Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City

11 October 2012

SEC OPINION NO. 12-19
Rules on Issuer Tender Offer/Buyback

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ATTENTION : **ATTY. FRANCES T. YUYUCHENG**

Dear Attorney Yuyucheng:

This refers to your request for clarification on the applicability of certain provisions of SRC Rule 19 of the Amended Implementing Rules and Regulations[1] ("SRC Rule 19," for brevity) of the Securities Regulation Code (SRC)[2] to an issuer tender offer/buyback ("Issuer TO") of listed common shares by a listed corporation. You stated that that the subject listed corporation is contemplating on filing a petition for voluntary delisting with the Philippine Stock Exchange (PSE). It was likewise stated in your letter that PSE requires, for a voluntary delisting, that a tender offer to all stockholders of record be made.

In the light of such PSE requirement, the listed corporation intends to undertake an Issuer TO. Thus, the request for confirmation of the following:

1. Paragraph 4 of SRC Rule 19 solely pertains and applies to an Issuer TO and conversely does not apply to a tender offer to be conducted by a third party ("Third Party TO") other than the issuer or its affiliates;

2. Paragraphs 6, 7, 8 and 9 of SRC Rule 19 solely pertain and apply to a Third Party TO and do not apply to an Issuer TO; and

3. Paragraphs 10, 11, 12 and 13 commonly apply to an Issuer TO and a Third Party TO.

At the onset, it must be emphasized that there is no distinction between the disclosure and procedural requirements of a tender offer made by an issuer and that by a Third Party Bidder as provided under SRC Rule 19.

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[1] Signed on 30 December 2003.
[2] Republic Act No. 8799 (2000).

Under paragraph 1 (C) of SRC Rule 19, a "bidder" is defined as *any person who makes a tender offer or on whose behalf a tender offer is made.*

In accordance with the pertinent rules on statutory construction, inasmuch as the subject SRC Rule does not make any distinction in this regard, no such distinction can be made by means of interpretation or application. *Ubi lex non distinguit, nec nos distinguere debemus.*[3] Hence, the use of the term "bidder" cannot be confined to third parties alone but must likewise refer to an issuer-offeror. In other words, there should be no distinction in the application of SRC Rule 19 where none is indicated. This intent may likewise be gathered from the rest of the provisions of SRC Rule 19, as discussed below.

It is provided under paragraph 4, (B) and (C), of SRC Rule 19 that:

> "4. **Tender Offer by an Issuer/Buy Back**
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> xxx xxx xxx
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> B. Any issuer or any of its affiliates which intend to reacquire its own securities through active and widespread solicitation from the stockholders in general and in substantial amount of its shares, shall comply with **disclosure and procedural requirements set forth under subparagraphs (C) and (D)** below, and the preceding provisions of this Rule.
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> C. If an issuer or an affiliate publishes, sends or disseminates its tender offer to security holders by means of a summary publication in the manner prescribed in this Rule, the summary publication shall disclose only the following information:
>
> i. The identity of the issuer or affiliate making the tender offer;
> ii. The amount and class of securities being sought and the price being offered;
> iii. The information required by **paragraph 8** of this Rule;
> iv. A statement of the purpose of the issuer tender offer; and
> v. The appropriate instruction for security holders on how to obtain promptly, at the expense of the issuer or affiliate making the issuer tender offer, the information required by **paragraph 7** of the Rule." (Emphasis supplied)

Meanwhile, paragraph 8 of SRC Rule 19 provides for the *dissemination requirements* in making a tender offer, thus:

> "8. **Dissemination Requirements**
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> A. **A bidder or an issuer shall disseminate the tender offer by complying fully with one of the following methods of dissemination:**

[3] Agpalo, Ruben E. Statutory Construction, 6th Edition (2009), pp. 289-290. Citations omitted.

i. ***Long Form Publication***. The **bidder** shall publish in two (2) newspapers of general circulation in the Philippines on the date of commencement of the tender offer and for two (2) consecutive days thereafter the information required by paragraph 7 (A) of this Rule; or

ii. ***Summary Publication***. The **bidder** shall publish in two (2) newspapers of general circulation in the Philippines on the date of commencement of the tender offer and for two (2) consecutive days thereafter the information required by paragraph 7(A)(i) through (viii) of this Rule, including appropriate instructions for security holders on how to obtain promptly, at the expense of the bidder, the information included in SEC Form 19-1, and furnish promptly a copy of such form to any security holder who requests a copy of such information.

