**Republic of the Philippines**
**SECURITIES AND EXCHANGE COMMISSION**
**EDSA, Greenhills, Mandaluyong City**

OFFICE OF THE GENERAL COUNSEL

11 September 2009

**SEC Opinion No. 09-25**
*Special Purpose Vehicle Act: Consideration for True Sale*

**ATTY. ORLANDO E. MENDIOLA**
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Sir:

We reply to your letter dated 21 July 2009[1] requesting an opinion on what can be considered as proper consideration for an assignment of a non-performing loan/asset (NPL/NPA) by a financial institution (FI) to an SPV company (SPV) under Republic Act No. 9182, otherwise known as the SPV Act.

Your letter stated that your clients (borrowers) borrowed money from an undisclosed Philippine FI and mortgaged real properties in Hong Kong as collateral. Upon their alleged failure to pay, the FI sued the borrowers in Hong Kong for collection and foreclosure of the mortgage. While the collection case in Hong Kong was still pending, the FI assigned the obligation of the borrowers to an SPV. In the subject letter, it was disclosed that the consideration for the assignment of the loan was a promissory note for the amount of ₱2.953+ Billion issued by the SPV payable in five years and cash in the amount of ₱299+ Million. Hence, the letter proposed the following issue for resolution – whether or not the claimed consideration paid by the SPV to the FI consisting of cash and obligation under a promissory note is in accordance with the standards of the SPV Act.

We regret to inform you that the requested opinion cannot be issued for the following considerations:

[1] Payment of the Opinion Fee was made on 12 August 2009.

a) The sale may have already been approved[2] and considered to be a True Sale by the Appropriate Regulatory Authority which exercises jurisdiction over the undisclosed FI in accordance with the Implementing Rules and Regulations of the SPV Act[3]; and

b) There is already pending litigation on the matter.

**Approval of Sale by the Appropriate Regulatory Authority**

The Implementing Rules and Regulations of the Special Purpose Vehicle (SPV) Act of 2002 (IRR) defines the Appropriate Regulatory Authority as the agency/authority having jurisdiction over the FI's operations. SPV Rule 3 of the IRR specifically designates the Department of Finance (DOF) in the case of the PDIC and GOCCs, the Bangko Sentral ng Pilipinas (BSP) in the case of banks including the LBP and the DBP and trust and quasi-banking functions of financing companies and investment houses licensed by the BSP, and the Securities and Exchange Commission in the case of financing companies and investment houses, except their trust and quasi-banking functions or any qualified entity not under the DOF or BSP.

In your letter-request, the type of the FI was not disclosed and hence we cannot ascertain if it is subject to the jurisdiction of the DOF, or of the BSP, or of this Commission. In brief, we cannot determine which government agency is the Appropriate Regulatory Authority as defined and set out in SPV Rule 3.

The importance of determining which of the three aforementioned government agencies exercises jurisdiction over the subject FI is that this Commission may impinge on the other agencies' power to approve the sale of NPAs[4] by FIs, and hence violate the SPV Act and SPV Rule 13, as well as the independence and authority of either the DOF or the BSP. Under Guideline No. 5.7 of SEC

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[2] Under SPV Rule 13 of the Implementing Rules and Regulations of the Special Purpose Vehicle (SPV) Act of 2002 (Republic Act No. 9182).

[3] The Implementing Rules and Regulations was promulgated by the Congressional Oversight Committee composed of Senators Recto, Magsaysay, Jr., Arroyo, Barbers, Osmeña III, Angara and Pimentel and Representatives Lopez, Uy, Locsin, Jr., Espina, Sr., Moreno, Villar and Suplico.

[4] Under Section 2 paragraphs (g), (h) and (i) of the SPV Act, *Non-Performing Assets* or NPAs consist of the Non-Performing Loans (NPLs) and Real and Other Properties Owned or Acquired by FIs.

*Non-Performing Loans* refers to loans and receivables such as mortgage loans, unsecured loans, consumption loans, trade receivables, lease receivables, credit card receivables and all registered and unregistered security and collateral instruments, including but not limited to, real estate mortgages, chattel mortgages, pledges, and antichresis, whose principal and/or interest have remained unpaid for at least one hundred eighty (180) days after they have become past due or any of the events of default under the loan agreement has occurred.

