Securities and Exchange Commission
PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

5 November 2024

SEC OGC Opinion No. 24-33
Re: Foreigner in a Mirco-Finance Non-Governmental Organization, the Anti-Dummy Law and the power to invest Corporate Funds

ATTY. GENESES R. ABOT
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Dear Atty. Abot:

This refers to your letters dated 20 November 2018 and 29 January 2019, requesting for an opinion on behalf of your client, a Micro-Finance Non-Governmental Organization (MFI), regarding the application of the Anti-Dummy Law and other governance matters.

You stated that MFI is an organization that conducts technical and financial support to small entrepreneurs to enhance their business through microfinance, among other purposes, as indicated in its Articles of Incorporation (AOI). It is a locally established corporation and Filipino citizens own its entire initial capital. However, it is affiliated with an international organization engaged in the same work in many parts of the world. Its principal place of business is located in Tagbiliran City, Bohol. You mentioned in your letter of the possibility that individuals with foreign citizenship will sit as members of the Board of Trustees or as officers of the corporation.

You attached the Amended AOI of the MFI which states that its primary purposes are the following:

a. To facilitate the technical and financial support to small entrepreneurs to enhance their business through microfinance operations, pursuant to R.A. No. 8425, the Social Reform and Poverty Alleviation Act;
b. To develop income-generating projects that will assist individuals/families in need;
c. To promote programs that will sustain development activities in the communities;
d. To promote knowledge of Christian values and precepts;
e. To exercise any and all lawful powers in promoting the interest of the association to enhance the value of the properties and to perform everything necessary and proper for attainment of its goals and objectives; and
f. To acquire, hold, lease, purchase, exchange, borrow, mortgage or otherwise, deal in real and personal properties and to build, construct, acquire, lease, purchase, mortgage buildings and offices as may be necessary and useful, to solicit and receive contributions, grants, donations from any source, public and private, and to invest funds and utilize properties in such activities as may be necessary and useful to carry out the objectives of such association.

Lastly, you stated that MFI does not own real properties in the Philippines.

You raised the following queries:

1. Does Commonwealth Act No. 108, as amended by Presidential Decree, apply to your client?
2. Is your client allowed to elect a foreign national to its Board of Trustees?
3. May your client be allowed to transfer funds to its international affiliate for legitimate purposes?

Section 2-A of the Commonwealth Act No. 108, otherwise known as the "Anti-Dummy Law," states:

> " Section 2-A. Unlawful use, Exploitation or enjoyment — **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 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 a 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 charge of corporations, associations or partnerships 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 or business enjoyed or acquired in violation of the 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."

It is settled that Section 2-A of the Anti-Dummy Law applies to corporations engaged in a nationalized or partly-nationalized activity or business undertaking.[1]

As to the effects of being a nationalized or partly-nationalized corporation under the Anti-Dummy Law, the Commission opined:[2]

> "On the citizenship requirement of corporate officers. Sec. 2-A of Commonwealth Act No.108, as amended, **bans foreigners from being elected or appointed to management positions as president, vice-president, treasurer, secretary, etc.** in business activities where there is constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise, or privilege.
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> xxx xxx xxx
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> However, while in nationalized business activities foreigners are prohibited from being elected or appointed as corporate officers, **they can be elected as directors in proportion to their participation or share in the capital of such business entities pursuant to PD 175 which amends CA 108**.xxx"

With regard to who are corporate officers, they are those officers of a corporation who are given that character either by the Corporation Code [now Revised Corporation Code (RCCP)] or AOI, and by-laws of the corporation.[3]

At any rate, to determine if the corporation is nationalized or partly-nationalized, the corporation's purpose clause must be examined because it 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***. The primary purpose of the corporation, as stated in its AOI, is the first business to be undertaken by the corporation. Hence, the primary purpose determines its classification. Outside of the

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[1] SEC-OGC Opinion No. 18-16 dated 24 August 2018 addressed to Rodrigo Berenguer & Guno.
[2] SEC-OGC Opinion No. 14-05 dated 25 April 2014 addressed to Atty. Rester John L. Nonato.
[3] Cacho v. Balagtas, G.R. No. 202974, February 07, 2018.

primary purpose, the secondary purposes might determine a corporation's classification ***on the condition that the corporation is actually engaged in the business stated therein.***[4]

A Microfinance NGO is a nonstock nonprofit organization duly registered with the Commission, with the primary purpose of implementing a microenterprise development strategy and providing microfinance programs, products, and services, such as microcredit and microsavings, for the poor and low-income clients.[5] Being a Microfinance NGO is, per se, not a nationalized or partly-nationalized activity.[6]

However, we must also consider the ownership of land as a partly-nationalized activity.

Article XII, Section 7 of the 1987 Philippine Constitution provides that "save in cases of hereditary succession, no private lands shall be transferred or conveyed **except** to individuals, corporations, or associations qualified to acquire or hold lands of the public domain."

The 12th Regular Foreign Investment Negative List[7] (12th FINL) provides a list covering investment areas or activities in which foreign ownership is limited by the mandate of the constitution and specific laws (List A)[8], to wit:

> **Up to forty percent (40%) foreign equity**
>
> 17. Ownership of private lands (Section 7, Article XII of the Constitution; Section 22 of CA No. 141; Section 4 of RA No. 9182), except a natural born citizen who has lost his Philippine citizenship and who has the legal capacity to enter into a contract under Philippine laws (Section 10 of RA No. 7042, as amended by Section 5 of RA No. 8179).

