investigation Report *in toto*.

On **8 July 2017**, this En Banc issued **SEC Resolution 437, Series of 2017**, under which a Special Panel was created, viz:

> [F]or purposes of conducting a **formal, in-depth examination** of Rappler, Inc. and its parent, Rappler Holdings Corporation, as to possible violations of nationality restrictions on ownership and/or control of Mass Media entities, in relation to the Anti-Dummy Law, as well as possible violations of the Corporation Code, the Securities Regulation Code, and other laws within the Commission's mandate. (Emphasis supplied)

The governing laws were specified in the **Show Cause Order** dated 1 August 2017 as Foreign Equity Restrictions in Mass Media, enshrined in **Article XVI, Section 11(1) of Constitution** (in relation to **Article II, Section 19** thereof) and enforceable through:

- **Section 2 of Presidential Decree 1018, Limiting the Ownership and Management of Mass Media to Citizens of the Philippines** (in relation to the sanctions under Section 6(i) of Presidential Decree 902-A, as amended, and Section 5.1(f) of the Securities Regulation Code);

- **Section 1 of Commonwealth Act 108, aka The Anti-Dummy Act** (in relation to the sanctions under Section 6(i) of Presidential Decree 902-A, as amended, and Section 5.1(f) of the Securities Regulation Code); and

- **Section 7 in relation to Section 14 of Republic Act 7042, The Foreign Investments Act of 1991**, as amended.

This enumeration is without prejudice to any violation of the Corporation Code, the Securities Regulation Code, and other laws within the Commission's mandate, arising from the same act.

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[1] Authorized under **SEC Resolution 437, Series of 2017** dated 8 July 2017.

FACTS

THE RESPONDENTS

Rappler, Inc. is a domestic stock corporation registered[2] on **25 July 2011**. Its primary purpose is "to design, develop, establish, market, sell, maintain, support, distribute, customize, sell, re-sell and/or operate **news, information and social network services** including but not limited to contents, platforms, systems and/or applications **via web, internet, mobile, and other delivery formats**; communications, advertising, corporate social responsibility, marketing, PR, events, brand affinity and other related services and packages provided it will not act as an internet service provider." (Emphasis supplied)

Rappler Holdings Corporation is a domestic stock corporation registered[3] on **12 December 2014**. It presently owns **98.84%** of Rappler, Inc.[4]

PDR ISSUANCES IN 2015

On **29 October 2013**, Rappler, Inc. (through its President) started negotiating with Omidyar Network regarding funding.[5]

On **26 January 2014**, Rappler, Inc. (through its President) started negotiating with North Base Media regarding funding.[6]

On **25 May 2015**,[7] Rappler Holdings Corporation issued **12,028,718** Philippine Depositary Receipts ("PDRs") covering shares of Rappler, Inc., designated as "**NBM PDRs**" because they were sold to NBM Rappler L.P., a foreign juridical entity.[8] NBM Rappler L.P. was founded and co-owned by North Base Media Ltd.,[9] a foreign juridical entity.

Allegedly, NBM Rappler, Ltd. merely secured the permission of Rappler, Inc. to use the word "Rappler" in the name of NBM Rappler, L.P.[10] Rappler. Inc. is not listed as a partner of NBM Rappler, Ltd.[11]

On **31 May 2015**, Rappler Holdings Corporation publicly reported[12] that it entered into a partnership with North Base Media, Ltd.

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[2] SEC Registration No. **CS201112835**.
[3] SEC Registration No. **CS201424077**.
[4] As reported in 2016 Annual Financial Statements of Rappler, Inc.
[5] Page 15 of **Verified Explanation** filed on 29 August 2017.
[6] Page 8 of **Verified Explanation** filed on 29 August 2017.
[7] As reported in Rappler Holdings Corporation's Consolidated Financial Statements for 2015 and 2016.
[8] **Registered as a Limited Partnership in the Cayman Islands.** *See* **Annex 5 of Verified Compliance** filed 12 October 2017 – **Affidavit of Stuart Karle**, Partner and General Partner of North Base Media, Ltd., executed in New York, NY, USA and dated 29 August 2017.
[9] **Registered as a Limited Company in the Cayman Islands.** *See* **Annex 5 of Verified Compliance** filed 12 October 2017 – **Affidavit of Stuart Karle**, Partner and General Partner of North Base Media, Ltd., executed in New York, NY, USA and dated 29 August 2017.
[10] **Annex 5 of Verified Compliance** filed 12 October 2017 – **Affidavit of Stuart Karle**, Partner and General Partner of North Base Media, Ltd., executed in New York, NY, USA and dated 29 August 2017.
[11] **Annex 4 of Verified Compliance** filed 12 October 2017 – **Register of Partnership Interests of NBM Rappler L.P.** showing five (5) foreign juridical entities as partners in the Limited Partnership, including North Base Media, Ltd. but excluding Rappler, Inc. There are no Filipino partners, natural or juridical.

On **2 October 2015**,[13] Rappler Holdings Corporation issued **7,217,257** PDRs covering shares of Rappler, Inc., designated as "**ON PDRs**" because they were sold to Omidyar Network Fund LLC, a foreign juridical entity.[14]

On **5 November 2015**, Rappler Holdings Corporation publicly reported[15] that it received an investment from Omidyar Network LLC.

In 2015, Rappler Holdings Corporation filed **SEC Form 10-1 (Notice of/Application for Confirmation Exempt Transactions)** thrice: **8 June 2015**; **8 August 2015**; and **1 December 2015.** In these filings, it represented that:

(a) **264, 601 PDRs** were issued on 29 May 2015 to NBM Rappler, L.P.;
(b) **11,764,117 PDRs** were issued on 29 July 2015 to NBM Rappler, L.P.;
(c) **7,217,257 PDRs** were issued to Omidyar Network Fund LLC.

INTERNAL INVESTIGATION IN 2017

On **22 December 2016**, the Commission En Banc received a Letter[16] dated 14 December 2016 from the Office of the Solicitor General (OSG) requesting an investigation into Rappler, Inc. and Rappler Holdings Corporation "for any possible contravention of the strict requirements of the 1987 Constitution," with regard to the issuances of Philippine Depositary Receipts (PDRs) to NBM Rappler, L.P. and Omidyar Network Fund LLC in 2015.

On **28 February 2017**, Rappler Holdings Corporation and Rappler, Inc. (collectively "Rappler") appeared in response to a **Notice of Conference** called by the Commission's **Company Registration and Monitoring Department (CRMD)**. Rappler then furnished a copy of the ON PDRs.

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[12] "Top Journalists' Investment Fund Invests in Rappler" published on http://www.rappler.com on 31 May 2015 (last accessed 31 July 2017).

[13] As reported in Rappler Holdings Corporation's Consolidated Financial Statements for 2015 and 2016.

[14] **Registered as a Limited Liability Company (LLC) in the state of Delaware, USA.** *See* **Annex 6 of Verified Compliance** dated 12 October 2017 – **Authentication of Harriet Smith Windsor, Secretary of State** of the State of Delaware, executed in Wilmington, DE, USA.

[15] "Omidyar Network Invests in Rappler" published on http://www.rappler.com on 5 November 2015 (last accessed 31 July 2017).

[16] "It has recently been brought to the attention of the Office of the Solicitor General (OSG) that Rappler, Inc. (Rappler), a media corporation, has been on the receiving end of funds from foreign investors. In 2015, Rappler received 'an undisclosed amount from Omidyar Network, a fund created by eBay founder and entrepreneur Pierre Omidyar and his wife.' It has also entered into a "partnership"with North Base Media, an investment firm based in Washington, D.C., likewise for an undisclosed amount. xxx The investment agreements involve what are currently known as Philippine Depositary Receipts (PDRs). These are derivative securities under the Securities Regulation Code (SRC) xxx Admittedly, there is no certainty as to whether Rappler's PDR arrangement with Omidyar Network and North Base Media runs afoul of the Constitutional prescription on foreign ownership, as this would require an in-depth look at the corporate layering of Rappler and RHC, as well as the amount of the investments and the PDRs themselves, which are currently not disclosed to the public, Rappler not being a publicly-listed company. That being said, the OSG still feels it proper to call your attention to such situation, in order that your office may investigate the relevant companies for any possible contravention of the strict requirements of the 1987 Constitution xxx As the counsel for the Republic of the Philippines, it is our office's sworn duty to uphold the Constitution and to defend it from any entity which seeks to subvert its mandates. We therefore hope for your kind cooperation on the matter." **[Excerpt from OSG Letter to the SEC Chair Teresita Herbosa dated 14 December 2016]**

