**Republic of the Philippines**
**Department of Finance**
**Securities and Exchange Commission**

**OFFICE OF THE GENERAL COUNSEL**

04 June 2018

SEC OGC Opinion No. 18-10
Re: Retail Trade

**FIRST ASSOCIATED MEDICAL DISTRIBUTION CO., INC.**
FCI Corporate Center, 1814 Philip Street,
Multinational Village Parañaque City,
Metro Manila, Philippines 1708

**Attention: Ricarte R. Padilla**
President

Sir:

This refers to your letter dated 15 February 2017, requesting the Commission's opinion on whether or not Medtronic Philippines, Inc. (Medtronic-PH) can be classified as a foreign company engaged in business in the Philippines, and whether it is allowed to engage in direct selling its products to end-users.

In your letter, you stated that First Associated Medical Distribution Co., Inc. is the distributor on a non-exclusive basis of Medtronic Inc. ("Medtronic-US"), a US based manufacturing company with regional office in Singapore, of its **coronary and surgical technologies products** in the Philippines. However, sometime on 10 January 2014, Medtronic-US formed a domestic corporation here in the country, Medtronic-PH, with a total capitalization of ₱8,940,000.00, by owning at least 99.99% of the outstanding capital stock of the said corporation with the primary purpose, to wit:

> "To import, export, manufacture, conduct research and development, prepare for market, buy, ***sell at wholesale***, distribute, transport and promote **general merchandise, goods and wares of all kinds and descriptions, particularly but not limited to medical equipment, devices and supplies, scientific apparatus, and physicians and hospital equipment, devices and supplies**, and likewise to apply for, obtain, register, purchase, lease or assign, grant licenses or territorial rights in respect of, or otherwise to turn to account or dispose of, any trademarks, trade names, brands, labels, patents, inventions, formulas or processed for such products and to manage the affairs of the businesses of affiliated or sister companies engaged in similar business."[emphasis ours].

You further stated that Medtronic-PH sells directly on retail basis its products to the end-users here in the Philippines.

Thus, you request the Commission's opinion on the following:

1. Whether or not Medtronic-PH can be classified as a foreign company engaged in business here in the Philippines, considering that 99.99% of its authorized capital stock is owned by Medtronic-US; and
2. Whether or not Medtronic-PH is allowed to engage in direct selling of its products to the end-users, who are mostly customers of its distributors (i.e., First Associated Medical Distribution Co. Inc.) here in the Philippines without violating any trade laws of the country.

**FIRST QUERY**

The primary test under Philippine jurisdiction in determining the nationality of a corporation is the incorporation test, wherein a corporation is considered a national of the country under whose laws it was incorporated, viz-

> "Under Philippine jurisdiction, the primary test is always the Place of Incorporation Test since we adhere to the doctrine that a corporation is a creature of the State whose laws it has been created. A corporation organized under the laws of a foreign country, irrespective of the nationality of the persons who control it is necessarily a foreign corporation.[1]"

Thus, under the incorporation test, Medtronic-PH is not considered as a foreign corporation, but a domestic corporation, having been registered and incorporated under the laws of the Philippines.

However, while the incorporation test serves as the primary test under Philippine jurisdiction, other tests such as the control test must be used to determine compliance with the provisions of the Constitution and of other laws on nationality requirements.[2] Certain areas of investment and business activities are reserved to Filipinos. The control test is used to determine the eligibility of a corporation, which has foreign equity participation in its ownership structure, to engage in nationalized or partly nationalized activities.[3]

Under the control test, the nationality of the corporation depends on the nationality of the controlling stockholders[4]. This is embodied in Republic Act (RA) No. 7042 (RA 7042), otherwise known as the Foreign Investment Act (FIA), as amended by RA 8179, which prescribes varying degrees of Filipino ownership which apply to nationalized or partly-nationalized corporations.

To be considered a "Philippine national" under Section 3(a) of the FIA, Section 1, Rule 1 of the said law's Implementing Rules and Regulations (IRR) provides that:

> b. "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the

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[1] SEC-OGC Opinion No. 12-02 addressed to Ms. Carlota Christina G. Laiño-Santiago, dated 02 February 2012.
[2] SEC-OGC Opinion No. 11-42 addressed to Mr. James B. Yee, dated 12 October 2011.
[3] Ibid.
[4] SEC-OGC Opinion No. 08-03 addressed to Attys. Ruby Rose J. Yusi & Rudyard S. Arbolado, dated 15 January 2008.

> Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national. **The control test shall be applied for this purpose.**
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> **Individuals or juridical entities not meeting the aforementioned qualifications are considered as non-Philippine nationals.** (Emphasis ours)

Thus, under the FIA, Medtronic-PH is not a Philippine national, but a foreign-owned corporation.

In sum, while Medtronic-PH is a domestic corporation (having been incorporated in this jurisdiction), it is a foreign-owned corporation based on its ownership structure.

**SECOND QUERY**

In a previous opinion, the Commission pronounced, that:

> "It is the corporation's purpose clause which confers, as well as limits, the powers which a corporation may exercise and the character of a corporation is usually determined by the objects of its formation and the nature of its business as stated in the articles. The primary purpose of the corporation, as stated in its articles of incorporation, is the first business to be undertaken by the corporation. Hence, the primary purpose determines its classification.[5]"

Based on the foregoing, and upon careful perusal of the primary purpose of Medtronic-PH as stated in its Articles of Incorporation, it is empowered to sell its products at wholesale, not retail. If it is true, as stated in your letter, that Medtronic-PH sells directly on retail basis its products to the end-users, such sale/s on retail would be considered an *ultra vires* act, or an act beyond the corporate powers conferred to it by the State. Under Medtronic-PH's primary purpose clause, it can only sell at wholesale.