*ROPOAs* refers to real and other properties owned or acquired by an FI in settlement of loans and receivables, including real properties, shares of stocks, and chattels formerly constituting collaterals for secured loans which have been acquired by way of dation in payment (dacion en pago) or judicial or extra-judicial foreclosure or execution of judgment.

Memorandum Circular No. 15, series of 2003, the Commission, as a matter of policy, refrains from rendering an opinion when such would "require an examination and review of the acts and rulings of another government agency since the Commission does not review acts and rulings of other government agencies."

The statutory conferment of the power of the Appropriate Regulatory Authority to examine applications for the transfer or sale of NPAs by FIs to SPVs is found in the SPV Act Article III, Section 12 (b), which mandates that:

> (b) The transfer of NPAs from an FI to an SPV shall be **subject to prior certification of eligibility as NPA by the Appropriate Regulatory Authority having jurisdiction over its operations** which shall issue its ruling within forty-five (45) days from the date of application by the FI for eligibility. [Emphasis ours.]

SPV Rule 13 of the IRR which vests the power to approve all sales and transfers of NPAs as well as the duty to ascertain that such sales and transfers are True Sales, is quoted in full below:

> SPV RULE 13
> Nature of Transfer
>
> All sales or transfers of NPAs by an FI shall be in the nature of a True Sale with proper notice in accordance with Rule 12, **as approved by the Appropriate Regulatory Authority**. Any transfer of NPAs not in the nature of True Sale as provided for in the Act shall not qualify for tax exemptions and fee privileges granted under the Act. Provided, That GFIs and GOCCs shall be subject to existing law on the disposition of assets: Provided, further, That in the transfer of the NPLs, the provisions on subrogation and assignment of credits under the New Civil Code shall apply.
>
> The transfer by an FI of its NPAs to an SPV shall be considered not a True Sale if the FI:
>
> (a) Invests in or acquires, directly or indirectly, the IUIs issued by the SPV that acquired its NPAs; or
>
> (b) Has direct or indirect management of the transferee SPV; or
>
> (c) Has any of its directors, officers or employees on the board of the transferee SPV; or
>
> (d) Is obligated to repurchase or substitute/exchange the NPA or any part of the pool of NPAs at any time, except in cases of a breach of representation or warranty of the FI;
>
> (e) Has Related Interest, as defined under Rule 11, with the transferee SPV;
>
> (f) Possesses a claim of beneficial ownership of more than five percent (5%) of the transferee SPV.

**Unless otherwise determined by the Appropriate Regulatory Authority**, the following shall be presumed not a True Sale, if the FI:

(a) Purchases/invests in the IUIs of the SPV that acquired its NPAs through its trust department including the trust department of its Subsidiaries/Affiliates, Parent bank and the trust department of the Parent bank's Subsidiaries/Affiliates; or

(b) Is made the beneficiary of a trust used as a vehicle for purchasing and securitizing the NPAs; or

(c) Pays further expenses in relation to the NPAs after said NPAs have been sold/transferred to the transferee SPV; or

(d) Extends, directly or indirectly, any credit facility, guaranty or any similar financial transaction to the transferee SPV; or

(e) Extends any credit facility, guaranty or any similar financial transaction to any party for the purpose of investing in the equity or IUIs of the SPV, or for acquiring the NPAs from the SPV; or

(f) Extends any credit facility, guaranty or any similar financial transaction to any party for the purpose of acquiring the NPAs from the transferring FI; or

(g) Acts as trustee (FI's trust department) or if the trust department of any of the FI's subsidiaries/Affiliates, Parent bank or Parent bank's Subsidiaries/Affiliates acting as trustee, under any circumstances, in the securitization of NPAs that it has transferred to the SPV; or

(h) Accepts as collateral for a loan extended by said FI the equity shares and IUIs of the SPV that acquired its NPAs; or

(i) Enters into buy-back and other similar arrangements, or financial derivative transactions with similar effect, involving the NPAs or the securities backed by such NPAs; or

(j) Enters into any other transaction where the FI retains effective control over the transferred NPAs or shares in the losses of the SPV.

