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

**OFFICE OF THE GENERAL COUNSEL**

13 July 2011

SEC Opinion No. 11-31
Re: Queries on Quorum,
Special Election,
& Financial Assistance

ATTY. MARK THURSDAY P. ALCISO
General Counsel
Filipino Society of Composers, Authors
and Publishers, Inc. (FILSCAP)
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Brgy. Sacred Heart
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Sir:

This refers to your request for legal opinion dated 04 November 2010, on various subjects, as follows:

1. Is the presence of at least a majority of the members entitled to vote mandatory for the *election of the trustees* even if the by-laws provide for a lower quorum requirement?
2. Is it within the prerogative of the Board of Trustees (BOT) to decide not to conduct another special election to save on expenses and resources considering that two elections were already called but both failed due to a lack of quorum? If so, may the BOT declare the current trustees on holdover status until the next regular election?
3. In relation to query No. 2 above, assuming the BOT has the prerogative to decide not to conduct another special election and just have a hold-over board until the February 2012 regular election, is the Board nevertheless obligated to call a special election during the annual meeting of its members in February 2011?
4. May the BOT pass a resolution granting the members of FILSCAP the following benefits by way of financial assistance:
    a) Granting of non-monetary gifts in the form of grocery items and the like to the member family during FILSCAP's annual Christmas party;

b) Reimbursement by FILSCAP up to a certain amount of any funeral expense incurred by any of its members and that immediate member's family;
c) Reimbursement by FILSCAP up to a certain amount of any medical expense incurred by any of its members and that immediate member's family; and
d) As an alternative to item (c), shouldering the annual premium of a health card for each of its members.

We now address your queries:

Query No. 1

Section 24 of the Corporation Code[1] (the "Code") specifically applies to the election of trustees, thus:

> SECTION 24. Election of directors or trustees. — At all elections of directors or trustees, *there must be present, either in person or by representative authorized to act by written proxy*, the owners of a majority of the outstanding capital stock, or if there be no capital stock, *a majority of the members entitled to vote*.xxx (Emphasis ours)

On the other hand, Section 52 of the Code provides:

> SECTION 52. Quorum in meetings. — *Unless otherwise provided for in this Code or in the by-laws*, a quorum shall consist of the stockholders representing a majority of the outstanding capital stock or a majority of the members in the case of non-stock corporations. (Emphasis ours)

Section 52 lays down the general rule on quorum for meetings. However, the Code has special rules in certain instances, such as the election of trustees,[2] as laid down in Section 24. In short, Section 24 is one of the exceptions referred to by the phrase "unless otherwise provided in this Code" in Section 52.

Hence, even if Section 4 Article III of FILSCAP's amended by-laws[3] provides that, "At all meetings of the members, *a majority of the members present shall constitute a quorum* for the transaction of business," the quorum in meetings for purposes of electing the trustees, must be a majority of the members entitled to vote, as mandated by Section 24 of the Code, not *a majority of the members present* as provided in FILSCAP's amended by-laws.

Moreover, in a previous Opinion, the Commission explicitly stated that:

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[1] Batas Pambansa Blg. 68 ( Approved May 1. 1980).
[2] J. C. Campos, Jr. and M.C. L. Campos, The Corporation Code 419 (1990 Vol. I )
[3] Dated 18 May 2009.

"It is clear from the aforequoted provision that for the election of the members of the Board of a non-stock corporation, it is mandatory that at least a majority of all members entitled to vote must be present either in person or by proxy at the meeting held for the purpose. Thus, in the absence of the required quorum, there cannot be a valid election of the Board."[4]

Regarding the validity of the amended by laws of FILSCAP, the same Opinion applies:

"It is the first requisite of validity that by-laws must be consistent with, and not repugnant to or in contravention of the laws of the land (8 Fletcher Sec. 4185). The by-laws are subordinate to the articles of incorporation as well as the Corporation Code and related statutes, and should therefore not be inconsistent with any of these. Otherwise, they would have no binding effect (Campos and Lopez Campos, Corporation Code, citing Fleischer vs. Botica Nolasco, G.R. No. 23241, March 14, 1925, Phil. 584 (1925). Thus, in case of conflict between the Corporation Code and by-laws, the former shall prevail."[5]

Thus, your position "that the lower quorum requirement can only apply to meetings where the Corporation Code does not provide for a specific quorum requirement" is correct.

