Republic of the Philippines
Department of Finance
SECURITIES AND EXCHANGE COMMISSION
SEC Building, EDSA, Greenhills
Mandaluyong City Metro Manila
Philippines

16 November 2005

SEC Opinion No. 05-15
Re: Concurrence of Positions
of Corporate Officers

CENTER FOR EDUCATIONAL MEASUREMENT, INC.
24th Floor Cityland Pasong Tamo Tower,
2210 Chino Roces Avenue, Makati City

Attention: Mr. Lenore LL. Decenteceo, Ph.D.
President

Sir:

This refers to your letter dated 22 August 2005 requesting opinion on the query posed therein relative to the legality or validity of the concurrence in one person of several positions in your non-stock corporation, the CENTER FOR EDUCATIONAL MEASUREMENT, INC. ('CEM" for brevity).

As mentioned in your letter, your Corporate Secretary had been elected/appointed as such for more than ten (10) years now. You likewise averred that in its regular meeting held on 22 July 2005, the Board of Trustees of CEM elected the Corporate Secretary as a new trustee. You thus note that said secretary now holds concurrent positions in the corporation: (1) as Trustee and Corporate Secretary; (2) as Legal Counsel on individual retainership receiving a fixed monthly fee; and (3) as a partner of the same law firm which your corporation retains for a monthly retainership fee.

Specifically, your queries are:

(1) Whether or not a Trustee can be the Corporate Secretary at the same time;
(2) Whether or not he can, in addition to the said positions, be the Legal Counsel of the corporation on individual retainership; and
(3) Whether or not the firm of which he is a partner was validly retained in view of the above-stated circumstances.

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Anent your first query, **Section 25 of the Corporation Code** (the Code for brevity) is of pertinence. The first paragraph of the said provision reads:

> *" **Sec. 25. Corporate officers; quorum-** Immediately after their election, the directors of a corporation must formally organize by the election of a president, who shall be a director, a treasurer who may or may not be a director, a secretary who shall be a resident and citizen of the Philippines, and such other officers as may be provided for in the by-laws. Any two (2) or more positions may be held concurrently by the same person, except that no one shall act as president and secretary or as president and treasurer at the same time. xxx.*

It can be gleaned from Section 25 that the directors or trustees of a corporation may be elected or appointed as officers thereof in appropriate instances. It is **even expressly mandated therein that the president be a director or trustee in view of the use of the word "shall".** Further, the provision states that the treasurer **"may or may not be a director (or trustee)."**

Although Section 25 does not expressly state that the secretary, like the treasurer, may or may not be a director or trustee, there is no compelling reason why it should not also be the case. Settled is the rule that inferences of limitations, prohibitions or disqualifications are frowned upon by the courts. In general, they must be expressly provided for. For example, said Section expressly limits the corporate presidency to a director or trustee. Had Congress meant to prohibit a director or trustee from being elected as corporate secretary, it could have so restricted. Instead, what it did was merely to require that **the corporate secretary be a resident and citizen of the Philippines.** The intent of the law that the corporate secretary may, but need not, be a director or trustee is thus clear. The only proscription is that **no one shall act as president and secretary or as president and treasurer at the same time.**

Your by-laws, however, should also be resorted to, pursuant to **Section 47** of the Code. Said provision provides that "subject to the provisions of the Constitution, this Code, other special laws, and the articles of incorporation, a private corporation **may provide in its by-laws: xxx; (5) The qualifications (conversely, the disqualifications), duties, and compensation of directors, trustees, officers and employees; xxx."** A perusal of your by-laws reveals that a director or trustee is not disqualified from being elected as corporate secretary.

Accordingly, the answer to your first query is in the affirmative.

Anent your second query, the SEC has opined **(Ltr. To Atty. Nony M. Yulo, dtd. 7/17/96)** that a director or trustee may at the same time be the legal counsel of the corporation, unless otherwise prohibited in the corporate charter or by-laws. "While a person may be an officer or employee of a corporation or both, he is not by law an employee by virtue of the fact that he is an officer. When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office, he is not considered an employee. However, a corporation may hire its president ***or, by analogy, its secretary,*** to perform services under

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circumstances which will make him an employee, ***as in the case of a retained counsel*** **(Ltr. To PEFTOK Integrated Services, Inc., dtd. 5/9/89).**"

From the foregoing, the answer to your second query is in the affirmative.

Anent your third query, please take notice that the matter raised therein falls within the business judgment rule considering that it questions the retainership of the firm of which the Corporate Secretary is a partner.

Fletcher **(2 Fletcher on Corporation, at p. 390)**, summing up the business judgment rule, states: "The members of the Board of Directors hold such office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. It is a well-known rule of law that questions of policy or of management are left solely to the honest decisions of officers and directors of a corporation, and the court is without authority to substitute its judgment for the board of directors; the board is the business manager of the corporation, and so long as it acts in good faith its acts are not reviewable by the courts." In **Gamboa v. Victoriano (90 SCRA 40)** it was held that courts cannot supplant the discretion of the board on administrative matters as to which they have legitimate power of action, and contracts which are intra-vires entered into by the board are binding upon the corporation and the courts will not interfere unless such contracts are so unconscionable and oppressive as to amount to a wanton destruction of the rights of the minority.

For this same reason, it has been the policy of the Commission not to render opinions on matters which clearly involve the exercise of business discretion or judgment which properly falls within the competence of the management of the entities concerned, or those which call for financial and technical expertise of economic managers **(SEC Memorandum Circular No. 15, Series of 2003).**

Please be guided accordingly.

VERNETTE G. UMALI-PACO
General Counsel

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