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

OFFICE OF THE GENERAL COUNSEL

12 August 2010

SEC-OGC Opinion No. 10-24
Re: Acquisition of Own
Shares of Stock

MR. ANTONIO Q. ALUMNO, JR.
President and CEO
SSS Retirees Service Corporation
Penthouse, SSS Building,
East Avenue, Quezon City

Gentlemen:

This refers to your letters dated 22 March 2010 and 14 April 2010, respectively, requesting opinion on whether the SSS Retirees Service Corporation ("RSC") can legally retire its own shares of stock by acquiring the same pursuant to Section 41 of the Corporation Code of the Philippines[1] ("the Code").

As disclosed in your aforesaid letters, the following are the relevant facts:

RSC supplies the Social Security System ("SSS") with manpower services thru RSC's Service Bureau Personnel ("SB Personnel"). For the said supply of SB Personnel, SSS pays RSC certain administrative cost.

The highest number of SB Personnel that RSC supplied to SSS reached a total of 1,417 at a certain time. However, said number is constantly declining since SB Personnel are continuously being absorbed by SSS into its regular *plantilla* positions. Consequently, the administrative cost that SSS pays to RSC is likewise diminishing.

With diminishing administrative cost, RSC will find it more difficult to cover its operational expenses and ultimately, a point will be reached where RSC will incur financial losses from its operations.

[1] Batas Pambansa Blg. 68 (1980).

To help prevent further financial losses, it was recommended that RSC retires its shares of stock by acquiring the same from its stockholders who choose to sell their shares.

Thus, in the present query, you are seeking the opinion of this Office whether the said recommendation is legally tenable.

Relevant to your query is the provision of the Code on the acquisition of one's own shares, which reads:

> *"**Sec. 41. Power to acquire own shares.** — A stock corporation shall have the power to purchase or acquire its own shares for a **legitimate corporate purpose or purposes**, including but not limited to the following cases: **Provided, That the corporation has unrestricted retained earnings in its books to cover the shares to be purchased or acquired:***
>
> *1. To eliminate fractional shares arising out of stock dividends;*
>
> *2. To collect or compromise an indebtedness to the corporation, arising out of unpaid subscription, in a delinquency sale, and to purchase delinquent shares sold during said sale; and*
>
> *3. To pay dissenting or withdrawing stockholders entitled to payment for their shares under the provisions of this Code. (a)"* (Emphasis supplied)

The Rules Governing Redeemable and Treasury Shares[2] are likewise instructive on this point, which provide:

> ***Section 1. General Provisions. — The outstanding capital stock of a corporation**, including unpaid subscriptions, **shall constitute a trust fund held by the corporation for the benefit of its creditors which shall not be returned to the stockholders by repurchase of shares** or otherwise, except in the manner as provided for under the Corporation Code and these rules.*
>
> *xxx xxx xxx*
>
> ***SECTION 3. Redeemable Treasury Shares. —***
>
> *1. **No corporation shall redeem, repurchase or reacquire its own shares, of whatever class, unless it has an adequate amount of unrestricted retained earnings to support the cost of the said shares**, xxx"* (Emphasis supplied)
>
> *xxx xxx xxx*

From the foregoing, a corporation is authorized to purchase or acquire its own shares if the said acquisition has legitimate corporate purpose/purposes and only if

[2] Corporation Code of the Philippines (CCP) No. 1 (1982).

the corporation has unrestricted retained earnings. [3]

In relation to the first requirement, the enumeration provided by Section 41 of the Code with regard to legitimate corporate purposes is by no means exclusive since other purposes are also acceptable to justify a stock corporation's acquisition of its own shares.[4]

As can be gleaned from your letters, RSC's purpose for acquiring its own shares is to help prevent the incurrence of financial losses arising from RSC's operations. Said reason may be considered as a legitimate corporate purpose considering that such acquisition will reduce RSC's cost of doing business by decreasing the amount of dividends which will have to be paid in the future.[5]

With regard to the second requirement, the same springs from the necessity of imposing safeguards against the depletion by a corporation of its assets and the impairment of its capital needed for the protection of its creditors.[6] It is perceived that as long as the acquisition of shares does not exceed the unrestricted retained earnings, the corporate creditors are deemed protected.[7]

Based on the RSC's Audited Financial Statements for 31 December 2009 and 2008[8], RSC has an Unrestricted Retained Earnings amounting to Php 6,807,088. Thus, RSC also met the second requirement provided by the Code.

In view of the foregoing, this Office is of the opinion that RSC can legally retire its own shares of stock by acquiring the same pursuant to Section 41 of the Code.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances.[9]

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[3] SEC Opinions dated 27 March 1995 (to Atty. Marietta Turingan), 12 October 1992 (to Mr. Lauris L. dela Peña), 11 September 1985 (to Tierra International Construction Corporation) and 15 December 1982 (to Trident Development Corporation) elaborated further that a corporation may re-acquire or purchase its own stock under the following conditions:

a.) Its capital is not thereby impaired;
b.) A legitimate and proper corporate objective is advanced;
c.) The condition of corporate affairs warrants it:
d.) The transaction is designed and carried out in good faith;
e.) There is intended and there results no undue advantage to a few favored stockholders at the expense of the remainder;
f.) The rights of creditors are not jeopardized.
g.) There must be unrestricted retained earnings to acquire the same.

[4] CESAR L. VILLANUEVA, PHILIPPINE CORPORATE LAW 253 (2001 ed.).

[5] *See Id.*, citing Salonga, *The Purchase by a Corporation of Its Own Shares*, 27 Phil. L.J. 686-687 (1952).

[6] *See* Ballantine, Law of Corporation (Rev. Ed.), p. 605, citing legal periodicals.

[7] *See* Note 4 at 580.

[8] Attached to your letter dated 14 April 2010.

[9] SEC Memorandum Circular No. 15-03, 16 December 2003.

If, upon further inquiry, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel