Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

16 November 2018

SEC-OGC Opinion No. 18-18
RE: MERGER OF A DOMESTIC CORPORATION WITH A FOREIGN CORPORATION LICENSED TO DO BUSINESS IN THE PHILIPPINES

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Attention: Atty. Roderick R.C. Salazar III
Atty. Criela D.F. Fragrante

Attorneys:

This refers to your letter dated 2 July 2018, requesting an opinion on **whether or not a domestic corporation may merge with a foreign corporation doing business in the Philippines**, where the intended effect is merely the integration of the domestic corporation and the foreign corporation's Philippine branch.

The request specifically calls for our interpretation of **Paragraph 1 of Section 132 of the Corporation Code**, viz.

> Section 132. *Merger or consolidation involving a foreign corporation licensed in the Philippines.* – One or more foreign corporations authorized to transact business in the Philippines may merge or consolidate with any domestic corporation or corporations if such is permitted under Philippine laws and by the law of its incorporation: Provided, That the requirements on merger or consolidation as provided in this Code are followed. (Emphasis supplied)

In your letter, you stated that your client, Converga Asia Incorporated (the domestic corporation) wishes to merge with Harbour IT Hong Kong (the foreign corporation), which is licensed to do business in the Philippines under the name "Harbour IT Asia" (the Philippine branch). You also stated that "the

plan is just to have Converga merge with Harbour IT Asia," without affecting the status of Harbour IT Hong Kong.

You further stated that in your research, you came across **SEC Opinion dated 23 October 1985 addressed to Mr. F.G. Tagao of SGV & Co.**, which was issued in response to a query involving a foreign corporation licensed to do business in the Philippines proposing to merge with a domestic corporation, where the foreign corporation would be the surviving company.

In that opinion, the Commission interpreted the phrase "if such is permitted under Philippine laws" in Section 132 as a requirement that **some other statute first needs to be passed**, which would expressly allow a merger between a foreign corporation and a domestic corporation. Citing **Fletcher, Cyclopedia of Private Corporations, Vol. 15, Sec. 7182**, the Opinion also stated that "[domestic] corporations have no inherent power to merge with foreign corporations."

To put this into context, Fletcher's discussion is quoted here, viz.

> XII. CONSOLIDATION OF CORPORATIONS CREATED BY DIFFERENT STATES
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> xxx xxx xxx
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> § 7182. Statutory or charter authorization.
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> Corporations have no inherent power to consolidate or merge either with corporations of each state, or with foreign corporations.
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> The merger or consolidation of a domestic and foreign corporation, that is two or more corporations organized under the laws of different states, is now authorized under the statutes of every state. Such authorization may be contained in the charters of the respective corporations, but the sovereign, in conferring this authority, may impose such conditions as it may deem proper. In general, the right of corporations of one state to combine with those of a sister state is derived from the laws of the respective states. That is to say, the power of a corporation to merge with a corporation of another state must be found under the statutes of both states, for neither corporation can have authority to consolidate except by virtue of a law of the state creating it. Statutes forbidding consolidation, except in case of certain classes of corporations, preclude a consolidation of a

> domestic corporation with a foreign corporation not of that class.[1] (Emphasis supplied)

Please note that a foreign corporation and its Philippine branch comprise one and the same entity. **It is impossible for Harbour IT Asia to merge independently of Harbour IT Hong Kong.** Considering that Harbour IT Hong Kong is unwilling to merge with Converga, then the situation falls outside the scope of Section 132 of the Corporation Code.

This is not to discourage you from resorting to other means to achieve the integration of Converga and (the operations of) Harbour IT Asia. For example, Harbour IT Asia may be spun-off and incorporated in the Philippines, turning this into a merger between two domestic corporations.

Alternatively, Harbour IT Hong Kong, a foreign corporation licensed to do business in the Philippines, may merge with Converga, a domestic corporation, provided that such merger will be governed by the Corporation Code and other relevant laws. Provided further that it is allowed by a reciprocal provision in the laws of Hong Kong.

For your guidance only, we wish to highlight that **SEC Opinion dated 23 October 1985** erroneously stated that "there seems to be no express provision in the Corporation Code authorizing the merger of a foreign corporation with a domestic corporation." On the contrary, Section 132 is that express provision.

It is elementary in Statutory Construction that the interpretation that would give effect to the law is favored. Recall that Fletcher attests that a merger between a domestic and a foreign corporation is "now authorized under the statutes of each state." A quick survey of state corporate laws in the United States reveals a substantial similarity between their authorizing provision and our own Section 132.

Consider a similar provision in the **New York Business Corporation Law (NYBCL)**, viz.

> Section 907. *Merger or consolidation of domestic and foreign corporations.* (a) One or more foreign corporations and one or more domestic corporations may be merged or consolidated into a corporation of this state or of another jurisdiction, if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign corporation is incorporated. xxx

Consider also a similar provision in the **Title 8 (Corporations) of the Delaware Code**, viz.

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[1] Fletcher, Cyclopedia of Private Corporations, Vol. 15, Sec. 7182 (rev. 1983) at 370-371.

> **Section 252 Merger or consolidation of domestic and foreign corporations; service of process upon surviving or resulting corporation.** (a) Any 1 or more corporations of this State may merge or consolidate with 1 or more foreign corporations, unless the laws of the jurisdiction or jurisdictions under which such foreign corporation or corporations are organized prohibit such merger or consolidation.
> xxx

In each of these, there is no contingency as to the authority of the domestic corporation and the foreign corporation to merge. The authority comes from the phrase "may merge" and "may be merged." Meanwhile, the contingent terms "if" and "unless" refer to whether the law of the foreign corporation contains a reciprocal provision. If there is, the foreign corporation would then be bound to observe the merger provisions of the host state.

Similarly, Paragraph 1 of Section 132 expressly states that the domestic corporation and the foreign corporation with a license to do business "may merge" but requires a reciprocal provision where it states "if such is permitted under Philippine laws and by the law of its incorporation." If there is a reciprocal provision in the foreign law, the foreign corporation must then comply with the merger provisions in the Corporation Code.

Fletcher clarifies that the laws of the domestic corporation may impose conditions and delineate which class of foreign corporations will be allowed to merge. Thus, Paragraph 1 of Section 132 of Corporation Code requires a license to do business in the Philippines, the issuance of which is conditioned upon a commitment by the foreign corporation to abide by our laws. This commitment extends to rules issued by the Commission.

Therefore, the correct interpretation of Paragraph 1 of Section 132 is that it authorizes a foreign corporation licensed to do business in the Philippines to merge with a domestic corporation, provided that the former can prove that there is a similar authorizing law in its home jurisdiction. Such merger will be governed by the Corporation Code and other relevant laws.

It must be emphasized that the phrase "if such is permitted under Philippine laws" should be construed to include our nationality laws. Thus, foreign equity restrictions in the Philippines would prevent a merger between a domestic corporation and licensed foreign corporation if the surviving corporation will be engaged in a nationalized industry and foreign control of such surviving corporation will exceed the limits imposed by law.

No such restrictions would apply here, however, since both Converga (business process outsourcing) and Harbour IT (information technology) are engaged in non-nationalized industries, where 100% foreign ownership is

allowed. However, the surviving corporation would be a domestic enterprise and it must have a minimum capital of $200,000.

It shall be understood, however, that this opinion is based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein. **It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.**[2] If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

By authority of the En Banc:

CAMILO S. CORREA
General Counsel

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[2] Number 7 of SEC Memorandum Circular 15, Series of 2003.