Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

SEC-OGC Opinion No. 17-05
RE: Ownership, Control, and Administration of an Online English School and Diving School

08 June 2017

PUNONGBAYAN AND ARAULLO
Unit 603, 6th Floor Ayala Life-FGU Center
Mindanao Avenue corner Biliran Road
Cebu Business Park
6000 Cebu City

Attention: **MR. WENDELL D. GANHINHIN**
Director, Tax Advisory and Compliance

Dear Mr. Ganhinhin:

This refers to your letter dated 28 January 2015, requesting for a legal opinion on the ownership, control and administration of an online English tutorial school and diving school, on behalf of your client, **Nikka Home., Ltd.** (*Nikka Japan).*

You mentioned in your letter that your client Nikka Japan is duly organized and existing under the laws of Japan and is now processing the establishment of a Philippine subsidiary *(Nikka Ph)* which would operate an online English tutorial service and diving school. You disclosed that the online English school would cater primarily to foreign nationals based outside the Philippines, particularly from Japan, through the use of any or all medium/media, including but not limited to, the telephone, internet and all kinds of web-based interaction. *The English school might also cater to foreign residents in the future. Likewise, the diving school would cater to foreign temporary residents in the Philippines primarily from Japan.* You further disclosed that Nikka Ph shall be one hundred percent (100%) owned by Nikka Japan, the Board of Directors of which shall be composed of five (5) members, two (2) of whom shall be Japanese nationals, and the other three (3) members are Filipino citizens.

Hence, you seek confirmation of your position that the ownership, control and administration of the online English tutorial school and diving school can be undertaken 100% by Japanese nationals pursuant to Section 4(2), Article XIV of the 1987 Philippine Constitution, which exempts educational institutions established by religious orders and

mission boards, and those established for foreign diplomatic personnel and their dependents, and for other foreign temporary residents from the 40% foreign ownership limitation.

Before delving to the main issue, it is best to discuss first whether or not an online English tutorial school and a diving school are educational institutions, hence, subject to the nationality restrictions for educational institutions under Article XIV, Section 4 (2), of the 1987 Constitution.

Please find instructive the recent Opinion[1] of the Commission involving the ownership, control and administration of an online English school, to wit:

> "Learning the English language, albeit short-term in nature, is considered as a skill proficiency intended to fit in a particular occupation, to which a diploma or certificate of completion is naturally expected to be given by the school. Thus, offering the English language as a training course or program for public consumption, in general, is considered offering 'technical vocational education.'[2] Educational institutions offering Technical Vocational Education Training is within the regulatory power of the Technical Education and Skills Development Authority (TESDA).
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> Section 25, Chapter 3 of the Education Act of 1982, in relation to *People v. Filomena Foster*[3] citing Section 2 of Act No. 2706, as amended, requires that only an educational institution can engage in the private business of providing technical vocational or training programs to its students, viz—
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> > Section 25. Establishment of Schools. - All schools shall be established in accordance with law. The establishment of new national schools and the conversion of existing schools from elementary to national secondary schools or from secondary to national secondary or tertiary schools shall be by law: Provided, That **any private school proposed to be established must incorporate as either a non-stock or a stock educational corporation in accordance with the provisions of the Corporation Code of the Philippines.** This requirement to incorporation may be waived in the case of family-administered pre-school institutions.

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[1] SEC Opinion No. 16-18 dated 21 July 2016 addressed to Punongbayan and Araullo.
[2] *Id.*, citing Memorandum of TESDA to the Securities and Exchange Commission dated 30 September 2013, invoking Section 4(22) of TESDA's Manual of Policies and Guidelines on the Establishment and Operation of Public and Private Technical-Vocational Education and Training Institutions which defines "Technical Vocational Education" as *any program at the post-secondary educational level oriented towards skills proficiency leading to certificates or diploma in preparation for a particular occupation or group of middle-level occupations. Short-term programs of instruction, including the acquisition of technical knowledge and skill lasting less than a year, are generally considered as technical-vocational educational activities, irrespective of the training provider in which such programs are offered.*
[3] *Id.*, citing G.R. No. L-12828, 13 April 1959.