The ON PDRs contain a provision wherein the "company" is required to **seek approval** of the ON PDR Holders **on corporate matters**, viz:

> 12.2 **The Issuer undertakes to cause the Company** from the date hereof and while the ON PDRs are outstanding: xxx
>
> 12.2.2 **not to, without prior good faith discussion with ON PDR Holders and without the approval of PDR Holders** holding at least two thirds (2/3s) of all issued and outstanding PDRs, **alter, modify or otherwise change the Company Articles of Incorporation or By-Laws or** take **any other action where such alteration, modification, change or action will prejudice the rights in relation to the ON PDRs**; xxx (Emphasis supplied)

On Page 1 of the **ON PDR**, the term "Company" is clearly distinguished from the term "Issuer," viz:

> This PHILIPPINE DEPOSITARY INSTRUMENT (the "PDR Instrument") is executed this [2 October 2015] by **RAPPLER HOLDINGS CORPORATION** (the **"Issuer"** or "RHC"), a corporation duly organized existing under and by virtue of the laws of the Republic of the Philippines xxx in favor of the holders for the time being (the "ON PDR Holders" of the Philippine Depositary Receipts (the "ON PDRs") to be issued by RHC.
>
> WITNESS: That
>
> WHEREAS:
>
> (A) The issuer is a shareholder in **Rappler, Inc.** (the **"Company"**).
>
> xxx xxx xxx
>
> **I. Definitions**
>
> In this this Instrument, the words and expressions set out below shall have the following meanings: xxx
>
> **"Company"** means Rappler, Inc.

Thus, the ON PDR imposes obligations not just on the Issuer of the derivative, Rappler Holdings Corporation, but also on the Company which issued the underlying shares, Rappler, Inc. The ON PDR instrument may be categorized as an **equity derivative**, since its value is dependent on the underlying **equity**. It follows that legal and economic rights granted to the ON PDR Holders can be traced back to the legal and economic rights originally reserved to the shareholders.

At the same conference, Rappler also produced a copy of another PDR Instrument covering **264,601** PDRs dated 29 May 2015 issued to NBM Rappler, L.P. This instrument did not contain a similar provision to that of the ON PDRs.

The CRMD was not given a copy of any other PDR Instrument corresponding to the **11,764,117** PDRs issued to NBM Rappler, L.P. on 29 July 2015.

From December 2016 to July 2017, pursuant to its broad regulatory power, the Commission undertook an internal, inter-departmental investigation into Rappler, Inc. and Rappler Holdings Corporation's corporate structure, as far as can be gleaned from their mandatory filings with the Commission, and later the terms and conditions of the actual PDRs issued by the respondents.

FORMAL INVESTIGATION / SPECIAL PANEL

On **8 July 2017**, the Special Panel was created by the En Banc through **SEC Resolution 437, Series of 2017,** to conduct a formal investigation.

On **1 August 2017**, the Special Panel issued a **Show Cause Order**, directing the respondents to file a sworn statement/explanation within fifteen (15) days. Respondents received the Show Cause Order on the same day.

On **17 August 2017**, the President-in-common of Rappler, Inc. and Rappler Holdings Corporation, filed a Request for Extension, due to a personal emergency.

On **23 August 2017**, the Special Panel issued an Order granting the request for extension, for a non-extendible period of five (5) days. Respondents received the Order on the following day, **24 August 2017**.

On **29 August 2017**, the respondents filed their Verified Explanation.

On **27 September 2017**, the Special Panel issued an Order for the Production of Documents, within fifteen (15) days, to wit:

1. A certified true copy of the Philippine Depositary Receipt Instrument[17] covering **11,764,117 PDRs** issued on 29 July 2015 to NBM Rappler, L.P.

2. The **registration/organization/incorporation documents** of the following foreign entities:
   (a) North Base Media, Ltd.
   (b) NBM Rappler, L.P.
   (c) Omidyar Network Fund LLC

Respondents received the Order for the Production of Documents on the following day, **28 September 2017**.

On **12 October 2017**, respondents filed their **Verified Compliance**, to which they attached the following annexes:

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[17] Footnote in the Order for the Production of Documents stated that: "It is evident from the Financial Statements and Notices of Exemption on file with this Commission that Rappler Holdings Corporation issued Philippine Depositary Receipts (PDRs) to NBM Rappler, L.P. on two separate occasions, but the respondents have only submitted one instrument which covers the **264,601 PDRs** issued on 29 May 2015, **out of the total 12,028,718 PDRs issued to NBM Rappler, L.P.**"

> **Annex 1** – a certified **PDR Certificate** covering **11,764,117 PDRs** issued on 29 July 2015 to NBM Rappler, L.P., but not a full-text PDR Instrument. Allegedly, respondent Rappler Holdings Corporation issued the remaining NBM PDRs under the exact same terms as the **264,601 PDRs** issued on 29 May 2015.
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> **Annex 2** – a copy of the **Certificate of Registration of Exempted Limited Partnership**, issued in the Cayman Islands to **NBM Rappler, L.P.**
>
> **Annex 3** – a copy of the **Certificate of Good Standing of Partnership**, issued in the Caymans Islands to **NBM Rappler, L.P.**
>
> **Annex 4** – a copy of the **Register of Partnership Interests**, issued in the Cayman Islands to **NBM Rappler, L.P.**
>
> **Annex 5** – a copy of the notarized **Affidavit of Stuart Karle**, Partner and General Counsel of North Base Media, Ltd. executed in New York, NY, USA, stating that: "**NBM Rappler, L.P.** is not a partnership between North Base Media, Ltd. and Rappler, Inc., a Philippine corporation. NBM Rappler, L.P. does not have any Filipino partners or investors."
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> **Annex 6** – a copy of the **Certificate of Formation**, issued in Wilmington, Delaware, USA to **Omidyar Network Fund, LLC**.
>
> **Annex 7** – **Certificate of Change of Agent Amendment**, issued in Wilmington, Delaware, USA to **Omidyar Network Fund, LLC**.

In **Paragraph 3** of their **Verified Compliance**, respondents stated that:

> xxx RAPPLER and RHC respectfully notify this Honorable Special Panel that their stockholders were aware of the reputations of North Base Media, Ltd./ NBM Rappler, L.P. and Omidyar Network/ Omidyar Network Fund LLC and **did not see the need to do due diligence of these entities** xxx (Emphasis supplied)

On **22 December 2017**, respondents filed a **Supplemental Verified Compliance**, to which was attached a ***photocopy*** of a purported Waiver of Paragraph 12.2.2 of the ON PDR. The document is a private one, ***not subscribed*** before a Notary or a Philippine Consulate. It was executed as recently as 11 December 2017, more than four (4) months since the start of Formal Investigation.

DISCUSSION

GOVERNING LAWS AND RULES

The Foreign Equity Restriction in **Article XVI, Section 11(1)** of the Constitution provides that:

> "The **ownership** and **management** of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens. xxx"

Section 2 of Presidential Decree 1018, Limiting the Ownership and Management of Mass Media to Citizens of the Philippines (in relation to the sanctions under **Section 6(i) of Presidential Decree 902-A, as amended, and Section 5.1(f) of the Securities Regulation Code),** similarly provides that:

> "The **ownership** and **management** of mass media shall be limited to citizens of the Philippines, or to corporations or associations wholly owned and managed by such citizens."

The term "Mass Media" was not further defined in the Constitution itself, evidently to adapt to changing times and to new technologies that may arise after 1987. Precisely to adapt to changing times, wide discretion has been given to the legislature and to administrative agencies. Today's **legislature** considers internet or online media a type of Mass Media. The Commission, an **administrative agency**, has followed the lead of the legislature and considers internet or online media as Mass Media and subject to the Foreign Equity Restrictions of the Constitution.

"Mass Media" refers to **any medium of communication designed to reach the masses** and that tends to set the standards, ideals and aims of the masses, the distinctive feature of which is the dissemination of information and ideas to the public, or a portion thereof.[18] **The citizenship requirement is intended to prevent the use of such facilities by aliens to influence public opinion** to the detriment of the best interests of the nation.[19]

For some years now, the Commission has recognized the statutory definition of Mass Media found in the **Tobacco Regulation Act of 2003**, which notably includes electronic media including the internet, viz:

> **"Mass Media"** - refers to **any medium of communication designed to reach a mass of people.** For this purposes, mass media includes print media such as, but not limited to, newspapers, magazines, and publications; broadcast media such as, but not limited to, radio, television, cable television, and cinema; **electronic media** such as but not limited to **the internet.**[20]

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[18] Department of Justice Opinion No. 40, Series of 1998.
[19] Ministry of Justice Opinion No. 24, Series of 1986.
[20] **Section 4(f) of R.A. 9211,** Tobacco Regulation Act of 2003.

