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

OFFICE OF THE GENERAL COUNSEL

30 May 2016

SEC-OGC Opinion No. 16-13
Re: Partially-Nationalized Industries and the Anti Dummy Law

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Sir:

This refers to your letter dated 18 August 2015 requesting for a confirmation of the following, regarding your client, Chemoscience Phils. Inc. (CPI):

> 1. That CPI is a small and medium sized domestic market enterprise under Section 8 of Republic Act No. 7042, as amended, otherwise known as the "Foreign Investment Act of 1991" (FIA) and, therefore, falling under Item No. 6 of List B of the Annex to Executive Order No. 184 dated 29 May 2015 which promulgated the Tenth Regular Investments Negative List (Tenth Negative List);
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> 2. As such, that it would be unlawful for CPI to hire any foreigners who will intervene in the management, operation, administration or control of CPI, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, because it would be contrary to Section 2-A of Commonwealth Act No. 108, as amended, otherwise known as the Anti-Dummy Law"; and
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> 3.That if CPI increased its paid-up capital to the equivalent of at least US Dollar Two Hundred Thousand (US $200,000,000.00), CPI would be removed from the coverage of the Tenth Negative List and the Anti-Dummy Law, provided that CPI is not engaged in any other nationalized or partially-nationalized industry, including ownership of land in the Philippines.

In your letter, you stated that CPI was registered with the Commission on 15 August 2015 with an authorized capital stock of Twenty Million Pesos (P20,000,000.00) divided into Two Hundred Thousand shares (200,000) with par value of One Hundred Pesos (P100.00) per share. The subscribed capital stock is Fifty Thousand (50,000) shares, of which Thirty Thousand (30,000) was subscribed by Filipinos while the remaining Twenty Thousand (20,000) was subscribed by Malaysians. Thus, CPI is sixty percent (60%) Filipino-owned and forty percent (40%) Malaysian-owned (60/40 corporation). The total paid up capital is Five

Million Pesos (P5, 000,000.00) which is approximately One Hundred Ten Thousand US Dollars ($110,000.00).

The primary purpose of CPI is to "to engage in, conduct, and carry on the business of buying, selling, distributing, marketing, at wholesale, insofar as may be permitted by law, all kinds of goods, wares and merchandise of every kind or description, including but not limited to scientific and laboratory instruments and supplies, industrial equipment, chemicals, laboratory furniture, medical devices and reagents, servicing maintenance and rental of the same, or any or all supplies, equipment, gears, paraphernalia, construction supplies which incidentally requires: (i) procurements, entering into contracts for the export, import, purchase, acquisition, sale at wholesale and other disposition for its account as principal or in a representative capacity as manufacturer's representative, merchandise, broker, indentor commission merchant, factors or agents, upon consignment of all kinds of goods, wares, merchandise, or products including but not limited to disaster supplies equipment gear, paraphernalia, communications equipment, construction supplies; and (ii) acquisition from the government or authority, national, provincial, municipal or otherwise, or any corporation, company, partnership or person, such charter, contracts, franchise, privileges, exemptions licenses and concessions, as may be conducive to the purposes of the Corporation, including but not limited to entering into a lawful arrangement for sharing of profits, union of interest utilization or agreement, reciprocal concession or cooperation, with any corporation, association, partnership, entity, person, or governmental, municipal, or public authority, domestic or foreign, in the carrying on of any business or transactions deemed necessary, convenient, or incidental to the purposes of the Corporation."

In your letter you disclosed that, one of the Secondary purposes of CPI is "to deal and engage in the real estate business in all its aspects; to hold, develop, manage, administer, sell, convey, encumber, purchase, acquire, rent, or otherwise deal in and dispose of, for itself or for others, all kinds of real property, improved or unimproved, with or to such persons and entities and under such terms and conditions as may be permitted by law". You noted that such aforequoted secondary purpose is qualified by the phrase, " under such terms and conditions as may be permitted by law;" hence, CPI does not own land in the Philippines.