B. If a material change occurs in the information published, sent or given to security holders, the **bidder** shall disseminate promptly disclosure of such change in a manner reasonably calculated to inform security holders of such change." (Emphasis supplied)

Parenthetically, paragraph 8 used "*bidder*" and "*issuer*" in identifying the person who should comply with the dissemination requirements provided therein. Then, in discussing the methods, the Rule reverted to using the term "bidder," which, to reiterate, is defined as "*any person who makes a tender offer or on whose behalf a tender offer is made.*" To construe the use of bidder to refer to "bidder" only because of the apparent omission of "issuer" in items (i) and (ii) of subparagraph (A) and in subparagraph (B), of paragraph 8 would result in absurdity. Pertinently, the correct interpretation would be that the two terms are used interchangeably. To reiterate, the term "bidder" is generally used and specifically defined in the same Rule, as explained above, to refer to any person who makes a tender offer or on whose behalf a tender offer is made. This only goes to show that no distinction was ever intended in the subject Rule; thus, the same requirements apply to both Issuer TO and Third Party TO.

Paragraph 7 of SRC Rule 19, on the other hand, provides for the *disclosure requirements* with respect to tender offers, to wit:

"7. **Disclosure Requirements with Respect to Tender Offers**

A. The bidder shall publish, send or give to security holders in the manner prescribed under **paragraph 9** of this Rule, a report containing the following information:

i. The identity of the bidder including his/its present principal occupation;

ii. The identity of the target company;
iii. The amount of class of securities being sought and the type and amount of consideration being offered therefor;
iv. The scheduled expiration date of the tender offer, whether the tender offer may be extended and, if so, the procedures for extension of the tender offer;
v. The exact dates when security holders who deposit their securities will have the right to withdraw their securities pursuant to this Rule and the manner in which shares will be accepted for payment and in which withdrawal may be effected;
vi. If the tender offer is for less than all of the securities of the class and the bidder is not obligated to purchase all securities tendered, the exact date of the period during which securities will be accepted on a pro rata basis under this Rule and the present intention or plan of the bidder with respect to the tender offer in the event of an oversubscription by security holders;
vii. The confirmation by the bidder's financial adviser or another appropriate third party that resources available to the bidder are sufficient to satisfy full acceptance of the offer; and
viii. The information included in **SEC Form 19-1**.

B. If any material change occurs in the information previously disclosed to security holders, the bidder shall disclose promptly such change in the manner prescribed by this Rule." (Emphasis supplied)

Clearly, paragraph 4 of SRC Rule 19 spells out the application of paragraphs 7 and 8 to an Issuer TO. Paragraph 4(C)(v) of SRC Rule 19 requires the issuer-offeror in an Issuer TO to disclose the information required in paragraph 7 of SRC Rule 19. Likewise, paragraph 4(C)(iii) mandates bidder and issuer to disseminate the tender offer by complying fully with either one of the available two methods of dissemination (long form or summary publication) provided under paragraph 8 of SRC Rule 19, in addition to the required prompt dissemination of the disclosure of any material change in the information published pursuant to paragraph 8(A) and (B).

Notably, "**Issuer Tender Offer**" is defined under SRC Rule 19, paragraph 1 (F) as a "***publicly announced intention*** *by an issuer to reacquire any of its own class of equity securities, or by an affiliate of such issuer to acquire such securities.*" Such requirement on public announcement of the intention of the issuer is clearly covered by paragraph 5 of SRC Rule 19, which provides that:

"5. **Any person making a tender offer shall make an announcement of his intention in a newspaper of general circulation, prior to the commencement of the offer**; Provided, however, that such announcement shall not be made until the bidder has the resources to implement the offer in full. **A copy of said notice shall be submitted to the Commission on the date of publication thereof.**" (Emphasis supplied)

Meanwhile, paragraph 6 of SRC Rule 19 pertains to the *filing requirements*, particularly that of ***SEC Form 19-1*** likewise referred to in Paragraph 7 (viii) of SRC Rule 19, including other additional tender offer materials, relative to the tender offer.

Lastly, paragraph 9 of SRC Rule 19 provides for the *Period and Manner of Making Tender Offer* that is likewise referred to in Paragraph 7 (A) of SRC Rule 19 on the disclosure requirements with respect to tender offers.

Based on the foregoing, it is clear that SRC Rule 19 and its provisions cover both Issuer TO and Third Party TO without distinction; hence, they are both required to comply with all the disclosure, dissemination and procedural requirements set forth therein, with the subject Rule being applicable to tender offers in general. This construction is likewise in accord with the fundamental rule that all provisions of the Rule relating to the same subject, in this case, the SRC Rule 19 on *Tender Offers*, should be read together and reconciled to avoid inconsistency. It is a well-settled principle in statutory construction that provisions that appear to be seemingly conflicting should be harmonized to give effect to the statute in its entirety.[4] This is likewise consistent with the declared policy of the State and avowed objectives of the Commission to protect the investing public and to ensure full, fair and timely disclosure about securities and of any material information.[5]

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 or upon the courts whether of similar or dissimilar circumstances.[6] If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

By Authority of the Commission:

CAMILO S. CORREA
General Counsel

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[4] *Id.*, at p. 361. Citations omitted.
[5] *See:* Section 2 on Declaration of State Policy, Securities Regulation Code; and SRC Rule 2 on Interpretation of Rules, Amended IRR of the SRC.
[6] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.