Indeed, recent opinions on Mass Media specifically cite this definition, viz:

> With the continuing evolution and proliferation of digital communication technology, i.e. internet and mobile technology, individuals are now exposed to information that was previously restricted to a select group, making them susceptible to the influence of modern mass media techniques such as advertising and propaganda. **Thus, the internet and mobile technology have become recognized platforms for mass media. In our jurisdiction, the Tobacco Regulation Act of 2003 specifically includes the internet in the definition of mass media.**[21]

What matters to the Commission in determining what is "mass media" is the transmission of information to the masses through "any medium of communication," which includes technologies that were not present at the time[22] the Constitution was drafted (e.g. Internet, Mobile Technology, and Social Media) but are nonetheless embraced by the spirit and intent of the law, which is to prevent foreigners from wielding influence over the minds of the Filipino people.

The constitutional and statutory Foreign Equity Restrictions in Mass Media must be related to the broader state policy in **Article II, Section 19 of the Constitution** which declares that:

> "The State shall develop a self-reliant and independent national economy effectively **controlled** by Filipinos."

Section 5 of the Securities Regulation Code expressly empowers the Commission to "prepare, approve, amend or repeal **rules, regulations and orders**, and issue opinions and provide guidance on and supervise compliance with such rules, regulations and orders."

In this regard, **Rule 3.1.8[23] of the 2015 Implementing Rules and Regulations of the Securities Regulation Code** defines "**Control**" as "the power to ***determine*** the financial and operating ***policies*** of an entity in order to benefit from its activities." The Commission's definition is intentionally broad and does not equate "control" with either ownership of shares of stock or with management as director or officer.[24]

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[21] **SEC Opinion No. 14-06 dated 8 May 2014**, Re: Marketing and Sale of Digital Publication through the Internet and Mobile Technology; Advertising; Mass Media.

[22] Indeed, in the 1986 deliberations quoted by respondents on **Page 28-29 of their Verified Explanation filed on 29 August 2017**, there were only two types, ***print*** and ***broadcast***. However, the final text of the Constitution merely says "mass media" and it is open-ended to adapt to the changing times.

[23] **Same language as SRC Rule 3(1)(E)** of the **2004** Amended Implementing Rules and Regulations of the Securities Regulation Code, as well as **all succeeding** IRRs up to the present.

[24] Even **SRC Rule 3(1)(f)** of the **original 2001** Implementing Rules and Regulations of the Securities Regulation Code, using similar language, includes in the definition of "Control" the power to cause the direction of corporate policies through a contract or otherwise, viz: "***Control, controlling, controlled by, and under common control with***, means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

Rule 3.1.8.2[25] **of the 2015 Implementing Rules and Regulations of the Securities Regulation Code** adds that Control exists whenever one entity has the power "to govern the financial and operating policies of [another] entity under a statute or agreement." This would be true even if the controlling entity does not own any equity, such as through agreements (e.g. **derivatives** based on underlying equity) that grant influence in corporate matters.

Section 1 of the Commonwealth Act 108, aka The Anti-Dummy Act (in relation to the sanctions under **Section 6(i) of Presidential Decree 902-A, as amended, and Section 5.1(f) of the Securities Regulation Code**) penalizes any citizen of the Philippines or of any other specific country *who allows his name or citizenship to be used for the purpose of evading constitutional or legal provisions* which require Philippine or any other specific citizenship as a requisite for the exercise or enjoyment of a right, franchise or privilege. Any alien or foreigner profiting thereby may also be held liable.

This may include a situation where a person allows disqualified foreigners to obtain a derivative that grants a measure of control over corporate matters, especially where the Constitution is very clear that there must be no foreign control whatsoever. Anything less than one hundred percent (100%) Filipino control, as stockholder or through any other means, is a violation.

Sections 2 and 7 of Republic Act 7042, The Foreign Investments Act of 1991, as amended, expounds on the value of foreign investment in areas not reserved to Filipinos, while reiterating the Foreign Equity Restrictions and providing for a regularly-promulgated Foreign Investment Negative List, viz:

> **Section 2. Declaration of Policy. –** It is the policy of the State to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations, and governments, including their political subdivisions, in activities which significantly contribute to national industrialization and socio-economic development to the extent that foreign investment is allowed in such activity by the Constitution and relevant laws. xxx
>
> As a general rule, there are no restrictions on extent of foreign ownership of export enterprises. In domestic market enterprises, foreigners can invest as much as one hundred percent [100%] equity except in areas included in the negative list.
>
> **Section 7. *Foreign Investments in Domestic Market Enterprises.*** – Non-Philippine nationals may own up to one hundred percent [100%] of domestic market enterprises unless foreign ownership therein is prohibited or limited by the Constitution and existing

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[25] Same language as **SRC Rule 3(1)(E)(ii)** of the **2004** Amended Implementing Rules and Regulations of the Securities Regulation Code, as well as **all succeeding** IRRs up to the present.

> law or the Foreign Investment Negative List under Section 8 hereof. [as amended by R.A. 8179]

The **Foreign Investment Negative List (FINL)**, from the first promulgation up to the current,[26] provides that "**Mass Media, except recording**" shall have **No Foreign Equity** pursuant to Article XVI, Section 11 of the Constitution and Presidential Memorandum dated 5 May 1994. Mass Media is the very first on the negative list, the most important, and it must be 0% Foreign and 100% Filipino.

Section 5.1 of the Securities Regulation Code, enacted in 2000, states that "The Commission xxx shall have the powers and functions provided by this Code, [PD] 902-A, the Corporation Code xxx and other existing laws." The term **"other existing laws"** refers to older laws enforced by the Commission at the time the SRC was enacted, e.g. the Anti-Dummy Law (in relation to PD 902-A), the Mass Media Law (in relation to PD 902-A), and the Foreign Investment Act of 1991.

Section 5.1(f) of the Securities Regulation Code grants the authority to "impose sanctions for the violation of laws and the rules, regulations and orders issued pursuant thereto."

As can be gleaned from the **2015 Implementing Rules and Regulations of the Securities Regulation Code**, the Commission's definition of "control" is neither limited to stock *ownership* nor to *management* in the board, but rather embraces a broad range of schemes, including equity derivatives that grant *control*, i.e. **influence over corporate policy and actions in certain matters affecting the disqualified foreigner**, and perhaps also grant economic rights to them.

Circumventions of the Foreign Equity Restriction in the Constitution may be enforced *inter alia* through **Section 2 in relation to Section 5 of P.D. 1018, the Mass Media Law.** The latter section imposes the penalty of "cancellation of permit." Under the broader and stricter Securities Regulation Code, the Commission may impose the equivalent of "Revocation of Certificate of Incorporation," viz:

(1) **Section 5.1, SRC,** regarding Existing Laws clarifies that the Mass Media Law is enforced and interpreted by the Commission;

(2) **Section 5.1(f), SRC,** regarding Sanctions in general, empowers the Commission to impose sanctions for violation of Mass Media Law;

(3) **Section 5.1(m), SRC,** regarding Revocation in particular, allows for the imposition of the penalty of Revocation of Certificate of Incorporation, i.e. the corporation's "permit" that gives legal capacity; and

(4) **Section 5.1(n), SRC** on Incidental Powers, leaves no doubt that the Commission may reconcile and enforce the laws in this manner.