Further, an entity engaged in retail business must be a Filipino national under the Retail Trade Liberalization Act of 2000 (RA 8762), unless it falls under the exceptions[6].

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[5] SEC-OGC Opinion No. 11-33 dated 29 July 2011 addressed to Mr. Jesus B. Lapuz.

[6] Section 5 of RA 8762 provides: Foreign Equity Participation. - xxx

Unfortunately, your letter does not expressly and clearly state facts, such as the objects of sale (i.e., whether they are coronary and surgical technologies products, or any other general merchandise, goods or wares, as allowed by the purpose clause of Medtronic-PH) and to whom they are being sold (e.g., to hospitals, clinics, and the like), which are necessary in order to determine whether the conditions or restrictions under RA 8762 apply to Medtronic-PH.

Nevertheless, for purposes of information, the Commission had held in a previous Opinion[7], that:

> "Under Section 3 of RA 8762, 'retail trade' shall mean any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption.
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> For sales transaction to be considered as 'retail' the following elements should concur:
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> 1. The seller should be *habitually engaged in selling*;
> 2. The sale must be *direct to the general public*;

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**Category A**- Enterprises with paid-up capital of the equivalent in Philippine Peso of less than Two Million Five Hundred Thousand US Dollars (US$2,500,000.00) shall be reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens.

**Category B** – Enterprises with a minimum paid-up capital of the equivalent in Philippine Pesos of Two Million Five Hundred Thousand US Dollar (US$2,500,000.00) but less than the Seven Million Five Hundred Thousand US Dollars (US$7,500,000.00) may be wholly owned by foreigners except for the first two (2) years after the effectivity of this Act wherein foreign participation shall be limited to not more than sixty percent (60%) of total equity.

**Category C**- Enterprises with a paid-up capital of the equivalent in Philippine Pesos of Seven Million Five Hundred Thousand US Dollars (US$7,500,000.00), or more may be wholly owned by foreigners; Provided, however, that in no case shall the investments for establishing a store in Categories B and C be less than the equivalent in Philippine pesos of Eight Hundred Thirty Thousand US Dollars (US$830,000.00).

**Category D**- Enterprises specializing in high-end or luxury products with a paid-up capital of the equivalent in Philippine Pesos of Two Hundred Fifty Thousand US Dollars (US$250,000.00) per store may be wholly owned by foreigners.

Section 2 of the Implementing Rules and Regulations of R.A. 8762 also provides:

Section 2. Sales Not Considered as Retail- The following sales are not considered as retail:

a. Sales of a manufacturer, processor, laborer, or worker of products, manufactured, processed or produced by him to the general public whose capital does not exceed One hundred thousand pesos (100,000.00);

b. Sales by a farmer or agriculturist selling the products of his farm, regardless of capital;

c.Sales arising from restaurant operations by a hotel owner or inn-keeper irrespective of the amount of capital, provided, that the restaurant is incidental to the hotel business

d.Sales through a single outlet owned by a manufacturer of products manufactured, processed or assembled in the Philippines, irrespective of capitalization;

e. Sales to industrial and commercial users or consumers who use the products bought by them to render service to the general public and/or produce or manufacture of goods which are in turn sold by them; or

f. Sales to the government and/or its agencies and government-owned and controlled corporations.

[7] SEC-OGC Opinion No. 16-25 dated 14 October 2016 addressed to Meer, Meer & Meer Attorneys-At-Law.

3. The object of the *sale is limited to merchandise, commodities or goods for consumption.*

One of the elements of a retail sale is that the products sold are consumer goods. Consumer goods, as defined by the Supreme Court, are 'goods which are used or brought for use primarily for personal, family or household purposes. Such goods are not intended for resale or further use in the production of other products.'

Furthermore, Section 2(e), Rule I, of the Implementing Rules and Regulations ('IRR') of the RTLA enumerates certain sales transactions which are not considered as retail, to wit:

> Section 2. Sales Not Considered as Retail. – The following sales are not considered as retail:
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> e. Sales to industrial and commercial users or consumers who use the products bought by them to render services to the general public and/or produce or manufacture of goods which are in turn sold by them; xxx.

In a more closely-related matter, the Commission also opined that the sale of chemical reagents, equipment and instruments directly to hospitals and laboratories cannot be considered as retail trade because the buyers will use the products to render service to the general public.

**As presented in your letter, the products of EPI include laboratory, medical and healthcare equipment used for storing, protecting handling and analyzing substances, hazardous chemicals and other related materials. xxx.**

**Furthermore, it appears from the circumstance that the buyers (i.e., laboratories, hospitals and commercial enterprises, schools and government agencies) of EPI's products will use the equipment to render service or produce goods to the general public. In this regard, the sale activities of EPI fit well within the activities enumerated in the above-mentioned Section 2 of the IRR.**" (emphasis ours)

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether similar or dissimilar circumstances. If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.[8]

Please be guided accordingly.

Very truly yours,

**CAMILO S. CORREA**
General Counsel

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