**Republic of the Philippines**
**Department of Finance**
**Securities and Exchange Commission**
**SEC Bldg. EDSA, Greenhills, Mandaluyong City**

**OFFICE OF THE GENERAL COUNSEL**

January 12, 2009

**ATTY. DEMOSTHENES B. DONATO**
Donato Zarate & Rodriguez
7/F Electra House
115 Esteban Street, Legaspi Village
1229 Makati City

**SEC-OGC Opinion No. 09-01**
*For: Allowable Investments of Trustee and Foreign Investments in Preferred Non-Voting Shares*

Dear Atty. Donato,

This refers to your letter dated September 8, 2008 and received by this Office on October 13, 2008 requesting confirmation of your opinion as follows:

1. that a trustee of funds for employee retirement benefits [where the trustee is a Philippine national and at least seventy-five percent (75%) of the fund will accrue to the benefit of Philippine nationals] is qualified to own and hold 75% of the voting capital stock of a recruitment agency; and

2. that the 75% nationality requirement for recruitment agencies apply only to the voting capital stock [and not to the preferred non-voting capital stock], and therefore foreign nationals are qualified to own and hold one hundred percent (100%) of the preferred non-voting capital stock of recruitment agencies.

According to you, the request is made on behalf of Dohle Manning Agencies Ltd. ("DMAL"), a non-resident foreign corporation formed, organized and existing under the laws of the Isle of Man, a Crown Dependency under the responsibility and nationality of the United Kingdom. While DMAL is currently not engaged in any business in the Philippines, you disclosed that it is contemplating on investing in twenty five percent (25%) of the voting capital stock of a seaman manning agency, in joint venture with a Philippine trustee of funds for the retirement benefits of Filipino employees, where the trustee will hold 75% of the voting capital stock reserved for Filipinos. Further, DMAL is also contemplating on investing in 100% of the preferred non-voting capital stock of the manning agency.

In support of your first opinion stated above, you cited Republic Act Number 7042 ("R.A. 7042") otherwise known as the Foreign Investments Act of 1991 and its Implementing Rules and Regulations, as amended by Republic Act 8179, which expressly define the term "Philippine National" to include "a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least 60% of the fund will accrue to the benefit of Philippine nationals."

It is your position that:

> *"Applying the same principle of qualification of a trustee, in relation to investments in an enterprise where the applicable nationality requirement is 75% [rather than the usual sixty percent (60%)] such as in manning or recruitment agencies, it reasonably follows that the said trustee may also be qualified to invest in 75% of the voting capital stock reserved for Filipino citizens, provided only that at least 75% of the fund will accrue to the benefit of Philippine Nationals."*

We disagree.

There is no correlation between the nationality of a trustee of employee retirement or benefit funds and the nature and extent of its allowable investments.

In order to determine whether a trustee is allowed to make certain investments, reference must be made to the trust agreement entered into by the trustor and trustee, if any, which must be in accordance with the general principles of trust.

It must be noted that a trust is a fiduciary relationship in which one person (called the trustee) is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another (called the beneficiary).[1] The trustee has the duty to act with strict honesty and candor and solely in the interest of the beneficiary.

In the instant case, no mention is made whether a trust agreement was executed between the trustor and the trustee. Despite this, the trustee is duty bound to act with fidelity and prudence.

Relating this to the matter at hand, we opine that the propriety of the trustee investing the funds of the employee retirement fund in 75% of the voting capital stock of a manning or recruitment agency would depend on the provisions of the trust agreement entered into by the trustor, in this case the employer company, and the trustee.

In case no trust agreement was entered into by the parties, the relevant laws and regulations on the allowable investments of the trust fund and the limitations thereof, shall be complied with. If the trustee is a bank, §X409.2 of the Manual of Regulations for Banks shall govern. In all instances, however, the general principles of trust shall be observed.

Anent your second opinion, we agree. The 75% nationality requirement for recruitment agencies apply only to the voting capital stock and therefore foreign nationals are qualified to own and hold one hundred percent (100%) of the preferred non-voting capital stock of recruitment agencies.

This is based on Section 27 of the Labor Code which specifically provides that the nationality requirement applies only to voting stocks, to wit:

> *"Art. 27. CITIZENSHIP REQUIREMENT. - Only Filipino citizens or corporations, partnerships or entities at least seventy-five percent (75%) of the*

1 Bogert, Trusts Sixth Edition, Hornbook Series (1987 Ed).

*authorized and voting capital stock of which is owned and controlled by Filipino citizens shall be permitted to participate in the recruitment and placement of workers, locally or overseas."*

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

**VERNETTE G. UMALI-PACO**
General Counsel