However, if the circumvention of the foreign equity restrictions involves a sale of securities, it may also be considered a species of Securities Fraud. **Section 26**

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[26] Number 1, List A, Tenth Regular Foreign Investment Negative List, Executive Order No. 184 dated 29 May 2015

of the Securities Regulation Code, the "anti-fraud" provision, based on Section 10, specifically Rule 10b-5 thereof, of the Securities Exchange Act of 1934 of the United States ("1934 Act"), states that:

> **Section 26.** *Fraudulent Transactions.* – It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of any securities to:
>
> **26.1.** Employ any device, scheme, or artifice to defraud;

According to the Commission, "Section 26 is a general antifraud provision applicable to securities transactions, modelled after Section 10 of the 1934 Act, and is a basic enforcement tool to protect investors." It applies even to fraud in relation to securities issued in **exempt transactions**.[27] Section 26 requires a showing of **fraud or deceit**, and not just negligence.[28]

For further guidance, there are five principal elements of a fraud action under **Rule 10b-5 of the 1934 Act**, the statute upon which Section 26 is based, viz:

> There are five principal elements for stating a claim under Rule 10b-5. The plaintiff must show: (1) fraud or deceit (2) by any person (3) in connection with (4) the purchase or sale (5) of any security. [29]

Section 71.2 of the Securities Regulation Code, in relation to the powers granted to the Commission in Sections 5.1(f) and 5.1(n), states that:

> **SEC. 71.** ***Validity of Contracts.*** – xxx
>
> **71.2.** Every contract made in violation of any provision of this Code or of any rule or regulation thereunder, and every contract, including any contract for listing a security on an Exchange heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this Code, or any rule or regulation thereunder, **shall be void**:
>
> **(a)** As regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract; and
>
> **(b)** As regards the rights of any person who, not being a

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[27] **Securities and Exchange Commission, History/Background of the Securities Regulation Code (2001), p. 41,** viz: "Section 26 of the SRC streamlines the language formerly used in Section 29 of the RSA xxx Former Section 29(c) of the RSA excepted **exempt securities** and **exempt transactions which xxx only applied to exception from registration requirements** previously contained in Sections 8 and 12 of the RSA. **All other sections of the RSA were applicable to such securities – thus Section 29(c) created unnecessary confusion and was deleted.**

[28] *See* Lucila M. Decasa, Securities Regulation Code Annotated (2013), p. 98, citing SEC v. Court of Appeals, 246 SCRA 738 (1995).

[29] Thomas Lee Hazen, The Law on Securities Regulation, 5th Ed, (2006), p.478.

> party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation.

If a scheme does not only violate the foreign equity restrictions on mass media *but also* the Securities Regulation Code, the contract itself would be void.

THE OMIDYAR NETWORK (ON) PDR

Every security, including derivatives, must be evaluated on its unique terms. The Commission does not consider instruments based on their nomenclature. Here, only the ON PDR contains a repugnant provision. Therefore, the issue is limited to the unique terms found only in the ON PDRs.

The ON PDRs contain a provision wherein the "company" is required to **seek approval** of the ON PDR Holders **on corporate matters**, viz:

> 12.2 **The Issuer undertakes to cause the Company** from the date hereof and while the ON PDRs are outstanding: xxx
>
> 12.2.2 **not to, without prior good faith discussion with ON PDR Holders and without the approval of PDR Holders** holding at least two thirds (2/3s) of all issued and outstanding PDRs, **alter, modify or otherwise change the Company Articles of Incorporation or By-Laws or** take **any other action where such alteration, modification, change or action will prejudice the rights in relation to the ON PDRs**; xxx (Emphasis supplied)

As already discussed, the "Company" is Rappler, Inc. Thus, the ON PDR imposes obligations not just on the Issuer of the derivative, Rappler Holdings Corporation, but also on the Company which issued the underlying shares, Rappler, Inc. The ON PDR instrument may be categorized as an **equity derivative**, since its value is dependent on the underlying **equity**. It follows that legal and economic rights granted to the ON PDR Holders can be traced back to the legal and economic rights originally reserved to the shareholders. **The Foreign Equity Restriction will prevent even the grant of minimal control through the ON PDR.**

The Foreign Equity Restriction is very clear. Anything less than One Hundred Percent (100%) Filipino control is a violation. Conversely, anything more than exactly Zero Percent (0%) foreign control is a violation.

Here, the stockholders must have **prior discussion** with and **approval** of at least 2/3 of the PDR Holders, meaning Rappler is at the very least under obligation to consult with Omidyar Network. The stockholder has become, in effect, subservient to the holder. **It is neither 100% control by the Filipino stockholders, nor is it 0% control by the foreigner PDR holders.**

Respondents wrongly assume that "control" is limited to stock ownership; they repeatedly stated in their Verified Explanation that (1) all their stockholders are Filipino, and that (2) any economic benefits derived by foreign holders from the ON PDR are mere "distributions" and not strictly "dividends." Upon that erroneous premise, respondents proudly stated that "Clause 12.2.2 of the ON PDR does not give Omidyar Network Fund LLC xxx any form of control over Rappler."[30]

In their estimation, perhaps, because the "prior discussion" and "approval" of corporate matters only when it "will prejudice" the PDR Holders, i.e. only **sometimes**, and because there is no transfer of shares, the stockholders being all-Filipino and seemingly compliant, there is no grant of control. However, as already stated, the Commission has already interpreted "control" as embracing not only stock ownership, but also other schemes that grant influence over corporate policy, actions, and structure—even "sometimes."

It does not matter what capacity or device gives the foreigner control, as stockholder or holder or otherwise, there must be none. It does not matter if control is only available in certain occasions, there must be no occasion.

Where Mass Media is concerned, **no control whatsoever** may be granted. **100% Filipino** control means **0% foreign** control. "Control" is any influence over corporate policy, and not limited to ownership of stock.

ACADEMIC DISCUSSION ON INTENT

Because this is a violation of special laws, **intent is immaterial**. Mere commission is enough.

For instructive purposes, however, it bears discussing why the intent behind **Paragraph 12.2.2**, as described by the respondents, is not consistent with the aim of the foreign equity restriction on mass media—i.e., to grant no degree of control, influence, or "assurance" whatsoever to any foreigner.

This is not an insignificant paragraph. It was intended to "assure" Omidyar Network a preferential, or at least equal, standing as opposed to (1) other PDR Holders, and more importantly, (2) the Issuer—it grants ***negative* control**. In fact, Omidyar Network specifically negotiated with Rappler to insert Paragraph 12.2.2 in the ON PDR as stated by respondents themselves, viz:

> [I]t is important to remember that, at the time Omidyar Network Fund LLC decided to purchase the [ON PDRs], **NBM Rappler LP had already purchased** PDRs from RHC. Also, **NBM Rappler LP purchased more PDRs** than Omidyar Network Fund LLC.
>
> On account of this situation, **Omidyar Network Fund LLC was concerned that it was at a disadvantage** because of the possibility that RHC may later agree to give NBM Rappler LP more benefits than Omidyar Network Fund LLC. Also, Omidyar Network Fund LLC

[30] Page 22 of **Verified Explanation** filed 29 August 2017.

> did not want to be placed at a further disadvantage if RHC sells PDRs to other investors.
>
> For these reasons and to protect its investment, **Omidyar Network Fund LLC had RHC agree to secure the approval of at least two-third (2/3) of all the PDR Holders before RHC takes any action** that would prejudice the rights of Omidyar Network under the ON PDR, which rights do not include ownership[31] and [management][32] over Rappler or RHC.[33] **(Emphasis supplied)**

In other words, Omidyar Network specifically wanted to have some some degree of control over Rappler's corporate policy. Paragraph 12.2.2 was **intended** to give the foreign holder some degree of **control**, *i.e.* control over other PDR holders, but inevitably also control over Rappler.

Respondents themselves believe that a substantial investment, such as this, results in an expectation of either ***control*** or ***returns*** from the investor. This is why there was a reluctance to accept more capital from the Filipino shareholders, viz:

> **1.11** It is important to point out, however, that the stockholders and Directors of RAPPLER are made up of independent investigative journalists, businessmen, and technology specialists who all work together to come up with decisions on important matters. Under this set up, the journalists in the group have been given both commercial and editorial powers. If the businessmen stockholders put up more **capital**, they may have the **power** to later override the commercial and editorial powers given to the journalist stockholders.[34]

Given their presupposition that **investment leads to control**, respondents cannot expect a reasonable person to believe that investors of ***over a million dollars***, such as Omidyar Network Fund LLC, do not desire control, viz:

> **1.33** Omidyar Network is known to make investments in companies even if the monetary returns are minimal as long as the business has the potential to give value to the greater community.[35]

If not for *Returns*, for what purpose then is the investment? *Control.* Maybe to "give value to the greater community," but definitely to gain control.

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[31] The word "ownership" is evidently used by respondents here to refer to stock ownership only.
[32] **Respondents used the word "control," but the replacement word "management" better fits the context, in the sense of being Directors or Officers. Respondents erroneously imply that "control" is merely synonymous to "management."** On Page 24 of their Verified Explanation, respondents stated that "control and management of RAPPLER rest in its Directors and Officers."
[33] Pages 23-24 of **Verified Explanation** filed 29 August 2017.
[34] Page 6 of **Verified Explanation** filed 29 August 2017.
[35] Page 15 of **Verified Explanation** filed 29 August 2017.