For purposes of the foregoing, the term "any party" includes proxies, nominees and voting trustees.

The extension of credit to an individual for the purpose of acquiring a single family residential unit ROPOA or NPL secured by real estate mortgage on a residential unit, as contemplated under Section 15 of the Act, shall be allowed.

Penalties

**Violation of any of the above prohibitions or any misrepresentation**

**of any fact or information relative to the True Sale nature of the transfer of NPAs shall be subject to the penalties prescribed under Section 25 of the Act without prejudice to other penalties that may be imposed by the Appropriate Regulatory Authorities of the transferring FI under applicable laws.** [Emphasis ours.]

It is very clear that the Appropriate Regulatory Authority for each type of FI has the duty to examine whether a proposed transfer of NPAs to an SPV is a True Sale or not as defined in the SPV Act and in SPV Rule 13 of the Implementing Rules. In the third paragraph of Rule 13 which deals with transfers that are *presumed to be not a true sale*, the Appropriate Regulatory Authority can still determine those transfers to be a True Sale because of the qualifying phrase "**unless otherwise determined by the Appropriate Regulatory Authority.**" Hence, there is the possibility that the Appropriate Regulatory Authority has approved the subject transfer to be a True Sale.

Furthermore, the duty of the Appropriate Regulatory Authority to approve a transfer as a True Sale and determine its validity is, in fact, complemented by the power to impose penalties other than those enumerated in Section 25[5] of the SPV Act. Hence, after the approval by the Appropriate Regulatory Authority, all transfers must be presumed to be valid True Sales in accordance with SPV Rule 13 as well as the presumption that an official duty has been regularly performed.[6]

The transfer and sale of your client's loan to the SPV, which you argue to be invalid for not being a True Sale, **must thus be brought to the attention of the Appropriate Regulatory Authority which approved the same** for a) possible misrepresentation or non-disclosure of material information by the FI to the Appropriate Regulatory Authority, or b) error on the part of the Appropriate Regulatory Authority.

## Existing judicial controversy

[5] SECTION 25. Penalties. — Any person who violates any of the provisions of this Act, or any person who, in a registration statement, notice, certification or plan filed under this Act, makes any untruthful statement of a material fact or omits to state any material fact required to be stated therein, shall, upon conviction, suffer a fine of not less than Fifty thousand pesos (P50,000.00) nor more than One million pesos (P1,000,000.00) or imprisonment of not less than six (6) years and one (1) day nor more than twelve (12) years, or both, in the discretion of the court, without prejudice to the penalties provided under Section 18 hereof and other applicable laws. If the offender is a corporation, association, partnership or any juridical person, the penalty shall be imposed upon the responsible officers, as the case may be, who participated in the commission of the crime or who shall have knowingly permitted or failed to prevent its commission. If the offender is a juridical person, the court may order the suspension or revocation of license. If the offender is an alien, he shall, in addition to the penalties herein prescribed, be deported without further proceedings after serving the penalties herein prescribed. If the offender is a public official or employee, he shall, in addition to the penalties prescribed herein, suffer absolute or temporary disqualification from government or public office, as the case may be.

[6] Rule 131 Section 3 (m), Rules of Court.

Moreover, you state that "[in] 2007, while the Hong Kong case is pending, the FI assigned the obligation of the Borrowers, together with other loans in one basket, to an SPV company under the provisions of the SPV Act" and that "[as] of 2009, the outstanding obligation of the Borrowers was computed by the FI at ₱3.253+ Billion.

It is thus apparent that the subject matter at hand is currently under litigation. Under Guideline No. 5.1 of the same SEC Memorandum Circular No. 15, the Commission cannot likewise render an opinion on "issues which had been decided by the courts or have been elevated to the court or are pending therein." While it may be argued that in this case, the court referred to is the Hong Kong court which is beyond Philippine jurisdiction and hence Guideline No. 5.1 does not apply, the rationale of the Guideline No. 5.1 still applies because the validity of the sale of your client's loan by the FI to the SPV can be raised as an issue in that court and may already be submitted for judicial resolution.

Please be guided accordingly.

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