Query No. 2

The general rule is that, there must be an annual election of trustees on the date fixed in the by-laws. This is because Section 23 of the Code provides that, as a general rule, the term of directors or trustees is one (1) year. However, in non-stock corporations, the term may be different as desired.[6] Nevertheless, while the term of trustees of non-stock corporations may vary under the articles of incorporation or by-laws, lifetime or unlimited term of the board of trustees is not allowed.[7]

In a previous Opinion, the Commission clearly stated that,

"*The general rule is that, there must be an annual election of directors on the date fixed in the by-laws.* However, in case of failure of the corporation to hold an election due to some valid and justifiable reasons, the incumbent members of the board may hold-over their office until their successors are duly elected and qualified. This hold-over principle is sanctioned under Section 23 of the Corporation Code which provides that the Board of Directors "shall hold office for one (1) year and until their successors are elected and qualified". *It can be*

[4] SEC Opinion dated September 3, 1992 addressed to Mr. Rodolfo B. Valdez.
[5] *Id.*
[6] SEC Opinion dated 05 July 2006 addressed to Atty. Edsel E. Ocson.
[7] SEC Opinion dated December 16, 1991, addressed to Ms. Celedonia M. Aquino.

*construed from the preceding underlined phrase that the corporation should hold another meeting to elect a new set of Board. The non-holding of annual meeting cannot be justified by mere reasons that big expenses is incurred if another meeting is to be held for the purpose and the uncertainty that quorum can be secured."*[8] (Emphasis ours)

Section 1 of Article III of FILSCAP's By-laws provides that "The Society shall hold a regular meeting of its general members for the transaction of general business on an annual basis, and for *the election of Trustees on a bi-annual basis* xxx."

Applying the principle in the Opinion cited above to FILSCAP, it should therefore follow the mandate of its by-laws for the election of its trustees, which is, every two years. You have explained that in February 2010, only 201 out of the required quorum of 363 were present for the holding of the regular election, thus a failure of election was declared. There was a call for a special election that was held on 14 August 2010, but again a failure of election occurred due to lack of quorum.

As a result, the Board of Trustees decided not to conduct another special election to save on expenses and resources due to the fact that FILSCAP will be spending at least Php 200,000.00 to hold another special election. Moreover, the normal operations of FILSCAP is affected when a special election is called because many of its employees assist in the preparation and the actual conduct of the elections. This has led the Board of Trustees to consider declaring the current trustees on holdover status until the next regular election.

There is no need to declare that the current trustees are on hold-over capacity as Section 23 of the Code provides that:

"SECTION 23. The board of directors or trustees. — Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year *until their successors are elected and qualified.* (emphasis ours)

Every director must own at least one (1) share of the capital stock of the corporation of which he is a director, which share shall stand in his name on the books of the corporation. Any director who ceases to be the owner of at least one (1) share of the capital stock of the corporation of which he is a director shall thereby cease to be a director. Trustees of non-stock corporations must be members thereof. A majority of the directors or trustees of all corporations organized under this Code must be residents of the Philippines."

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[8] SEC Opinion dated May 18, 1993 addressed to Mr. Zosimo O. Orille.

However, "[t]he Commission, on several occasions, had consistently opined that, as a general rule, the regular election of directors and officers as stated in the By-laws cannot be dispensed with or postponed by the Directors and officers in order to extend their term of office as fixed in the By-laws. *While 'hold over term' may be allowed under Section 23 of the Corporation Code, such situation arises only when no successors are elected due to valid and justifiable reasons."*[9] (Emphasis ours)

In another previous Opinion of the Commission, incurring of big expenses for the purpose of holding a meeting and because there is uncertainty that a quorum can be secured is NOT *considered a valid and justifiable reason.* [10] If the members cannot be present in person, Section 89[11] of the Code and Section 6 of FILSCAP's By-laws allow voting by proxy, by mail, or other similar means, that could sufficiently address the problem of quorum.

Query No. 3

Based on your representation, the BOT in February 2011 is duty bound to call, not a special meeting, for the purpose of electing the members of the BOT, but already the annual meeting of FILSCAP. As clearly stated in a previous Opinion:

> "*The general rule is that, there must be an annual election of directors on the date fixed in the by-laws.* xxx The non-holding of annual meeting cannot be justified by mere reasons that big expenses is incurred if another meeting is to be held for the purpose and the uncertainty that quorum can be secured. *The corporation should, as soon as possible, call a special meeting for such purpose with proper notice given to all members.* Non-holding of annual meeting without justifiable reason is subject to the "SEC Rules Governing the Filing of Information Sheet by Domestic Corporation". It has to be emphasized that violation of said Rules carries with it the corresponding penalty prescribed therein."[12] (Emphasis ours)

Your attention is called to the requirement under Section 50 of the Code that a regular meeting of the members must be held annually as fixed in the By-laws. Since the said election occurs during the annual meeting, it appears that FILSCAP also failed to muster a quorum for purposes of the annual meeting. Although your query is focused on the failure of elections of the members of the BOT due to lack of quorum,