Thus, if Paragraph 12.2.2 appears to grant **control** (*i.e.* influence over corporate policy, sometimes) to Omidyar Network, it is because it was specifically inserted by Rappler to grant such **control**. Rappler colluded to grant control, or to become a Dummy, as long as Omidyar was not given "equity" per se.

Recall that on 22 December 2017, respondents submitted a ***photocopy*** of a purported Waiver of Paragraph 12.2.2 of the ON PDR. The document is a private one, ***not subscribed*** before a Notary or a Philippine Consulate. It was executed as recently as 11 December 2017, more than four (4) months since the start of Formal Investigation. It is obviously inadmissible, a mere scrap of paper.

However, even if given due course, the waiver would not negate the fact that Paragraph 12.2.2 was intentionally placed in the ON PDR by respondents, with the consent of Omidyar. **It does not remove Paragraph 12.2.2**, rather the purported Waiver states that it "is not intended as, and shall not constitute, an admission or acknowledgment by any Party that the PDR Instrument or Section 12.2.2 thereof is invalid or otherwise contrary to law xxx" **Therefore, the purported Waiver is of *no substantial value* to the Formal proceedings against respondents.** It failed to tilt the balance of weight and sufficiency of evidence in their favor.

ENGAGED IN MASS MEDIA

In an attempt to evade the foreign equity restriction, Respondents absurdly claim Rappler Inc. is not engaged in Mass Media.[36] The Commission disagrees for three reasons: (1) Rappler fits the definition of Mass Media; (2) Rappler consistently claimed to be Mass Media; and (3) Rappler's scheme reveals that it believes itself to be Mass Media and thus prohibited from directly issuing shares to raise capital.

Rappler Inc. fits the description of Mass Media. The term "Mass Media" was not further defined in the Constitution itself, evidently to adapt to changing times and to new technologies that may arise after 1987. Precisely to adapt to changing times, wide discretion has been given to the legislature and to administrative agencies. Today's **legislature** considers internet or online media a type of Mass Media. The Commission, an **administrative agency**, has followed the lead of the legislature and considers internet or online media as Mass Media and subject to the Foreign Equity Restrictions of the Constitution.

"Mass Media" refers to **any medium of communication designed to reach the masses** and that tends to set the standards, ideals and aims of the masses, the distinctive feature of which is the dissemination of information and ideas to the public, or a portion thereof.[37] **The citizenship requirement is intended to prevent the use of such facilities by aliens to influence public opinion** to the detriment of the best interests of the nation.[38]

For some years now, the Commission has recognized the statutory definition of Mass Media found in the **Tobacco Regulation Act of 2003**, which notably includes electronic media including the internet, viz:

> **"Mass Media"** - refers to **any medium of communication designed to reach a mass of people.**

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[36] Page 28 of **Verified Explanation** filed on 29 August 2017.
[37] Department of Justice Opinion No. 40, Series of 1998.
[38] Ministry of Justice Opinion No. 24, Series of 1986.

> For this purposes, mass media includes print media such as, but not limited to, newspapers, magazines, and publications; broadcast media such as, but not limited to, radio, television, cable television, and cinema; **electronic media** such as but not limited to **the internet.**[39]

Indeed, recent opinions on Mass Media specifically cite this definition, viz:

> With the continuing evolution and proliferation of digital communication technology, i.e. internet and mobile technology, individuals are now exposed to information that was previously restricted to a select group, making them susceptible to the influence of modern mass media techniques such as advertising and propaganda. **Thus, the internet and mobile technology have become recognized platforms for mass media. In our jurisdiction, the Tobacco Regulation Act of 2003 specifically includes the internet in the definition of mass media.**[40]

What matters to the Commission in determining what is "mass media" is the transmission of information to the masses through "any medium of communication," which includes technologies that were not present at the time[41] the Constitution was drafted (e.g. Internet, Mobile Technology, and Social Media) but are nonetheless embraced by the spirit and intent of the law, which is to prevent foreigners from wielding influence over the minds of the Filipino people.

Rappler Inc. consistently claimed to be Mass Media. In fact, Rappler Inc. owes its success to being accepted as a newer form of Mass Media, i.e. **online** media, on par with print media and broadcast media. The medium is different, but the function is the same: to communicate ideas to the masses. Rappler Inc. made these consistent claims before the Commision, the Courts, and the Public, viz:

- **Rappler Inc. claimed to be a Mass Media entity before the Commission.** In its ***Articles of Incorporation*** dated 25 July 2011 and also in its ***Amended Articles of Incorporation*** dated 16 April 2014, Rappler Inc. stated that its Primary Purpose is "to design, develop, establish, market, sell, maintain, support, distribute, customize, sell, re-sell and/or operate **news, information and social network services** including but not limited to contents, platforms, systems and/or applications **via web, internet, mobile, and other delivery formats**; communications, advertising, corporate social responsibility, marketing, PR, events, brand affinity and other related services and packages provided it will not act as an internet service provider."

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[39] **Section 4(f) of R.A. 9211,** Tobacco Regulation Act of 2003.

[40] **SEC Opinion No. 14-06 dated 8 May 2014**, Re: Marketing and Sale of Digital Publication through the Internet and Mobile Technology; Advertising; Mass Media.

[41] Indeed, in the 1986 deliberations quoted by respondents on **Page 28-29 of their Verified Explanation filed on 29 August 2017**, there were only two types, ***print*** and ***broadcast***. However, the final text of the Constitution merely says "mass media" and it is open-ended to adapt to the changing times.

Furthermore, in its annual ***General Information Sheet*** (GIS) from 2012-2017, Rappler Inc. stated that its Primary Purpose is "to design, develop, maintain, operate **news, information**, and social network **services**."

The Commission would normally consider an entity whose stated business consists of the **creation and distribution of news and information** a Mass Media entity, after all:

> The term "mass media" shall mean the gathering, transmission of **news**, **information**, messages, signals, and forms of written, oral and all visual communication xxx[42] (Emphasis supplied)

Obviously, this involves the use of a medium of communication, either traditional or **online**, to transmit the news and information to the Filipino masses. Pertinently, the Commission's database shows that Rappler Inc. is listed under the **Industry Classification** of "News Agency Activities," which makes it of the same class as print and broadcast entities.

- **Rappler Inc. claimed to be a Mass Media entity before the Courts.** In the Supreme Court case of ***Rappler v. Andres Bautista***,[43] which concerned a proposed Memorandum of Agreement (MOA) granting equal access to Mass Media entities (including Rappler Inc.) of the presidential debates, the Court stated that:

> In this petition for certiorari and prohibition, **petitioner [Rappler Inc.] prays** for the Court to render judgment:
>
> a. Declaring null and void, for being unconstitutional, pertinent parts of the Memorandum of Agreement that violate the **rights of the Petitioner**, specifically Part VI (C), paragraph 19 and Part VI (D), paragraph 20 [of the MOA]; xxx
>
> d. Pending resolution of this case, issuing a Preliminary Mandatory Injunction requiring the Respondent **to ensure an unimpaired and equal access to all mass media, *online* or traditional**, to all the Debates.

Thus, Rappler Inc. considered itself entitled to equal rights to Free Press as an **online** Mass Media entity. Under Part VI(C), Paragraph 17 of the assailed MOA, the Lead Networks (composed of print and broadcast entities), were allowed to broadcast the debates on their respective websites and social media sites, while Rappler Inc. was not allowed to do so. Rappler Inc. thus argued that **online** mass media should be on equal footing.

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[42] Villanueva and Tiansay, Philippine Corporate Law (2013), p. 61 (citing P.D. 36, as amended by P.D. 191 and 197). *See also* Lucila M. Decasa, Handbook on Private Corporations (2009), p. 305 (citing **SEC Opinion dated 15 July 1991**, based on P.D. 36, as amended by P.D. 191 and 197).
[43] G.R. No. 222702, April 5, 2016.