> The term 'private school or college' shall be deemed to include any private institution for teaching, managed by private individuals or corporations, which is not subject to the authority and regulations of the Bureau of Education or of the University of the Philippines, or of the Bureau of Public Welfare, and which offer courses of kindergarten, primary, intermediate or secondary instruction or **superior courses in vocational, technical, professional or special schools by which diplomas or certificates are to be granted or titles and degrees conferred (People v. Foster).**

Relative thereto, it is imperative to look at a previous Opinion[4] of TESDA, which imparts the following:

> (1) If the domestic corporation purely caters to foreign clients abroad who wish to enhance their English language skills through informal **on-line tutorial class instruction for a fee and <u>does not</u> issue any Certificate of Training or Diploma for Program Completion to their successful on-line students, it cannot be considered as engaged in formal technical-vocational education or training activities**, and hence, not under the jurisdiction of TESDA.
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> (2) If the domestic corporation offers English program for a fee and at the end of the training program **<u>is issuing any Certificate of Training or Diploma for Program Completion to its successful students</u>**, it is considered engaged in formal technical vocational education, regardless of whether the same is performed on-line or within a regular classroom atmosphere and regardless of whether its students are foreigners or not, and hence, under the jurisdiction of TESDA.

Accordingly, if a corporation wishes to engage in the business of providing technical vocational education or training program based on the foregoing standards, it follows that, being an educational institution, it must comply with the 60%-40% Filipino-Foreign equity requirement, subject to limitation and exceptions prescribed by law.

Article XIV, Section 4 (2), of the 1987 Constitution specifically provides nationality restrictions for educational institutions:

'Section 4.

XXX XXX XXX

> "(2) Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations **at least sixty per centum** of the capital of which is owned by such citizens.

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[4] *Id., c*iting Memorandum of TESDA to the Securities and Exchange Commission dated 30 September 2013.

> The Congress may, however, require increased Filipino equity participation in all educational institutions.
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> The control and administration of educational institutions shall be vested in citizens of the Philippines.
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> No educational institution shall be established exclusively for aliens and no group of aliens shall comprise more than one-third of the enrolment in any school. **The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.**'

Pursuant to the foregoing, all educational institutions, other than those established by religious orders and mission boards, and those established for foreign diplomatic personnel and their dependents, and for other foreign temporary residents, is subject to 40% foreign ownership limitation. Likewise, foreigners are not allowed any control and administration of educational institutions, thus are barred from becoming members of the Board of Directors/Trustees of educational institutions. This prohibition/restriction against foreigners applies to all persons who are not citizens of the Philippines, including natural-born citizens of the Philippines who have lost their Philippine citizenship by acquiring naturalized citizenship.[5]"

Relatively, upon consultation with TESDA, the above-discussed rule likewise applies to a diving school, that is, if the training program/course of the diving school is registered with TESDA as a formal program offered to the public for a fee, with issuance of Certificates of Program Completion, then it shall be regarded as an educational institution.

Coming now to your query, the facts are insufficient to make a categorical opinion on whether Nikka Ph is an educational institution (*i.e.* whether it shall be offering the online English tutorial class/diving class as a formal training course or program for a fee and shall provide Diplomas or Certificates of Program Completion).

If Nikka Ph shall be offering the online English tutorial class/diving class as a formal training course or program for a fee and shall be issuing Certificates of Training or Diplomas for Program Completion, then it shall be engaged in a formal technical vocational education or training activities. Hence, it is considered as an educational institution; otherwise, it is not.

If Nikka Ph is an educational institution, the rule is that all educational institutions, other than those established by religious orders and mission boards, and those established for foreign diplomatic personnel and their dependents, and for other foreign temporary

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[5] *Id.*, citing SEC Opinion dated 27 March 2009 addressed to Picazo Buyco Tan Fider and Santos; SEC-OGC dated 5 August 2014, addressed to Nonato Nonato and Nonato Law Offices; SEC Opinion dated November 10, 1992, addressed to Mr. Eleno L. dela Cruz.

residents, are subject to the 40% foreign ownership limitation.[6] Thus, if Nikka Ph does not fall within the exceptions prescribed under this rule, its ownership, control, and administration cannot be undertaken one hundred percent (100%) by foreign nationals.

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.[7] 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.

Very truly yours,

EMILIO S. CORREA
General Counsel

[6] SEC Opinion dated 27 March 2009, addressed to Picazo Buyco Tan Fider and Santos.
[7] SEC Memorandum Circular 2003-15, No. 7.