Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Bldg. EDSA, Greenhills, Mandaluyong City

OFFICE OF THE GENERAL COUNSEL

07 June 2011

SEC-OGC Opinion No. 11-28

Registration of increase of authorized capital stock by a "non-Philippine national" corporation

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ATTENTION: Atty. Joseph Jason M. Natividad

Sir:

This refers to your 04 October 2010 letter requesting opinion.

You stated that:

"The company is not engaged in a nationalized or partly nationalized undertaking. It is currently doing business as an international freight forwarder which can be undertaken by a 100% foreign owned corporation. It was also the decision of the stockholders and the Board of Directors of the company that it will not avail of the incentives under the Foreign Investments Act (Republic Act No. 7042).

During our initial query from the Company Registration and Monitoring Department of the SEC, we were informed that SEC Form F-101 will have to be filed by the company to the SEC. When we sought clarification on the legal basis of said requirement, they cited the Foreign Investments Act particularly Section 5 thereof.xxx

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Given the foregoing, we would like to formally request for an opinion on which cases of increase in the percentage of foreign equity in existing corporations would require prior registration with the SEC, and the legal basis

for the imposition of such requirement. We would also seek clarification on whether SEC Form F-101 is required to be filed by all existing corporations even if it has no intention of doing business under the Foreign Investment Act."

We opine as follows:

Foreign Investments Act of 1991 (FIA),[1] Section 5 provides:

> "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)**, 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 to a smaller percentage by existing law and/or under the provisions of this Act. The SEC or BTRCP, as the case may be, shall not impose any limitations on the extent of foreign ownership in an enterprise additional to those provided in this Act: xxx." (Emphasis ours.)

Under FIA, Section 3 (a), a corporation with foreign equity participation of more than 40% is considered as non-Philippine national.[2]

Consequently, corporations with more than 40% foreign equity participation, whether new or existing, are required to register under the FIA in order to do business in the country as defined under FIA, Section 3(d).[3]

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[1] Republic Act No. 7042 (1991), as amended by Republic Act No. 8179 (1996).

[2] FIA, Section 3 (a) provides:

> 'SEC. 3. Definitions. - As used in this Act:
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> 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 and 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."'

[3] FIA, Section 3 (d) provides:

The Commission requires SEC Form F-101 for an existing corporation that increases the foreign equity participation in its outstanding capital stock to more than 40% because: (1) it shall now become a "non-Philippine national," and (2) the fact the corporation is incorporated in the Philippines and registered with the Commission indicates that it intends to do business in the country as defined under the FIA.

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

Please be guided accordingly.

Vesper Julius B. Garcia
Officer-in-Charge

"SEC. 3. Definitions. - As used in this Act:

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d. The phrase "doing business" shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eighty [180] days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or of the purpose and object of the business organization: Provided, however, That the phrase "doing business" shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account;"