The Supreme Court, in ruling for Rappler Inc. in that case, agreed that Rappler Inc. is an online Mass Media entity, ***entitled to equal rights with traditional forms of mass media,*** such as print and broadcast, essentially because their "capacity" (function) is the same—to inform the public, viz:

> [T]his right to broadcast by live streaming online the audio of the debates is denied petitioner and other **online media entities**, which also have the capacity to live stream the audio of the debates.
>
> xxx
>
> The political nature of the national debates and **the public's interest in the wide availability of the information** for the voter's education certainly justify allowing the debates **to be shown or streamed in other websites for wider dissemination**, in accordance with the MOA.
>
> Therefore, the debates should be allowed to be live streamed in other websites, including the petitioner's [Rappler Inc.'s] xxx

- **Rappler Inc. claimed to be a Mass Media entity to the Public.** In the article entitled *Omidyar Network invests in Rappler,*[44] it was stated that:

> Created by award-winning journalists and news managers xxx Rappler became the Philippines' first **all-digital news organization** in January 2012, combining technology and crowdsourcing through the use of social media and mobile phone **to merge traditional television broadcasting with the internet**, reinventing systems and distribution channels.
>
> xxx
>
> Rappler is the first and only **media** startup in the Philippines to join **broadcasting** network giants xxx in offering Philippine Depositary Receipts or PDRs to international investors. xxx
>
> xxx
>
> The largest independent news group in Southeast Asia, Rappler was ranked the Philippines' 3rd top **online news** site by Alexa after a little more than a year and a half. It has

[44] Published on www.rappler.com on 5 November 2015.

> won numerous awards since then, most recently in October [2015], the UN's World Summit Awards, which said it's among the world's "best and most innovative digital innovation," the only Asian **media group** to win the **Media & News** category.
>
> xxx
>
> "Rappler combines **the discipline and credibility of traditional print and TV journalists** with the pace and knowledge of millenials," said [Rappler's Managing Editor].

Given these consistent claims to the Commission, the Courts, and the Public that Rappler Inc. is engaged in Mass Media, respondents are **estopped** from raising the argument that Rappler, Inc. is not engaged in Mass Media, viz:

> Through estoppel **an admission or representation is rendered conclusive upon the person making it**, and cannot be denied or disproved as against the person relying thereon.[45]

Rappler's scheme reveals that it believes itself to be Mass Media and thus prohibited from directly issuing shares to raise capital. In fact, the actions of both respondents leave no doubt that they consider themselves as alter egos and equally bound to observe the **100% Filipino Control** requirement.

Rappler Inc. would not have had to create Rappler Holdings Corporation to issue the PDRs if it was not a mass media entity. Rappler Inc. could have just issued stock directly to Omidyar Network Fund LLC. Rather, it truly believed itself to be a mass media entity because it publishes news and information, for the **mass**es, though various **media** of communication.

Aware of the Constitutional restrictions, and yet eager to receive capital from its "global impact investors," Rappler Inc. created an alter ego that would validate the transfer of control. So that no "equity" per se would be transferred, the alter ego would issue an equity derivative. If Rappler Holdings Corporation were not a mere alter ego of Rappler, Inc., it could issue its own stock; and yet, because it was, respondents opted to issue instead the ON PDR.

SUBSTANTIAL EVIDENCE

The standard adopted by administrative agencies such as the Commission is ***substantial evidence***,[46] which is "that amount of relevant evidence which a reasonable mind might accept as adequate to support a conclusion." Reasonable persons who read Paragraph 12.2.2 of the ON PDR would agree that there is some

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[45] Article 1431 of the Civil Code.
[46] Rule 133, Section 5 of the Rules of Court.

control—definitely **not zero**—granted to the foreign holder. It clearly says that when a corporate action would affect the PDR Holders, the stockholders must consult the ON PDR holders and obtain their approval. Thus, there is substantial evidence of a violation of the Foreign Equity Restriction.

PIERCING THE CORPORATE VEIL

Primary liability for any violation of law arising out of the issuance of the ON PDR would clearly fall on the issuer, Rappler Holdings Corporation. However, several key facts suggest that Rappler, Inc. is a ***mere alter ego*** of the issuer and thus its separate juridical personality must be disregarded.

If respondents are mere alter egos, liability for the ON PDR issuance of Rappler Holdings Corporation would extend to Rappler, Inc. Conversely, liability for circumventing the Foreign Equity Restrictions on Mass Media that apply to Rappler, Inc. would extend to Rappler Holdings Corporation.

In 2015, the year of the ON PDR transaction: [47]

1. Rappler, Inc. was wholly-owned **(98.77%)** by Rappler Holdings Corporation;

Shareholders of Rappler, Inc. as of 31 July 2015	Shares	Percentage
1. Rappler Holdings Corporation	112,217,181	98.76872%
2. Maria Angelita Ressa	637,496	0.56110%
3. Dolphin Fire Group, Inc.	436,535	0.38422%
4. DMT Ice Angels Holdings, Inc.	211,221	0.18591%
5. Benjamin So	38,671	0.03404%
6. Ma. Teresa D. Vitug	25,000	0.02200%
7. Glenda M. Gloria	25,000	0.02200%
8. Ma. Rosario F. Hofilena	25,000	0.02200%
9. Manuel I. Ayala	1	0.0000%
10. Nico Jose Nolledo	1	0.0000%
11. James C. Bitanga	1	0.0000%
12. Felicia Atienza	1	0.0000%
13. James Velasquez	1	0.0000%
TOTAL	**113,616,109**	**100.0000%**

2. Rappler, Inc. and Rappler Holdings Corporation had 5 interlocking Directors;

Directors of Rappler, Inc.	Directors of Rappler Holdings Corporation
Manuel I. Ayala (Chairman)	Manuel I. Ayala (Chairman)
Maria Angelita Ressa	Maria Angelita Ressa
Nico Jose Nolledo	Nico Jose Nolledo
Glenda M. Gloria	Glenda M. Gloria
James C. Bitanga	James C. Bitanga
Felicia Atienza	[redacted]
James Velasquez	

3. Rappler, Inc. and Rappler Holdings Corporation had identical Officers;

Officers of Rappler, Inc.	Officers of Rappler Holdings Corporation
Maria Angelita Ressa (President)	Maria Angelita Ressa (President)
James C. Bitanga (Treasurer)	James C. Bitanga (Treasurer)

[47] See 2015 General Information Sheet of Rappler, Inc.

Jose Maria G. Hofilena (Secretary)	Jose Maria G. Hofilena (Secretary)

4. Rappler, Inc. and Rappler Holdings Corporation operated from the same office;

5. Rappler, Inc. and Rappler Holdings Corporation simultaneously negotiated with the PDR investors, through their President-in-common, Ms. Maria Ressa.

Note the **probative factors** that should be considered in Alter Ego cases, as laid down by the Supreme Court in ***Concept Builders, Inc. v. NLRC***,[48] viz:

- Stock ownership by one or common ownership of both corporations;
- Identity of directors and officers;
- The manner of keeping corporate books and records; and
- Methods of conducting the business.

The Supreme Court likewise laid down a **three-tiered test** on whether it would be proper to pierce the corporate veil to hold an alter ego liable, viz:

> (a) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice with respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will, or existence of its own;
>
> (b) Such control must have been used by the defendant to commit fraud or wrong, to perpetuate the violation of statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights;
>
> (c) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.[49] (Emphasis supplied)

Here, there is an undeniable overlap in the ownership and management of both corporations—to the point that they are almost identical—they have the same Chairman, Members of the Board, President, Treasurer, and Secretary. Rappler Holdings Corporation wholly-owns Rappler, Inc. Moreover, with regard to the PDR deals, the interest of each of the respondent is **inseparable** and **indistinguishable** from the other; and when their President-in-common speaks, it is for both.[50]

Rappler, Inc. evidently created Rappler Holdings Corporation in December 2014 for the sole purpose of raising capital through the issuance of PDRs to foreign entities. The timing of Rappler Holding Corporation's registration is subsequent to Ms. Maria Ressa's pre-issuance talks with Omidyar Network[51] (October to

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[48] 257 SCRA 149 (1996).

[49] Id. See also Villanueva and Tiansay, Philippine Corporate Law (2013), p.101.

[50] See, e.g., **Request for Extension of Time filed on 17 August 2017** by Ms. Maria Ressa: "Gentlemen, I am the President and Chief Executive Officer of Rappler, Inc. (RAPPLER) and Rappler Holdings Corporation (RHC). On behalf of RAPPLER and RHC, I respectfully request an extension of time xxx"

[51] Page 15 of **Verified Explanation** filed 29 August 2017.

November 2013; April 2014 onwards) and North Base Media[52] (January 2014 onwards). In 2015, Rappler, Inc. increased it capital stock and sold practically all its shares to Rappler Holdings Corporation, which the latter used as underlying securities for the issuance of Philippine Depositary Receipts that same year.

