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

10 May 2021

SEC-OGC Opinion No. 21-07
Re: Engaging in Mass Media and Advertising Activities thru the Offering of Space on Assets (Moving Structures)

AQUENDE YEBRA ANIAG LOON & ASSOCIATES
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Attention: Atty. Kathrina Sheena Marie L. Que
Senior Associate

Dear Atty. Que:

This refers to your *letter* requesting the Commission's opinion on whether Metro Promo Concepts Corporation's ("**MPC**") proposed new business of offering space in moving vehicles ("assets") for the purpose of advertising products and services constitutes MPC and the owner of the assets as engaged in advertising and mass media activities.

You disclosed that MPC is a domestic corporation, wholly owned by Filipino citizens, whose primary purpose is to engage in the business of "*importing or buying locally, trading, servicing, assembling, manufacturing, constructing, or installing, preparing, exporting, or selling locally in wholesale or in retail, general merchandise, goods, wares, commodities of all kinds and description, and products and services whether natural or artificial, which may become articles of commerce, as principals or agents of local or foreign principals and, as such, to negotiate, bid, contract or otherwise deal with any government or governmental institution, public or private corporation, firm entity or person, locally or abroad.*"

You stated that MPC now seeks to expand its business by providing its clients with *marketing services* that include advertising, promotions, and mass media. MPC will offer a complete package of marketing services to its clients and, in return, MPC's clients will pay a fixed fee.

In your letter, the proposed business process of MPC is as follows:

1. MPC will of offer a complete package of marketing services to its clients that include conducting market research, creating a market plan,

conceptualizing, campaigns, designing advertisements (traditional print and digital), proposing brand/campaign ambassadors, creating a story board, installation of campaign paraphernalia/materials, providing social media direction, offering various tools and mediums (sic) of dissemination, to the actual execution of the campaign/project;

2. After MPC signs a contract with client for marketing services, MPC will first conduct a market research that will determine the proper market of the client's products and services;

3. Based on the results of the market research, MPC will create a campaign or project to promote the said products and services. The campaign will include suggestions on execution and mediums of dissemination;

4. MPC will offer spaces on moving vehicles (or "Assets") as one medium of dissemination of the campaign advertisements;

5. Considering that MPC currently does not own Assets, MPC intends to purchase space on said Assets for a consideration. MPC will purchase space on Assets owned by individuals and/or corporations that are engaged in the logistics business;

6. For the complete marketing services rendered by MPC, client will pay a fixed fee which will be provided in the contract; and

7. The agreement between MPC and its client is one for rendering of services, particularly marketing services. The owner of the Assets and MPC's clients will have no contractual relationship with one another.

You also mentioned that, in order to carry out MPC's advertising and mass media activities, MPC intends to purchase space from corporations engaged in the logistics business that regularly sell or lease spaces in their assets. Thereafter, MPC will offer to prospective clients the purchased space from the Assets as one medium of dissemination of the campaign advertisements. You alleged that this third-party logistics company shall retain ownership over the said Assets while MPC shall obtain ownership over the specific space in said assets. To further delineate ownership and operation of the Asset vis-à-vis ownership over the space, MPC shall install an external structure in the form of a poster frame on the Assets. The framework shall at all times expressly disclose via a clear physical manifestation that MPC is the sole owner and operator of the structure on the Asset.

You further stated that the owner of the Assets shall not, in any way, gain control of the contents on the space owned by MPC, hence the former cannot select which clients MPC will accommodate, contract with, and offer its services to. Neither can the owner of the Assets reject the advertisements MPC may place on the said space that it owns.

Hence, you seek confirmation of your following positions:

1. That MPC is legally allowed to engage in the business of providing marketing services which includes advertising and mass media activities;

2. That MPC shall be considered as an agency engaged in the business of providing advertising and mass media services; and

3. That the owners of the assets are not considered as engaged in the business of providing marketing services including mass media and advertising activities, and that the nationalization requirements do not apply to them.

FIRST AND SECOND QUERIES.

