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

May 19, 2014

SEC-OGC Opinion No. 14-07
Re: Filling-up of Vacancies in the Board of Trustees

MR. ROLAND A. DE AUSEN
Chairman/President
Water and Sewerage Sector Savings and Loan Association, Inc.
MWSS Complex, Katipunan Road, Old Balara, Q.C.

Dear Mr. De Ausen,

This refers to your letter dated 10 April 2012 requesting for opinion on whether the existing Board of Trustees ("Board") of Water and Sewerage Sector Savings and Loan Association, Inc. ("WASSLAI") is required to fill up a vacancy in its Board, and if so, by what manner shall the vacancy be filled up. You further requested for a guideline or criteria in the determination of the most qualified person to fill up the vacancy.

In your letter, you mentioned that after a vacancy occurred in WASSLAI's Board due to the untimely demise of one of its Trustees, Mr. Vicente Elefante ("Mr. Elefante"), a losing candidate for the position of Trustee who placed number sixth during the last election (the first five are winners), applied for the vacancy, claiming that it should be filled up, and that being number six during the last election, he is the most qualified person to fill up such vacancy. You further stated that under Section 5, Article V of WASSLAI's By-laws, "vacancy occurring in the Board shall be filled for the unexpired term in accordance with law; provided that filling up of vacancy shall not be made if such vacancy occurs within three (3) months before the date of the next election, except if such vacancy will affect the existence of a quorum". Accordingly, you claim that a quorum still exists in WASSLAI's Board and the next election is less than one (1) year away.

Corollarily, on 26 April 2012, we received a letter from Mr. Elefante, together with his several exchanges of correspondence with WASSLAI, pertaining to his application as member of WASSLAI's Board.

As to your query on whether WASSLAI's Board is required to fill up the vacancy, the Commission had already opined on the issue of whether or not it is mandatory for the Board of Trustees to fill up vacancies in its Board, *viz*:

SEC - OGC

> "The general rule is well settled that the **power of a board of directors is not suspended by vacancies in the board unless the number is reduced below a quorum**, the rule being that the number necessary to constitute a quorum under a by-law which provides that a majority of the directors shall be necessary and sufficient to constitute a quorum, is a majority of the entire board, **notwithstanding [that] there may be vacancies in the board at the time**. (2 Fletcher, Cyc. Corps. 1954 Rev. Ed., sec. 421, p. 276-277)[1] [Emphasis supplied.]

In this connection, Section 25 of the Corporation Code of the Philippines ("Corporation Code") provides:

> "Sec. 25. Corporate officers, quorum. –
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> The directors or trustees and officers to be elected shall perform the duties enjoined on them by law and the by-laws of the corporation. Unless the articles of incorporation or the by-laws provide for a greater majority, a majority of the number of directors or trustees as fixed in the articles of incorporation shall constitute a quorum for the transaction of corporate business, and every decision of at least a majority of the directors or trustees present at a meeting at which there is a quorum shall be valid as a corporate act, except for the election of officers which shall require the vote of a majority of all the members of the board. xxx"

A perusal of WASSLAI's Amended Articles of Incorporation provides that "the number of trustees of the association shall be five"[2]. Similarly, WASSLAI's By-Laws states that "the corporate powers of the association shall be vested in and exercised by a board composed of five trustees"[3], and that "a majority of the Board of Trustees shall constitute a quorum to do business"[4]. Hence, considering that, according to you, WASSLAI's Board still consists of four Trustees, the required quorum for the transaction of all corporate business as stated in Article 25 of the Corporation Code, which is the majority of five Trustees, i.e., three Trustees, is satisfied, thus, WASSLAI's Board is not mandated to fill-up the vacancy.

With regard to your query as to the manner by which the vacancy shall be filled up, if such is necessary, Section 29 of the Corporation Code provides, to wit:

> Sec. 29. Vacancies in the office of director or trustee. - Any vacancy occurring in the board of directors or trustees other than by removal by the stockholders or members or by expiration of term, may be filled by the vote of at least a majority of the remaining directors or trustees, if still constituting a quorum; otherwise, said vacancies must be filled by the stockholders in a regular or special

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[1] SEC Opinion dated 17 December 1986 Opinion addressed to Asian Brothers Corporation.
[2] Paragraph 6, Amended Articles of Incorporation of WASSLAI approved on 10 November 1999.
[3] Section 1, Article V, Amended By-Laws of WASSLAI approved on 06 September 2005.
[4] Section 10, Article V, *Ibid.*

meeting called for that purpose. A director or trustee so elected to fill a vacancy shall be elected only or the unexpired term of his predecessor in office.

Consequently, the Commission in its 06 May 2013 Opinion[5] explained that:

> Based on Section 29 as above-quoted, the remaining directors or trustees can fill-up the vacancies in the Board when: (1) such vacancies were occasioned by reasons other than the removal by the stockholders or trustees or by expiration of term; and (2) such remaining directors or trustees still constitute a quorum of the Board. These conditions must concur; otherwise, the filling-up of the vacancies must be done by the stockholders or members in a regular or special meeting called for the purpose.
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> In the case [of] **Tan** v. **Sycip,** G.R. No. 153468, [decided] on 17 August 2006, it was held that "[t]he phrase **'may be filled'** in Section 29 shows that the filling of vacancies in the board by the remaining directors or trustees constituting a quorum is merely permissive, not mandatory. Corporations, therefore, may choose how vacancies in their respective boards may be filled up -- either by the remaining directors constituting a quorum, or by the stockholders or members in a regular or special meeting called for the purpose."
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> The above-quoted ruling in *Tan v. Sycip* cannot be interpreted to mean that even in the absence of a quorum, the remaining directors or trustees can fill-up the vacancy. The phrase "may be filled" in Section 29 is, by the very language of the provision, premised on the two (2) conditions above mentioned for the exercise by the remaining directors or trustees of their authority to fill-up the vacancy (i.e. that the vacancy is not by removal or by expiration of term and that there is still a quorum). Such that if these two (2) conditions are met, the permissiveness spoken of is triggered, meaning, the filling-up may be done by the remaining directors or trustees, or by the stockholders or members, especially so if the latter option is required by the By-Laws. On the other hand, absent any of these two (2) conditions, such as when the remaining directors or trustees do not constitute a quorum, then only the stockholders or members can fill-up the vacancies. This is the import of Section 29 when it says "otherwise, said vacancies must be filled by the stockholders xxx."

Accordingly, based on the facts you presented, should the Association decide to fill up the vacancy, the remaining trustees can fill up such vacancy in the Board because: (1) the vacancy was caused by death, and (2) the remaining trustees still constitute a quorum of the Board.

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[5] SEC-OGC Opinion No. 13-06 addressed to Atty. Jeremiah V. Villanueva of the PEOPLE'S LAW OFFICE.

Finally, with regard to your second query as to the guideline or criteria in the determination of the most qualified person to fill up the vacancy, please be advised that pursuant to SEC Memorandum Circular No. 15, Series of 2003, the Commission refrains from rendering an opinion on the matter stated in your query involving as it does the exercise of sound business judgment or discretion by WASSLAI's Trustees.

Nevertheless, it shall be understood 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 courts, 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.

Very truly yours,

CAMILO S. CORREA
General Counsel

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