Together, Rappler, Inc. and Rappler Holdings Corporation partook of a scheme whereby stock ownership and board management would strictly-speaking remain with Filipinos, while **control** (i.e. the ability to **influence** corporate policy) would be granted to foreigners holding equity-derivative instruments. The scheme necessarily required the respondents the act in total concert with each other, with identity of interests and no independent mind, in a manner similar to this:

- Rappler, Inc. sold practically all its shares (even increasing its authorized capital stock for this purpose) to Rappler Holdings Corporation, each corporation and all their shareholders-of-record were Filipino;

- Through the equity derivative issued by Rappler Holdings Corporation to Omidyar Network, pertaining to shares of Rappler, Inc., partial **control** (i.e. influence over corporate policy) was granted to the foreign Holder;

- The Foreign Holder, Omidyar Network, benefits through the ON PDR in two ways: (1) influence over the shareholders on relevant corporate matters; and (2) cash distributions, through a pass-through arrangement.[53]

- In addition to Paragraph 12.2.2, through which Rappler, Inc. (the "Company") grants a measure of control to the PDR Holders, **there are other provisions in the ON PDR wherein Rappler Holdings Corporation (the "Issuer") likewise grants control to Omidyar Network Fund LLC**, with regard to the latter's corporate policy on (a) financing to pay taxes, (b) type of dividend and (c) primary purpose, viz:

> **8. Taxation and Stamp and Other Duties**
> **8.2** xxx Notwithstanding anything to the contrary, the Issuer through its Board of Directors, and upon the affirmative vote of PDR Holders holding at least two thirds (2/3) of all outstanding PDRs, may obtain financing specifically to settle said tax assessment xxx
>
> **10.1 Distribution of Shares**
> xxx In the event that the Company grants an option to receive shares or cash in respect of a dividend, the Issuer shall seek instructions from the ON PDR Holders as to what type of dividend the Issuer should receive.
>
> **12. Undertakings**
> **12.1.2** [The Issuer] will not, without prior good faith discussions with ON PDR Holders and without the approval of Holders holding at least two thirds (2/3) of all issued and outstanding PDRs, alter, modify or otherwise change its Articles of Incorporation or By-

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[52] Page 8 of **Verified Explanation** filed 29 August 2017.

[53] **Paragraph 12.1.8 of the ON PDR** states that: "[The Issuer] will declare and pay or otherise transfer distributions to the ON PDR Holder promptly after receipt of a dividend distribution from the Company xxx"

> laws or take any other action with the objective of changing its primary purpose as a holding company or expanding its business as presently set out xxx

Evidently, the interests of Rappler, Inc. and Rappler Holdings Corporation are aligned and both of them grant control to Omidyar through the ON PDR.

Therefore, there is substantial evidence that Rappler, Inc. and Rappler Holdings Corporation are mere alter egos of each other and equally liable. **Any restrictions on Rappler, Inc. also attach to Rappler Holdings Corporation.**

POWER TO IMPOSE SANCTIONS

Section 5.1(f) of the Securities Regulation Code grants the authority to "impose sanctions for the violation of laws and the rules, regulations and orders issued pursuant thereto."

Here, there is substantial evidence that respondents violated the Foreign Equity Restrictions in Mass Media, enshrined in the Constitution and enforceable through the **Mass Media Law**, the **Anti-Dummy Law**, and the **Foreign Investment Act**. The statutes and administrative rules merely reflect and reiterate a sacred duty the fundamental law of the land, hence the gravity of the offense.

Recall that respondents argued that (1) the ON PDR does not grant control and is compliant with the law, and that, alternatively, (2) they are not engaged in mass media and thus exempt from the law. In response to both arguments, the Commission disagrees with respondents and advances its own interpretation of "control," pursuant to its broad mandate as the specialized agency in charge of enforcing the law on corporations, securities, and foreign investment.

Respondents' true error lies in equating "control" with ownership of stock or management in the board. Upon this premise, they devised a scheme where no foreigner would own stock or sit on the board. The scheme employed by respondents—making the ownership and management appear "Filipino" on paper, while **granting control (i.e. influence over corporate policy)** to Foreign Investors via the terms of an equity derivative—is not a harmless circumvention.

THE ON PDR IS VOID

Section 71.2[54] **of the Securities Regulation Code**, in relation to the powers granted to the Commission in Sections 5.1(g) and 5.1(n) thereof, states that:

> **SEC. 71.** ***Validity of Contracts.*** – xxx
>
> **71.2.** Every contract made in violation of any provision of this Code or of any rule or regulation thereunder, and every contract, including any contract for listing a security on an Exchange heretofore or hereafter made, the performance of which involves the violation of, or

[54] Section 71.2 is an administrative penalty within the ambit of Section 54.1(v) "Other penalties within the power of the Commission to impose" in relation to Section 54.1(a) "If after due notice, the Commission finds that there is a violation of this Code, its rules, or its orders."

> the continuance of any relationship or practice in violation of, any provision of this Code, or any rule or regulation thereunder, **shall be void**:
>
> **(a)** As regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract; and
>
> **(b)** As regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation.

Here, the scheme employed by the respondents not only violated the laws on mass media, but also the Securities Regulation Code. Thus, the ON PDR is void.

Section 26 of the Securities Regulation Code, the "anti-fraud" provision, based on Section 10, specifically Rule 10b-5 thereof, of the Securities Exchange Act of 1934 of the United States ("1934 Act"), states that:

> **Section 26.** *Fraudulent Transactions.* – It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of any securities to:
>
> **26.1.** Employ any device, scheme, or artifice to defraud;

According to the Commission, "Section 26 is a general antifraud provision applicable to securities transactions, modelled after Section 10 of the 1934 Act, and is a basic enforcement tool to protect investors." It applies even to fraud in relation to securities issued in **exempt transactions**.[55] Section 26 requires a showing of **fraud or deceit**, and not just negligence.[56]

For further guidance, there are five principal elements of a fraud action under **Rule 10b-5 of the 1934 Act**, the statute upon which Section 26 is based, viz:

> There are five principal elements for stating a claim under Rule 10b-5. The plaintiff must show: (1) fraud or deceit (2) by any person (3) in connection with (4) the purchase or sale (5) of any security. [57]

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[55] **Securities and Exchange Commission, History/Background of the Securities Regulation Code (2001), p. 41,** viz: "Section 26 of the SRC streamlines the language formerly used in Section 29 of the RSA xxx Former Section 29(c) of the RSA excepted **exempt securities** and **exempt transactions which xxx only applied to exception from registration requirements** previously contained in Sections 8 and 12 of the RSA. **All other sections of the RSA were applicable to such securities – thus Section 29(c) created unnecessary confusion and was deleted.**

[56] *See* Lucila M. Decasa, Securities Regulation Code Annotated (2013), p. 98, citing SEC v. Court of Appeals, 246 SCRA 738 (1995).

[57] Thomas Lee Hazen, The Law on Securities Regulation, 5th Ed, (2006), p.478.

Here, there is substantial evidence that respondents, who are alter egos, acted with deceit in a scheme to justify the **grant of control**, and also financial returns, to **foreign investors** when they sold the ON PDR, a security.

Putting together all the evidence, the scheme that emerges is this:

- Incorporated in 2011, Rappler, Inc. publishes news and other information intended for the masses via the internet, mobile devices, and other media of communication;
- Rappler, Inc. has all-Filipino shareholders, directors, and officers;
- In 2013 and 2014, Rappler, Inc. obtained commitments from foreign investors, to whom it will grant control (but not in the form of stock ownership or management on the board) and/or returns (but not in the form of dividends) in exchange for **over a million dollars**;
- In December 2014, Rappler, Inc. needing a way to legalize the receipt of foreign money, but unable issue its stock directly or give seats on its board, *formed* Rappler Holdings Corporation, intended for the sole purpose of issuing PDRs which derive their value from equity;
- Rappler Holdings Corporation also has all-Filipino shareholders, directors, and officers, because the buyer of the shares of a mass media entity, like Rappler, Inc., has to be owned entirely by Filipinos;
- In 2015, Rappler Holdings Corporation, a mere instrumentality of Rappler, Inc., purchased the latter's shares and then issued derivatives to two foreign investors, North Base Media and Omidyar Network;
- Because Omidyar was the later purchaser and the purchased of less PDRs, it caused the insertion of certain provisions that assure control over other PDR Holders, and also over the corporate policies of Rappler, Inc. and its alter ego Rappler Holdings Corporation;
- NBM's PDR, although also called "PDR," does not contain these terms;
- Omidyar Network does not, by owning the ON PDR, become a stockholder of either Rappler, Inc. or Rappler Holdings Corporation;
- Rappler Inc., the Philippine mass media entity, intentionally granted more than 0% control (influence over corporate policy) to Omidyar;
- Rappler Holdings Corporation, the alter ego, also intentionally granted more than 0% control (influence over corporate policy)to Omidyar;
- The ON PDR also grants financial returns through a pass-through arrangement, where any amount Rappler Holdings Corporation would receive from Rappler, Inc. as cash *dividends* would then pass-through entirely to the ON PDR Holders as "cash *distributions*";
- Financial returns have not accrued to Omidyar because Rappler, Inc. does not have any retained earnings and cannot declare dividends;

