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Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

20 April 2018

SEC-OGC Opinion No. 18-08
Re: Delegation of the power
to amend or repeal by-laws

UNIONBANK
Unionbank Plaza
Meralco Avenue cor. Onyx&Sapphire Roads
Ortigas Center, Pasig City 1605

ATTENTION: ATTY. JOSELITO V. BANAAG
Senior Vice President, Corporate Secretary & General Counsel

Atty. Banaag,

This refers to your letter dated 17 January 2018, requesting the Commission's legal opinion on the proposed amendment to the by-laws of Union Bank of the Philippines, delegating to the Board of Directors (the "Board") the power to amend or repeal said by-laws.

In your letter, you stated that the Bangko Sentral ng Pilipinas ("BSP") did not give due course to the proposed amendment citing certain opinions[1] of the Securities and Exchange Commission ("SEC") to the effect that the delegation should be embodied in a Stockholders' Resolution ("Resolution") to be submitted to SEC and not in the By-Laws.

You further stated that presently, there are some publicly-listed commercial banks that have embodied in their respective by-laws the power to delegate to the board the authority to amend or repeal their by-laws, similar to that of UnionBank, that were approved by SEC. In particular, you stated that in fact, the Commission approved the amendment of the

[1]**SEC Opinion No. 06-02 dated 03 January 2006** addressed to Atty. Rodel R. Grimaldo, citing **SEC Opinion dated 25 October 1965** addressed to Rico Finance and Credit Corporation, **SEC Opinion dated 09 February 1994** addressed to Mr.Benjamin V. Abela, and **SEC Opinion dated 31 July 2002** addressed to Atty. A.C. Jarabata.

By-laws of Prime Orion Philippines, Inc., which is the same provision as that proposed by UnionBank, to wit:

> "1. These By-Laws may be amended or repealed by the affirmative vote of at least a majority of the Board of Directors and the stockholders representing a majority of the outstanding capital stock at any stockholders' meeting called for that purpose. However, the power to amend, modify, repeal or adopt new by-laws may be delegated to the Board of Directors by the affirmative vote of stockholders representing not less than two-thirds of the outstanding capital stock; provided, however, that any such delegation of power to the Board of Directors to amend, repeal or adopt new by-laws may be revoked only by the vote of the stockholders representing a majority of the outstanding capital stock at a regular or special meeting."

Hence, this request.

Section 48 of the Corporation Code of the Philippines (the "Code"), provides:

> Sec.48. Amendment to by-laws. - The board of directors or trustees, by a majority vote thereof, and the owners of at least a majority of the outstanding capital stock or at least a majority of the members of a non-stock corporation, at a regular or special meeting duly called for the purpose, may amend or repeal any by-laws or adopt new by-laws. **The owners of two-thirds (2/3) of the outstanding capital stock or two-thirds (2/3) of the members in a non-stock corporation may delegate to the board of directors or trustees the power to amend or repeal any by-laws or adopt new by-laws**: Provided, That any power delegated to the board of directors or trustees to amend or repeal any by-laws or adopt new by-laws shall be considered as revoked whenever stockholders owning or representing a majority of the outstanding capital stock or a majority of the members in non-stock corporation, shall so vote at a regular or special meeting.

In a 1965 SEC Opinion, the Commission held:

> "In this connection, please be advised that the **delegation to the board of directors** of the power to amend, alter or repeal by-laws or adopt new by-laws should not be embodied in the by-laws, but merely in a resolution adopted by 2/3 of the subscribed capital stock of the corporation. This is for the reason that the **delegated authority is temporary in nature and may be revoked anytime by a majority vote of the stockholders**. xxx Accordingly, if the power is provided in the by-laws, the authority may have been revoked already, but may still appear therein until the corresponding amendment is made and filed with the Commission.[2]"

This is further reiterated in a 1994 SEC Opinion, which held that:

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[2] SEC Opinion dated 25 October 1965 addressed to Rico Finance and Credit Corporation.

> "While the power to amend the by-laws may be delegated to the Board of Directors, such **delegated power is temporary in nature and may be revoked at any time by the vote of a majority of the outstanding capital stock**. Hence, it cannot be permanently embodied in the By-laws but merely in a Stockholders' Resolution.
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> In the present case, there is no certainty that the **alleged delegated power of the Board** still remains effective taking into consideration the length of time since it was granted to it by the stockholders way back in 1930. The corporate records on file with this Office show that the latest approved amendments to the By-laws of the corporation were approved not only by the Board but also by the stockholders. The presumption, therefore, is that said delegated power of the Board to amend the by-laws had already been revoked.[3]"

Lastly, in a 2002 SEC Opinion, the Commission, in disapproving the proposed amendment of Composite Wings Savings and Loan Association to its By-laws, worded as:

> ARTICLE XVII. AMENDMENT OF BY-LAWS
>
> "Sec.1. This By-laws may be amended by the affirmative vote of at least 2/3 of all the Directors in a general or special meeting, which may be called for the purpose."

had enunciated, thus:

> "**What is not allowable under the situation is the inclusion of the very provision on the delegated power in the by-laws.** As aptly observed in the opinion cited, the delegated authority, being transitory in nature, may be revoked anytime by a majority vote of the members which may not be reflected in the by-laws until the corresponding amendment of the proviso has been effected.[4]"

Thus, taking into account the above-cited Opinions, it appears that what is required to be embodied in a Resolution, and not in the by-laws, is the **actual delegation** by the stockholders to the Board of the power to amend or repeal the by-laws, and not the **enabling provision** that allows the delegation by the stockholders of such power, as lifted from Section 48 of the Code.

The reason for requiring the actual delegation to be embodied in a resolution, and not in the by-laws is that it is transitory in nature, and, as provided in Section 48 of the Code, may be revoked at any time by a majority vote of the stockholders or members of the

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[3] SEC Opinion dated 09 February 1994 addressed to Mr. Benjamin V. Abela.
[4] SEC Opinion dated 31 July 2002 addressed to Atty. A.C. Jarabata.

corporation. In other words, if the actual delegation is provided in the by-laws, the power delegated may have been revoked already, but such revocation will not reflect in the by-laws until the corresponding amendment is filed with the Commission.

In the case at hand, the UnionBank's proposed amendment to the by-laws merely states the power of its stockholders to delegate to the Board the authority to amend or repeal said by-laws, the language of which is lifted directly from Section 48 of the Code, and not the actual delegation itself.

To operationalize the delegation, owners of at least 2/3 of the outstanding capital stock shall pass the appropriate Resolution in a stockholder's meeting. The Resolution may spell out the extent or limits of the delegation, including when it is considered '*functus officio*'.

Hence, we believe that the afore-cited Opinions do not apply in the case at bar.

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. 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