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

OFFICE OF THE GENERAL COUNSEL

20 April 2011

SEC Opinion No. 11-27
Restriction on Ownership by
Foreigners of Equity in
Domestic Market Enterprises

MS. CHRISTINE P. BASE
Corporate Secretary
Active Alliance Incorporated
Building 1428 POL Pier Compound
Argonaut Highway, Subic Bay Freeport Zone
Subic, Zambales

Madam:

This refers to your letter dated 26 October 2010 requesting our opinion on whether or not Active Alliance Incorporated (**"AAI"**) is subject to any foreign ownership restriction.

As stated in your letter, AAI's primary purpose is "to engage in the business of manufacturing, producing, processing, assembling, importing, exporting, buying, selling or otherwise dealing in all kinds of commerce, including but not limited to consumer communication, electronic equipment and other goods of similar nature, and any and all equipment, materials and supplies used or employed in or related to the manufacture of such finished products". You further stated that to date, AAI does not own any real property in the Philippines.

In connection herewith, we call your attention to Republic Act No. 7042, otherwise known as the Foreign Investments Act of 1991, as amended (**"RA 7042"**), which pertinently provides:

"Sec. 2. *Declaration of Policy.* – 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. xxx

Sec. 5. *Registration of Investments of Non-Philippine Nationals.* – Without need of prior approval, a non-Philippine national, as that term is defined in Section 3(a)[1], and not otherwise disqualified by law may, upon registration with the Securities and Exchange Commission (SEC), or with the Bureau of Trade Regulation and Consumer Protection (BTRCP) of the Department of Trade and Industry in the case of single proprietorships, do business as defined in Section 3(d) of this Act or invest in a domestic enterprise up to one hundred percent (100%) of its capital, **unless participation of non-Philippine nationals in the enterprise is prohibited or limited by a smaller percentage by existing law and/or under the provisions of this Act.** xxx

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Sec. 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 law or the Foreign Investment Negative List under Section 8 hereof.**

Sec. 8. *List of Investment Areas Reserved to Philippine Nationals (Foreign Investment Negative List).* – The Foreign Investment Negative List shall have two (2) component lists: A and B:

a. List A shall enumerate the areas of activities reserved to Philippine nationals by mandate of the Constitution and specific laws.

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[1] Sec. 3. *Definitions.* – As used in this Act:

a. The term "Philippine national" shall mean a citizen of the Philippines; of a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding ad entitled to vote is owned and held by citizens of the Philippines; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: *Provided*, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a "Philippine national." *(as amended by Republic Act No. 8179)*

b. List B shall contain the areas of activities and enterprises regulated pursuant to law:

xxx xxx xxx

Small and medium-sized domestic market enterprises with paid-in capital of less than the equivalent of Two hundred thousand US dollars (US$200,000.00) are reserved to Philippine nationals: *Provided*, That if: (1) they involve advanced technology as determined by the Department of Science and Technology; or (2) they employ at least fifty (50) direct employees, then a minimum paid-in capital of One hundred thousand US dollars (US$100,000.00) shall be allowed to non-Philippine nationals. xxx" (Emphasis and underscoring ours)

In this regard, Executive Order No. 858, otherwise known as the Eighth Regular Foreign Investment Negative List (**"8th FINL"**), which was promulgated on 05 February 2010, provides:

"LIST B: FOREIGN OWNERSHIP IS LIMITED FOR REASONS OF SECURITY, DEFENSE, RISK TO HEALTH AND MORALS AND PROTECTION OF SMALL- AND MEDIUM-SCALE ENTERPRISES

Up to Forty Percent (40%) Foreign Equity

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6. Domestic market enterprises with paid-in equity of less than the equivalent of US$200,000 (RA 7042 as amended by RA 8179)

7. Domestic market enterprises which involve advanced technology or employ at least fifty (50) direct employees with paid-in equity capital of less than US$100,000 (RA 7042 as amended by RA 8179)"

Based on the foregoing provisions, the general rule is that non-Philippine nationals can own up to one hundred percent (100%) of the equity in export as well as domestic market enterprises. However, the 8th FINL restricts foreign ownership to a maximum of forty percent (40%) of the equity in small and medium-sized domestic market enterprises in cases where the paid-in capital is less than the equivalent of Two Hundred Thousand US dollars (US$200,000). Nonetheless, a paid-in capital of at least the equivalent of One Hundred Thousand US dollars (US$100,000) is sufficient so long as the enterprise either (1) involves advanced technology as determined by the Department of Science and Technology, or (2) employs at least fifty (50) direct employees, and the foreign equity restriction shall not apply.

Applying the foregoing provisions to the instant case, AAI shall not be subject to any foreign equity ownership restriction if it is an *export* enterprise, which is

defined by RA 7042 as one "wherein a manufacturer, processor or service (including tourism) enterprise exports sixty percent (60%) or more of its output, or wherein a trader purchases products domestically and exports sixty percent (60%) or more of such purchases". On the other hand, if its activities make it a *domestic market* enterprise that "produces goods for sale, or renders services to the domestic market entirely or if exporting a portion of its output fails to consistently export at least sixty percent (60%) thereof", it is subject to the restrictions given above.

Based on the facts stated in your letter, it appears the activities being performed by AAI do not fall within the 8th FINL. However, there is a need to determine if AAI is considered a small or medium-sized enterprise (SME) as defined by RA 7042 to determine whether or not the statutory restrictions on said kinds of enterprises apply to it. Nonetheless, even assuming that AAI is classified as a SME under the law, it appears that it is still not subject to any foreign ownership restriction since its authorized capital stock is Eighty Million Pesos (₱80,000,000.00), which is more than the equivalent of Two Hundred Thousand US dollars (US$200,000.00).

The foregoing opinion rendered is based solely on the facts disclosed in the query 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.[2]

VESPER JULIUS B. GARCIA
Officer-in-Charge

[2] SEC Memorandum Circular No. 15, series of 2003.