Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

SEC OGC Opinion No. 16-19
RE: Application of Control Test to Manning Companies

11 August 2016

DEL ROSARIO & DEL ROSARIO
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1630 Taguig, Metro Manila

Attention: Atty. Saben Loyola and Atty. Joseph Rebano

Gentlemen:

This is in reply to your letter dated 10 March 2016, on behalf of your client, Scanmar Maritime Services, Inc. ("Scanmar"), requesting an opinion on the application of the Control Test to manning companies.

You stated that Scanmar was incorporated under Philippine law on 27 February 1989 and is engaged in the business of recruiting of Filipino seafarers for deployment on board the vessels of its foreign principals. You also stated that Scanmar has an authorized capital stock of Ten Million Pesos (Php 10,000,000.00) divided into One Hundred Thousand (100,000) shares, out of which 35,970 shares have been issued and fully paid. While you did not present the actual shareholding of Scanmar, you aver that Scanmar is required under the law to be 75% owned by Filipino citizens.

Further, you disclosed that Navigo Management Services, Inc. ("Navigo") is a corporate investor of Scanmar. Navigo is a 60% Filipino-40% Foreign owned domestic corporation. The shareholdings of Navigo, as shown in its General Information Sheet, is as follows:

Name	Nationality	Type	Number of Shares Subscribed	Amount Subscribed	Percent of Ownership
Hans J. Haase	Swedish	Common	1	1,000.00	0.04%
Per Olof Oweson	Swedish	Common	1	1,000.00	0.04%
Skarp Limited	Hongkong	Common	998	998,000.00	39.92%
Alejo S. Dimailig	Filipino	Common	600	600,000.00	24.00%
Imelda Ramilo	Filipino	Common	1	1,000.00	0.04%
Leslie Nacional Wharmby	Filipino	Common	299	299,000.00	11.96%
Jose Mario C. Buñag	Filipino	Common	600	600,000.00	24.00%

Hence, you seek confirmation of your position that the Control Test is the prevailing rule in determining the nationality of corporations in the Philippines, and as such, all of the existing and would-be shares of Navigo in Scanmar being 60% Filipino-

owned, are considered Filipino, for purposes of determining whether Scanmar complied with the nationality requirements for manning companies.

Going now to your query, we find instructive the pronouncements of the Supreme Court in the recent case of *Narra Nickel Mining and Development Corporation, et.al. v. Redmont Consolidated Mines Corporation,*[1] to wit:

> "Basically, there are two acknowledged tests in determining the nationality of a corporation: the control test and the grandfather rule. Paragraph 7 of DOJ Opinion No. 020, Series of 2005, adopting the 1967 SEC Rules which implemented the requirement of the Constitution and other laws pertaining to the controlling interests in enterprises engaged in the exploitation of natural resources owned by Filipino citizens, provides:
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> > Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality, **but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality.** Thus, if 100,000 shares are registered in the name of a corporation or partnership at least 60% of the capital stock or capital, respectively, of which belong to Filipino citizens, all of the shares shall be recorded as owned by Filipinos. But if less than 60%, or say, 50% of the capital stock or capital of the corporation or partnership, respectively, belongs to Filipino citizens, only 50,000 shares shall be counted as owned by Filipinos and the other 50,000 shall be recorded as belonging to aliens.
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> > x x x
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> Likewise, paragraph 7, DOJ Opinion No. 020, Series of 2005 provides:
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> > 'xxx there are two cases in determining the nationality of the Investee Corporation. The first case is the 'liberal rule', later coined by the SEC as the Control Test in its 30 May 1990 Opinion, and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which states, '(s)hares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality.' Under the liberal Control Test, there is no need to further trace the ownership of the 60% (or more) Filipino stockholdings of the Investing Corporation since a corporation which is at least 60% Filipino-owned is considered as Filipino.
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> > The second case is the Strict Rule or the Grandfather Rule Proper and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which states, "but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality." Under the Strict Rule or Grandfather Rule

[1] G.R. No. 195580, 21 April 2014.

> Proper, the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., "grandfathered") to determine the total percentage of Filipino ownership.
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> Moreover, the ultimate Filipino ownership of the shares must first be traced to the level of the Investing Corporation and added to the shares directly owned in the Investee Corporation xxx.'
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> x x x
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> In other words, based on the said SEC Rule and DOJ Opinion, the Grandfather Rule or the second part of the SEC Rule applies only when the 60-40 Filipino-foreign equity ownership is in doubt (i.e., in cases where the joint venture corporation with Filipino and foreign stockholders with less than 60% Filipino stockholdings [or 59%] invests in other joint venture corporation which is either 60-40% Filipino-alien or the 59% less Filipino). Stated differently, where the 60-40 Filipino- foreign equity ownership is not in doubt, the Grandfather Rule will not apply.
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> x x x
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> **In ending, the 'control test' is still the prevailing mode of determining whether or not a corporation is a Filipino corporation, within the ambit of Sec. 2, Art. II of the 1987 Constitution, entitled to undertake the exploration, development and utilization of the natural resources of the Philippines. When in the mind of the Court there is doubt, based on the attendant facts and circumstances of the case, in the 60-40 Filipino-equity ownership in the corporation, then it may apply the "grandfather rule."**

Thus, we answer your query in the affirmative. Absent any doubt, the Control Test shall be used in determining the nationality of a corporation specially in cases where foreign ownership restrictions apply. Consequently, because, and as long as, Navigo is 60% owned by Filipinos, its existing and would-be shareholdings in Scanmar is considered owned by Filipinos for purposes of computing the required Filipino equity for manning agencies, provided that 75% of Scanmar is owned by Filipinos.

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 courts, or upon the Commission in other cases of similar or dissimilar circumstances.[2] 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.

CAMILO S. CORREA
General Counsel

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[2] SEC Memorandum Circular 2003-15, No. 7.