The definitions of **marketing**, **advertising** and **mass media** have been discussed by the Commission in SEC-OGC Opinion No. 14-06[1], to wit:

> "Professors Philip Kotler, Gary Armstrong, John Saunders and Dr. Veronica Wong defines **marketing** as a combination of "many activities – marketing research, product development, distribution, pricing, advertising, personal selling and others – designed to sense, serve and satisfy the consumer needs while meeting the organization's goals." In other words, advertising and distribution are two of the essential aspects in marketing of products.
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> **Advertising**, as defined in Article 4(b) of Republic Act No. 7394[2], is "the business of conceptualizing, presenting or making available to the public, through any form of mass media, fact, data or information about the attributes, features, quality or availability of consumer products, services or credit." Thus, the Implementing Rules and Regulations of the same law defines an **advertising agency or agent** as "a service organization or enterprise creating, conducting, producing, implementing or giving counsel on promotional campaigns or programs through any medium for and in behalf of any advertiser."
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> **Mass media** in the Constitution, as opined by the Department of Justice, refers to *any medium of communication* designed to reach the masses and that tends to set the standards, ideals and aims of the masses, the distinctive feature of which is the dissemination of information and ideas to the public, or a portion thereof. Mass media, as defined in Article 4(a) of Republic Act No. 7394, refers to "any means or methods used to convey advertising messages to the public such as television, radio, magazines, cinema, billboards, posters, streamers, hand bills, leaflets, mails and the like." *(Emphasis supplied.)*

In its previous Opinions[3], the Commission has distinguished an advertising agency from a mass media entity for the purpose of determining the extent of allowable foreign equity participation, viz. –

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[1] SEC-OGC Opinion No. 06-14 dated 8 May 2014 addressed to Atty. Alvin O. Geli, Atty. Regina G. Santos.
[2] The Consumer Act of the Philippines.
[3] SEC-OGC Opinion No. 21-18 dated 28 November 2018 addressed to Angelito M. Villanueva, *citing* SEC-OGC Opinion No. 07-17 dated 24 July 2017 addressed to Gorriceta Africa Cauton & Saavedra, *citing* SEC-OGC Opinion No. 16-12 dated 13 September 2012 addressed to Puno & Puno Law Office, *citing* SEC Corporate Legal Department Opinion dated 2 September 1988.

> "The function of advertising agencies is to serve as agents or counsellors of advertisers by writing, preparing, or producing the commercial messages or materials by advertisers in selling their goods and services, and by selecting and recommending the medium or media to be used as the vehicle for disseminating such messages to the public. **Advertising agencies do not actually disseminate the materials they prepare as they have to *utilize* or *avail* of the facilities of mass media, i.e., newspapers, radio, television, etc., for this purpose. Advertising agencies falling within this concept are not mass media, considering that they do not operate or control any medium of communication designed to reach or influence the masses, although the activities of such agencies, by their nature, are closely related to those of mass media.**
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> **However, where the advertising agency actually disseminates information, or operates, controls or otherwise engages in the business of mass media, a specific example of which is an advertising firm which sells billboard space to advertisers, then such advertising agencies would fall within the purview of the constitutional limitation.**" *(Emphasis supplied.)*

The main function of an advertising agency is the creation and/or conceptualization of the commercial messages with the end goal of promoting the goods or services. On the other hand, mass media covers any medium of communication, the primary objective of which is to disseminate information to the public. However, an advertising company is said to be engaged in mass media activities when it not only creates and conceptualizes commercial messages but also disseminates information through any medium of communication. This was further affirmed by the Department of Justice (DOJ) in its DOJ Opinion No. 11-07[4] when it reiterated the same and cited a similar example –an advertising firm which ***sells billboard spaces*** to advertisers, to wit:

> "The advertising industry is, thus, clearly treated differently from mass media on the argument that **advertising is not mass media but the use of mass media**. Stated differently, the media are the channels of communication that carry the messages from the advertisers to the audience.
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> As this Department had once stated:
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> "**If the advertising agency actually disseminates information, i.e. operates or controls or otherwise engages in the business of mass media, like for instance, an outdoor advertising firm which sells billboard space to advertisers, I think they would come within the purview of the constitutional limitations.**" *(Emphasis supplied.)*

In another opinion[5], the Commission opined that a corporation was a media entity when it provided a medium to disseminate or convey advertising messages to the public by leasing out or subleasing advertising spaces, such as waiting shed, billboard

[4] DOJ Opinion No. 11-07 dated 05 March 2007 addressed to Frank Abueva.
[5] SEC-OGC Opinion No. 17-16 dated 11 July 2016 addressed to Mr. Darmo N. Castillo.

structures, electronic LED displays and other fixed or movable structures where advertisements can be displayed.