- Through the ON PDR, a security, Omidyar Network has **more than 0% control** of a Filipino mass media entity and its alter ego;

- The ON PDR is not stock (i.e. "equity"), but it gives to its Holders certain rights *derived from equity* and *reserved to Filipinos*;

- Rappler, Inc. and Rappler Holdings Corporation filed a Notice for Exemption claiming that the ON PDR issuance was an **exempt transaction**, i.e. a sale of securities within the Philippines to less than 20 persons under Section 10(k) of the SRC;

- As private corporations, and because they claim the ON PDR issuance is an Exempt Transaction, Rappler, Inc. and Rappler Holdings Corporation were not required to submit a copy of the ON PDR.

Therefore, there is **substantial evidence** that respondents intentionally created an elaborate scheme, upon which its receipt of over a million dollars from a foreign investor would be theoretically defensible—the investor would never own "stock" and would never receive "dividends," and he would never become an officer or director, but respondents would still be able to give him his money's worth in the form of negative control and cash distributions, all through a private contractual arrangement. Since this deceptive scheme involves the sale of a security, it falls within Section 26 (the Anti-Fraud provision) of the Securities Regulation Code.

Without prejudice to its character as a violation of the Constitution, this fraudulent scheme is a violation of the Securities Regulation Code. Therefore, the **ON PDR** is void pursuant to **Section 71.2 of the SRC.** Given the blatant attempt to circumvent the fundamental law of the land, however, it seems proper to also impose penalties on the respondents themselves.

REVOCATION OF CERTIFICATE OF INCORPORATION

The Foreign Equity Restriction in **Article XVI, Section 11(1)** of the Constitution provides that:

> "The **ownership** and **management** of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens. xxx"

Section 2 of Presidential Decree 1018, Limiting the Ownership and Management of Mass Media to Citizens of the Philippines (in relation to the sanctions under **Section 6(i) of Presidential Decree 902-A, as amended, and Section 5.1(f) of the Securities Regulation Code),** similarly provides that:

> "The **ownership** and **management** of mass media shall be limited to citizens of the Philippines, or to corporations or associations wholly owned and managed by such citizens."

The constitutional and statutory Foreign Equity Restrictions in Mass Media must be related to the broader state policy in **Article II, Section 19 of the Constitution** which declares that:

> "The State shall develop a self-reliant and independent national economy effectively **controlled** by Filipinos."

Section 5 of the Securities Regulation Code expressly empowers the Commission to "prepare, approve, amend or repeal **rules, regulations and orders**, and issue opinions and provide guidance on and supervise compliance with such rules, regulations and orders."

In this regard, **Rule 3.1.8 of the 2015 Implementing Rules and Regulations of the Securities Regulation Code** defines "**Control**" as "the power to ***determine*** the financial and operating ***policies*** of an entity in order to benefit from its activities." The Commission's definition is intentionally broad and **d**oes not equate "control" with either ownership of shares of stock or with management as director or officer.

Rule 3.1.8.2 of the 2015 Implementing Rules and Regulations of the Securities Regulation Code adds that Control exists whenever one entity has the power "to govern the financial and operating policies of [another] entity under a statute or agreement." This would be true even if the controlling entity does not own any equity, such as through agreements (e.g. **derivatives** based on underlying equity) that grant influence in corporate matters.

As can be gleaned from the **2015 Implementing Rules and Regulations of the Securities Regulation Code**, the Commission's definition of "control" is neither limited to stock *ownership* nor to *management* in the board, but rather embraces a broad range of schemes that grant **influence over corporate policy**.

The Constitutional and Statutory prohibition with regard to foreign control of Mass Media is **absolute.** It means to isolate the Filipino masses from all foreign influence (even apparently "harmless" ones) sent via "any medium of communication." **The harm is implicit** in the grant of control to a foreigner, as respondents did here.

Also, the restriction on foreign equity prevents ***any scheme to transfer rights attached to equity***—even in the guise of an ***equity derivative***. The ON PDR requirement of "prior discussion" and "approval of 2/3" was a grant of **more than 0%** control to foreigners; control **no less than 100%** reserved to Filipinos.

Because respondents' concept of "Control" is inconsistent with the Securities Regulation Code and its Implementing Rules, they erroneously posit that the ON PDR transaction is perfectly valid simply because it does not confer title to shares of stock (equity) or grant managerial positions as Director or Officer.

Not surprisingly, therefore, there is no effort to hide their scheme in their *Verified Explanation*. Respondents stress that Rappler, Inc. did not directly issue shares of stock, while admitting that the foreign investor, Omidyar Network, profited from their scheme:

> xxx **a foreign investor may validly profit from a corporation with a foreign equity restriction.**
>
> In the case of xxx Omidyar Network Fund LLC, [it] did not acquire ownership or [management] over RAPPLER, and even RHC, by purchasing the PDRs. To reiterate, xxx **Omidyar Network Fund LLC did not become [a stockholder] of RAPPLER or RHC.** [It was] not given any power to vote the shares of RHC in RAPPLER and [it was] not given the right to receive dividends from either RAPPLER or RHC. [It] profits from cash distributions, if any, that RHC would give [it].[58]

Circumventions of the Foreign Equity Restriction in the Constitution may be enforced *inter alia* through **Section 2 in relation to Section 5 of P.D. 1018, the Mass Media Law.** The latter section imposes the penalty of "cancellation of permit." Under the broader and stricter Securities Regulation Code, the Commission may impose the equivalent of "Revocation of Certificate of Incorporation," viz:

(1) **Section 5.1, SRC,** regarding Existing Laws clarifies that the Mass Media Law is enforced and interpreted by the Commission;

(2) **Section 5.1(f), SRC,** regarding Sanctions in general, allows the Commission to impose sanctions for violation of Mass Media Law;

(3) **Section 5.1(m), SRC,** regarding Revocation in particular, allows for the imposition of the penalty of Revocation of Certificate of Incorporation, i.e. the corporation's "permit" that gives legal capacity; and

(4) **Section 5.1(n), SRC** on Incidental Powers, leaves no doubt that the Commission may reconcile and enforce the laws in this manner.

The Commission has the power to impose the administrative penalty of Revocation of Certificate of Incorporation in case of corporations that employ **deceptive schemes that aim to circumvent the Constitution's foreign equity restrictions in Mass Media.** Here, there is **substantial evidence** that respondents, acting as alter egos, and through unique terms of the ON PDR issuance, intentionally and deceptively granted more than 0% control to a disqualified foreigner.

As an additional penalty, the Commission can declare **void** the ON PDR itself.

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[58] Page 39 of **Verified Explanation** filed on 29 August 2017. Mention of North Base Media omitted.

WHEREFORE, premises considered, the En Banc finds Rappler, Inc. and Rappler Holdings Corporation, a Mass Media entity and its alter ego, liable for violating the constitutional and statutory Foreign Equity Restrictions in Mass Media, enforceable through laws and rules within the mandate of the Commission.

The En Banc hereby imposes the following ***administrative*** penalties:

(1) The Omidyar PDR is declared **VOID** pursuant to Section 71.2 of the SRC, for being a fraudulent transaction within the ambit of Section 26.1 of the SRC;

(2) **REVOCATION OF CERTIFICATE OF INCORPORATION** on each respondent—**Rappler, Inc.** being the mass media entity that sold control to foreigners, and **Rappler Holdings Corporation** being its ***alter ego***, existing for no other purpose than to effect a deceptive scheme to circumvent the Constitution.

Let a copy of this DECISION be furnished the Department of Justice for appropriate action.

SO ORDERED.

Pasay City, Philippines; 11 January 2018.

TERESITA J. HERBOSA
Chairperson

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO*
Commissioner

EMILIO B. AQUINO
Commissioner

*Did not take part