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

25 November 2019

SEC-OGC Opinion No. 19-54
Re: Pre-Need Products as Securities

MR. JAIME B. DIZON
Executive Vice President and COO
PHILPLANS FIRST, INC.
12/F STI Holdings Center
6764 Ayala Ave., Makati City

Dear Sir:

This is in response to your *letter* dated 22 June 2018 requesting the opinion of the Commission on your following queries:

> 1) Whether or not, prior to the promulgation of the Pre-Need Code, the SEC considered pre-need plans as securities, and if so, the legal basis for the same;
>
> 2) What are the attributes of securities that the SEC considers as important, in order that they fulfill their function as investment vehicles and trustworthy assets (e.g. determinate growth, ease of liquidation and transferability, etc.); and
>
> 3) What does the SEC consider as "non-traditional" securities, and whether or not pre-need plans were classified as such.

Specifically, these queries are posed to aid the Insurance Commission in determining whether or not pre-need plans are admissible assets for investment by insurance companies and other potential clients.

As to your **first** and **third** queries, we answer in the affirmative.

You have correctly cited in your letter that before the passage of the *Securities Regulation Code*[1] ("SRC") and the *Pre-Need Code*[2], the law governing pre-need plans was the *Revised Securities Act*[3] ("RSA") of 1982. Under *Section 2(a)* of the RSA, pre-need

[1] R.A. 8799 which took effect on 08 August 2000.
[2] R.A. 9829 which took effect on 03 December 2009.
[3] B.P. 178 which took effect on 23 February 1982.

plans were specifically identified as securities. The pertinent provision states:

> "Sec. 2. Definitions. — For purposes of this Act:
>
> (a) "Securities" shall include xxx **pre-need plans**, pension plans, life plans, joint venture contracts, and similar contracts and investments where there is no tangible return on investments plus profits but an appreciation of capital as well as enjoyment of particular privileges and services." [Emphasis supplied]

Under *Section 3.1* of the SRC, the definition of securities is as follows:

> "Section 3. Definition of Terms. - 3.1. "Securities" are shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instruments, whether written or electronic in character. It includes:
>
> (a) Shares of stocks, bonds, debentures, notes evidences of indebtedness, asset-backed securities;
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> (b) Investment contracts, certificates of interest or participation in a profit sharing agreement, certifies of deposit for a future subscription;
>
> (c) Fractional undivided interests in oil, gas or other mineral rights;
>
> (d) Derivatives like option and warrants;
>
> (e) Certificates of assignments, certificates of participation, trust certificates, voting trust certificates or similar instruments;
>
> (f) Proprietary or nonproprietary membership certificates in corporations; and
>
> (g) Other instruments as may in the future be determined by the Commission."

Although pre-need plans, such as pension and life plans, were not specifically mentioned as securities under the SRC, the same does not necessarily take out pre-need plans from the definition of securities. The word "includes" preceding the enumeration of securities in *Section 3.1* of the SRC clearly suggests that it is a non-exhaustive list. Thus, so long as it qualifies as shares, participation, or interests in a corporation, commercial enterprise, or profit-making venture, it may be considered as securities.

That pre-need plans are securities is further confirmed by *Section 3.9* of the SRC which specifically defines pre-need plans as:

> "SECTION. 3. Definition of Terms. -
>
> xxx
>
> 3.9. "Pre-Need Plans" are contracts which provide for the

> performance of future services or the payment of future monetary considerations at the time of actual need, for which planholders pay in cash or installment at stated prices, with or without interest or insurance coverage and includes life, pension, education, interments and other plans which the Commission may from time to time approve."

For pre-need plans to be defined and discussed in *Section 3.9* could only mean that it is treated as one of the securities being regulated by the SRC. Otherwise, there is no reason for its inclusion in the said law which was primarily enacted for the purpose of regulating a socially conscious free market that ensures full and fair disclosure of securities.

In fact, *Rule 16.1-1* of the old SRC IRR of 2000 provided that the rules and related Commission circulars governing pre-need plan companies and persons involved in the sale and distribution thereof that were issued under the RSA shall continue in force and effect until new rules are adopted.

However, even if there is no *Section 3.9*, a pre-need plan still satisfies all the elements of an investment contract under the Howey Test and is, therefore, a security. In a pre-need plan or contract, the planholder pays a pre-need company a certain amount to answer for a determined future need (education, pension, memorial, etc.), which is essentially a return or benefit, primarily from the efforts of others, the amount of which is higher than the amount he earlier paid.

For clarification, the Commission defined *"non-traditional securities"* as those securities which are not specifically mentioned in the enumeration of securities under *Section 3.1* of the SRC but nonetheless are contracts or arrangements, however they may be called, which call for a person to invest, entrust, or give his money to another person/s and is led to expect profits from such primarily from the efforts of others.

By reason thereof, the Commission had included pre-need plans as one of the non-traditional securities whose registration and operation were being regulated and supervised by its then newly formed Non-Traditional Securities and Instruments Department (NTD).[4]

As to your **second query**, the Commission does not prescribe, through a rule or circular, the attributes of a security for it to be considered as a trustworthy asset. Opinions issued by the academe, professionals, and financial analysts, which are based on their expertise, may be relied on by the market on this matter.

The foregoing notwithstanding, please be advised that it is the Insurance Commission which has the power to determine whether or not pre-need plans are admissible assets for investment by insurance companies and other potential clients.[5]

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[4] Securities and Exchange Commission Annual Report 2008, Non-Traditional Securities and Instruments Department, p. 23.

[5] R.A. 9829 or the Pre-Need Code of the Philippines, "Sec. 4. Definition of Terms. – Whenever used in this Code, the following terms shall have their respective meanings: (a) "Commission" refers to the Insurance Commission. xxx

It shall be understood, however, that the above-stated 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 of 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.[6]

Please be guided accordingly.

Very truly yours,

ROMUALD C. PADILLA
Officer-in-Charge

Sec. 6 Powers and Functions of the Commission. – The Commission shall, at all times, act with transparency and dispatch and shall have, among others, the following powers and functions: xxx (k) Prepare, approve, amend or repeal rules, regulations and orders, and issue opinions and provide guidance on and supervise compliance with such rules, regulations and orders; (l) Formulate policies and recommendations on issues concerning the pre-need industry, including proposed legislations; xxx.

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