We now proceed to answer your queries.

Section 8 of the Foreign Investment Act of 1991 (FIA)[1], states that:

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> Small and medium-sized domestic market enterprise with paid-in capital less than the equivalent of Two Hundred Thousand US Dollars (US$ 200,000.00), are reserved to Philippine nationals[2]: 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.
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> xxx xxx

[1] Republic Act No. 7402, as amended by Republic Act No. 8179.

[2] *Ibid.* Section 3. Philippine nationals- 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 (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; xxx xxxx

The Implementing Rules and Regulations of the FIA, Section 1 (k) defines **domestic market enterprise** as an enterprise which produces goods for sale, or renders service or otherwise engages in any business in the Philippines.

Item 6 List B of the Tenth Foreign Investment Negative List (FINL-10)[3] provides that "[d]omestic market enterprises with paid-in capital of less than the equivalent of US$200,000 shall not be more than forty percent (40%) foreign owned.

As held in one opinion, 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 xxx 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.[4]

As you stated, CPI is a small and medium sized domestic market enterprise with approximately One Hundred Ten Thousand US Dollars (US$110,000.00) as paid up capital only, which is less than Two Hundred Thousand US Dollars (US$200,000.00) as provided by law.

Applying the foregoing, as to your first query, we answer the same in the **affirmative**. CPI clearly falls under Item No. 6 of List B of the FINL-10, and hence, is a partially nationalized corporation.

Since it has been established that CPI is a partly nationalized corporation, we also answer your second query in the **affirmative**. CPI cannot hire any foreigner who will intervene in the management, operation, administration or control of CPI.

It has been held that "the requirement under Section 2-A of the 'Anti-Dummy Law', specifically refers only to "partially-nationalized activities."[5] A partially nationalized corporation cannot hire any foreigner to intervene in its management, operation, administration or control, whether as an officer, employee or laborer therein with or without remuneration except as technical personnel whose employment may be specifically authorized by the Secretary of Justice because to do otherwise is a violation of Section 2-A Commonwealth Act No. 108.[6]

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[3] Exective Order No. 184

[4] SEC-OGC Opinion No. 27-11 dated 20 April 2011, addressed to Ms. Cristine P. Base

[5] SEC-OGC Opinion No. 09-03 dated 21 January 2011, addressed to Ms. Atty.M.Jasmine S. Oporto et al. citing SEC-OGC Opinion dated July 12, 1996, addressed to Quasha Ancheta Pena & Nolasco

[6] C.A. 108.

> Section 2-A. *Unlawful use, Exploitation or enjoyment* — Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by a the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the

In a previous SEC Opinion[7], citing a DOJ Opinion, it was reiterated that:

> "A reading of Section 2-A readily reveals the legislative intent to complement our nationalization laws by closing any avenue whereby aliens may defeat their purpose (King v Hernaez, 4 SCRA 792, (1962)." **It penalizes the employment of aliens in any position pertaining to management, operation, administration and control, "whether as an officer, employee or laborer therein"**, which means that the employment of a person who is not a Filipino citizen even in a minor or clerical or non-control position is prohibited.(Emphasis ours)

From the foregoing, we also answer your last query in the **affirmative.** An increase in CPI's paid up capital to more than or equal to Two Hundred Thousand US Dollars ($200, 000.00) will remove it from the coverage of the FINL-10, as long as it is not engaged in any other nationalized or partly nationalized industry, including ownership of land.

This Opinion is based solely on the facts disclosed in the query and relevant to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission whether of similar or dissimilar circumstances.[8] If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

MANUEL HUBERTO B. GAITE
OGC Supervising Commissioner

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provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, That the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: And provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.

[7] SEC-OGC Opinion No. 11-37 dated 01 September 2011, addressed to Ms. Lailani Maniago

[8] SEC Memorandum Circular No. 15, Series of 2003