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[9] SEC Opinion dated May 5, 1997 addressed to Ms. Nona S. Ricafort.
[10] *Op. cit.,* Note 6.
[11] SECTION 89. Right to vote. — The right of the members of any class or classes to vote may be limited, broadened or denied to the extent specified in the articles of incorporation or the by-laws. Unless so limited, broadened or denied, each member, regardless of class, shall be entitled to one vote.
Unless otherwise provided in the articles of incorporation or the by-laws, a member may vote by proxy in accordance with the provisions of this Code. (n)
Voting by mail or other similar means by members of non-stock corporations may be authorized by the by-laws of non-stock corporations with the approval of, and under such conditions which may be prescribed by, the Securities and Exchange Commission.
[12] *Id.*

please be reminded that, as stated in the quoted Opinion, the non-holding of the annual meeting without justifiable reason is subject to SEC Rules Governing the Filing of Information Sheet by Domestic Corporation.

Query No. 4

Its Articles state that FILSCAP is a non-stock and non-profit corporation. Unlike a stock corporation, non-stock corporations exist for purposes other than profit. Non--stock corporations are governed by Title XI of the Code on Non-Stock Corporations, that defines non-stock corporations in Section 87:

> SECTION 87. Definition. — For the purposes of this Code, a non-stock corporation is *one where no part of its income is distributable as dividends to its members, trustees, or officers,* subject to the provisions of this Code on dissolution: Provided, That *any profit which a non-stock corporation may obtain as an incident to its operations shall, whenever necessary or proper, be used for the furtherance of the purpose or purposes* for which the corporation was organized, subject to the provisions of this Title. (Emphasis ours)

It does not follow however, that non-stock corporations can make no profits. Many such corporations do obtain profits as incident to their operations, but unlike in stock corporations, such profits are NOT distributed to its members, but are used for the furtherance of its purposes.[13]

Although Section 36 (10) grants a corporation the power and capacity, "To establish pension, retirement, and other plans for the benefit of its directors, trustees, officers and employees," the granting of the financial assistance you mentioned in your letter, to the MEMBERS of a non-stock corporation such as FILSCAP out of its profits is prohibited by Section 87, for such cannot be considered as "the furtherance of the purpose or purposes for which the corporation was organized."

In SEC-OGC Opinion No. 29-06 dated 07 June 2006[14] the Commission enumerated the characteristics of a non-stock corporation and concluded that,

> "The following are the most common characteristics of a non-stock corporation:
> (1) Any profit derived by it from any authorized activity cannot be distributed as dividends to its members; [15]
> (2) It may not lawfully engage in any business activity for profit as it would run counter to its very nature as a non-profit entity; [16]
> (3) When incidental to the objects and purposes of the corporation and without the end of making profits to be distributed to the members, it

[13] J. C. Campos, Jr. and M.C. L. Campos, The Corporation Code 44 (1990 Vol. I ).
[14] Addressed to Rayla Melchor Santos, dated 06-07-2006.
[15] De Leon, Hector S. Corporation Code of the Philippines Annotated, 2002 Edition, p. 675.
[16] Section 14 (2), Corporation Code of the Philippines .

may engage in certain economic activities stated in its articles of incorporation; [17]

(4) Do not issue stock and distribute dividends to their members; they are created not for profit but for public good and welfare;[18] and

(5) The mere fact that a non-stock corporation may earn profit does not make it a profit-making corporation where such profit or income is used to carry out the purposes set forth in the articles of incorporation and is not distributed to its incorporators, members, trustees or officers.[19]

In relation to the above-quoted provision and enumeration, it is clear that non-stock corporations may not distribute its profits to its members. Thus, to address your first query, *no profit derived by the non-stock corporation may ever be distributed or apportioned to the members of the board of trustees, nor to any officer or member thereof.* The corporation is allowed by law the use of such profits solely for the furtherance of the purpose or purposes for which the corporation was organized, and to those that are necessary and incidental thereto." (Emphasis ours)

It is only upon dissolution when the members can reap for themselves any incidental income or profit made by non-stock corporations, as provided for in Section 87.[20]

It shall be understood that the foregoing opinion is rendered 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 in other cases 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.

Very truly yours,

**VESPER JULIUS B. GARCIA**
Officer-in-Charge

[17] *Supra*, pp. 675-676.
[18] *Ibid*, p. 47.
[19] SEC Opinion addressed to Atty. Generosa R. Jacinto 13 November 1989.
[20] *Supra*, Note 13.