Considering that MPC will offer a complete package of marketing services that includes conducting market research, creating marketing plan, conceptualizing, proposing brand/campaign ambassadors, story board, installation of campaign materials, providing social media direction, offering various tools and media of dissemination and the actual execution of campaign/project, as well as offers or leases spaces in moving vehicles or assets, MPC clearly performs the functions of an advertising and mass media agency, and is therefore engaged in nationalized activities. Consequently, MPC is subject to foreign ownership restrictions on mass media and advertising entities under Items 1 and 2, respectively, of Section 11, Article XVI of the 1987 Constitution[6], the Foreign Investment Act and Executive Order (EO) No. 65[7], and other pertinent laws.

Thus, we confirm your position that, by providing the abovementioned marketing services and by offering spaces on moving vehicles or assets as one medium of dissemination of the campaign advertisements, MPC is engaged in advertising and mass media activities within the purview of the Constitutional limitations.

Further, since MPC is a domestic corporation wholly owned by Filipino citizens, as disclosed in your letter, then we confirm your position that MPC is legally allowed to engage in advertising and mass media activities.

THIRD QUERY.

You stated that advertising or the conceptualization, presentation, or making of the fact, data or information are ***all*** conducted and performed by MPC as part of its marketing services offered to its clients. In this case, the owner of the Assets exercises no control over the contents of the purchased space and has no participation in the preparation of the commercial information/messages prepared by MPC for its clients in

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[6] SECTION 11. (1) **The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.** The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.
(2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.
Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry. (emphasis supplied)
The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

[7] Promulgating the Eleventh Regular Foreign Investment Negative List.
List A: Foreign Ownership is Limited by Mandated of the Constitution and Specific Laws
No Foreign Equity
1. **Mass media**, except recording (Art. XVI, Sec. 11 of the 1987 Constitution; Presidential Memorandum dated 05 May 1994) and internet business (DOJ Opinion No. 40, s. 1998)

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Up to Thirty Percent (30%) Foreign Equity
14. **Advertising** (Art. XVI, Sec. 11 of the Constitution)

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selling the latter's goods and services to the public.

On the other hand, you emphasized in your letter that the ownership over the Assets shall remain with the third-party logistics company while ownership over a specific space on said asset shall belong to MPC. You also emphasized that **to further delineate ownership and operation of the Asset vis-à-vis ownership over the space, MPC shall install an external structure in the form of a poster frame on the Assets. The framework shall at all times expressly disclose via a clear physical manifestation that MPC is the sole owner and operator of the structure on the Asset**. In short, the external structure which is the movable structure where the advertising material is displayed, is separately *owned by MPC*, while the vehicle to which such structure is attached, shall remain with the owner of said vehicles.

Based on the facts you provided, and on the assumption that there is no legal infirmity in the arrangement/contract between MPC and the Asset owner, it is our opinion that by procuring **ownership** over the space in the Asset where the external structures will be installed, it is MPC which sells the advertising space within the **external structure** to its client, and not the third-party logistics company which retains ownership over the Asset(s). Hence, as the owner of the spaces in the Asset and the external structure on it, it is MPC which has the right to use, control and exercise other attributes of ownership over such medium.

In view of the foregoing, we also confirm your position that the owner of the Assets is ***not*** engaged in advertising and mass media activities by offering the spaces in its Assets to MPC.

It shall be understood, however, that the above-stated opinion is rendered solely on the basis of the facts and circumstances disclosed to the Commission, and should be considered relevant only to the particular issue raised therein. This opinion shall not be considered and 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.[8]

Please be guided accordingly.

Very truly yours,

ROMUALD C. PADILLA
General Counsel

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