Republic of the Philippines
Department of Finance
Securities and Exchange Commission
OFFICE OF THE GENERAL COUNSEL

18 November 2019

SEC-OGC Opinion No. 19-52
Re: Allowable Foreign Equity in Cargo and Freight Forwarding Activities

PROCY FERNANDEZ
Blk 16 L9, Diamond Village
Salawag, Dasmarinas, Cavite

Dear Ms. Fernandez:

This refers to your letter dated 10 September 2019, raising the following inquiries/concerns:

1. What is the allowable percentage of foreign equity in cargo and freight forwarding activities? Are there constitutional provisions or existing laws which allows foreign equity on said activities? In the event that the allowable foreign equity has exceeded, what are the possible penalties or actions that may be imposed?
2. May a foreign corporation or entity, which is not registered with the Securities and Exchange Commission (SEC), subscribe to a domestic corporation's shares and what are the requirements of the same?
3. Are there restrictions of the SEC for Cargo/Freight forwarding companies; and
4. What are the possible penalties that may be imposed for companies operating without the necessary permits from the Department of Information and Communication and Technology and local government licenses?

As to your first query, a freight forwarder is considered an operator of a public utility, which is defined as a "business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service."[1]

In this connection, Article XII of the 1987 Constitution provides that only up to forty percent (40%) foreign ownership is allowed in corporations or associations operating a public utility, to wit:

> **"Section 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty per centum of whose capital is owned by such citizens**; nor shall such franchise, certificate, or authorization be exclusive in

[1] *Albano vs Reyes, G.R. No. 83551, 11 July 1989.*

> character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines." (Emphasis supplied)

The said constitutional prohibition has been carried over in List A, Item 15 of Executive Order No. 65, Series of 2018, otherwise known as the *"11th Regular Foreign Investment Negative List" (11th FINL)* to emphasize the forty percent (40%) foreign equity restriction over public utilities.

In previous Opinions[2], the SEC has consistently opined that "utility firms such as international freight forwarders **engaged exclusively in international commerce** are beyond the Constitutional prohibition limiting foreign ownership to 40% of the capital of a corporation."

Thus, corporations engaged in **purely international** cargo and freight forwarding activities may be wholly-owned (100%) by foreigners. With respect to corporations engaged in **purely local or mixed local and international cargo and freight forwarding activities**, the forty percent (40%) foreign ownership restriction under the 1987 Constitution shall apply.

Should the foreign equity restrictions as discussed above be violated by the corporation, the Commission may, after proper notice and hearing, suspend or revoke the certificate of registration of the corporation pursuant to Section 6(i) of Presidential Decree No. 902-A[3], otherwise known as the *"SEC Reorganization Act"*.

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[2] SEC-OGC Opinion No. 17-14, dated 17 November 2017 and addressed to Valdecantos & Valencia Law Office, SEC-OGC Opinion No. 16-08, dated 20 April 2016 and addressed to Takuma Yamaguchi; SEC-OGC Opinion 08-21, dated 29 October 2008 and addressed to Atty. Agerico T. Paras; SEC-OGC Opinion No. 10-30, dated 15 November 2010 and addressed to Mr. Arvin D. Delima.

[3] Section 6 of PD 902-A which reads:

> "Sec. 6. In order to effectively exercise such jurisdiction, the Commission shall possess the following powers:
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> Xxxxx
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> (i) To **suspend, or revoke, after proper notice and hearing, the franchise or certificate of registration of corporations**, partnerships or associations, upon any of the grounds provided by law, including the following:
> [1] Fraud in procuring its certificate of registration;
> [2] Serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damage to the general public;
> [3] Refusal to comply or defiance of any lawful order of the Commission restraining commission of acts which would amount to a grave violation of its franchise;
> [4] Continuous inoperation for a period of at least five (5) years;
> [5] Failure to file by-laws within the required period;

As to your second query, foreign corporations and entities not registered with the Commission may subscribe to domestic corporation's shares. However, in case said subscription shall cause the investee-domestic corporation's total foreign equity to exceed 40%, Sections 5 and 6 of Republic Act No. 7042 (RA 7042), otherwise known as the *"Foreign Investments Act of 1991"* (FIA) shall apply, to wit:

> "**Section 5.** ***Registration of Investments of Non-Philippine Nationals.*** - Without need of prior approval, **a non-Philippine national**[4], as that term is defined in Section 3 (a), and not otherwise disqualified by law may upon registration with the Securities and Exchange Commission (SEC), or with the Bureau of Trade Regulation and Consumer Protection (BTRCP) of the Department of Trade and Industry in the case of single proprietorships, do business as defined in Section 3 (d) of this Act or invest in a domestic enterprise up to one hundred percent (100%) of its capital unless participation of non-Philippine nationals in the enterprise is prohibited or limited to a smaller percentage by existing law and/or limited to a smaller percentage by existing law and/or under the provisions of this Act.xxxxx"
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> **Section 6.** ***Foreign Investments in Export Enterprises.*** - **Foreign investment in export enterprises** whose products and services do not fall within Lists A and B of the Foreign Investment Negative List provided under Section 8 hereof **is allowed up to one hundred percent (100%) ownership**. xxxxx" (Emphasis supplied)

By virtue of said provisions, it shall be the obligation of the investee corporation to register said investment of non-Philippine nationals with the Commission.

As to your third query, Section 2-A of Commonwealth Act No. 108, otherwise known as the *"Anti-Dummy Law"*, provides that:

> "Sec. 2-A. Any person, corporation, or association, which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or

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> [6] Failure to file required reports in appropriate forms as determined by the Commission within the prescribed period;" (Emphasis supplied)

[4] "Non-Philippine nationals" are those falling outside the definition of a Philippine National under Section 3(a) of RA 7042, which reads:

> "The term "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 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..xxxxx".

> associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, **to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice**, and any person who knowingly aids, assists, or abets in the planning, consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, that the president, managers or persons in violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege and the property provisions of this Act; and Provided, finally, **That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities**." (Emphasis supplied)

By virtue of the above-stated provision, foreigners are restricted from being appointed as corporate officers in corporations with foreign ownership restrictions or those engaged in wholly and partly-nationalized activities (for example: corporations engaged in purely local or mixed local and international cargo and freight forwarding activities), except for technical personnel authorized by the Department of Justice. Further, foreigners may only be appointed as members of the board of directors or trustees in proportion to their allowable participation or share in the capital.

As to your final query, please be advised that as a matter of policy and pursuant to SEC Memorandum Circular No. 15, Series of 2003 (MC 15-2003), the Commission shall refrain from rendering an opinion on queries involving interpretation of the administrative rules and issuances of other government agencies considering that it is the promulgating agencies which are competent to undertake such construction by reason of their knowledge of the specific intent and extent of application of the subject issuances.[5]

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[5] SEC Memorandum Circular 2003-15, No.5.6

Considering that your query involves the possible penalties which may be imposed by the Department of Information and Communication Technology, as well as the local government units, this Commission cannot answer the same.

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue 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.[6] 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.

ROMUALD C. PADILLA
Officer-in-Charge

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