Based on the Amended AOI of MFI, one of its "primary purposes" is:

> 6. To acquire, hold, lease, purchase, exchange, borrow, mortgage or otherwise, deal in real and personal properties and to build, construct, acquire, lease, purchase, mortgage buildings and offices as may be necessary and useful, to solicit and receive contributions, grants, donations from any source, public and private, and to invest funds and utilize properties in such activities as may be necessary and useful to carry out the objectives of such association.

In this connection, Section 35 (g) of the RCCP vests upon the corporation the authority to purchase, receive, take or grant, hold, convey, sell, lease, pledge, mortgage, and otherwise deal with such real and personal property, including securities and bonds of other corporations, **as the transaction of the lawful business of the corporation may reasonably and necessarily require**, subject to the limitations prescribed by law and the Constitution.

The Commission had opined[9]:

> "As to your third query, it should be noted that item 1 in West Spring's secondary purpose clause is ***substantially similar to Section 36 (7) of the Corporation Code[now Section 35(g) of the RCCP]*** ...In this regard, we have previously opined that: "Fletcher has regarded the power to acquire and convey property as an incident to every corporation although such power is expressly conferred to corporations incorporated in accordance with Section 36 (7) of the Corporation Code. ***Therefore, whether or not such power is included in what the corporation could do and perform under its [AOI], it is nevertheless, deemed to be within the scope of its corporate powers by express declaration of Section 36 of the Code.***" Section 36 contains an enumeration of powers expressly given to every corporation created under the general incorporation law. ***They may be exercised by the corporation whether or not any such powers are stated in the [AOI] or by-laws.*** Thus, even if West Spring's Articles does not so provide, it can still purchase and convey real property, **as the transaction of the lawful business of the corporation may reasonably and necessarily require**, because it is expressly allowed under Section 36 (7) of the Corporation Code.
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> Therefore, item 1 under the "secondary purpose" clauses of West Spring's Articles ***may not be strictly construed as a secondary purpose independent or distinct from its primary purpose of general construction because it is a general power of every corporation allowed under Section 36 (7).***

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[4] SEC-OGC Opinion No. 11-33 addressed to Mr. Jesus B. Lapuz dated 29 July 2011.
[5] Republic Act (RA) No. 10693 or the Microfinance NGOs Act, 03 July 2015.
[6] Ibid; see also Republic Act (RA) No. 8425, "Social Reform and Poverty Alleviation Act"; SEC-OGC Opinion No.24-18 dated 25 June 2024 addressed to Community Economic Ventures (A Microfinance NGO) Inc.
[7] Executive Order No. 175, 12th Foreign Negative List, dated 27 June 2022.
[8] *Ibid.* List A.
[9] Supra, Note 4.

> It would be different if the qualifying phrase in item 1 of West Spring's secondary clause "as may be necessary or incidental to the conduct of the corporate business" were not present, because the buying and selling of real estate, done in the ordinary course of business, would then be considered as a business in itself, distinct and separate from the primary purpose.
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> The right of a corporation to take and hold real property may be treated by the purpose to which said property was acquired and the ever-present intention of devoting it to a proper and necessary corporate use. ***Consideration should be given, in determining the right to the object of acquisition, to the intention with which the property is held, and the use to which it may be and is designated to be put, and the power of the corporation is to be limited to such real property as is reasonably necessary to such corporate purposes and uses.*** (Citations omitted, emphasis supplied)

The Commission further opined that a corporation's purpose clause which contains substantial reproduction of the general powers of a corporation granted under Section 35 of the RCCP should be taken merely as a re-affirmation of the latter and may not be strictly construed as a primary or secondary purpose xxx. **However, while a corporation is not outrightly banned from owning land based on a mere reproduction of Section 35(g) of the RCCP in its AOI, in the event that it owns land, it becomes a partly-nationalized corporation where aliens may own only up to forty percent (40%) foreign equity.**[10]

Similar to the above opinions, the MFI's afore-quoted power to own real property is limited by the clause "as may be necessary and useful", which means that its ownership of land is not in its ordinary course of business and is only incidental or in furtherance of its main business. Thus, we now go beyond the purpose clause and examine if the corporation actually holds land.

Accordingly, since the MFI does not own any real property in the Philippines as represented, we answer your first and second queries in the affirmative.

For your final query, Section 41 of the RCCP provides:

> "SEC. 41. Power to Invest Corporate Funds in Another Corporation or Business or for Any Other Purpose. – Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation, business, or for any purpose other than the primary purpose for which it was organized, when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of nonstock corporations, at a meeting duly called for the purpose. Notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at the place of residence as shown in the books of the corporation and deposited to the addressee in the post office with postage prepaid, served personally, or sent electronically in accordance with the rules and regulations of the Commission on the use of electronic data message, when allowed by the bylaws or done with the consent of the stockholders: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, **That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary"**

Pursuant to the above provision, where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in its articles of incorporation, only the approval of the Board of the corporation is necessary[11]. However, if the investment of funds is made in any other corporation or business or for any purpose other than the primary purpose for which the investing corporation was organized, the ratification of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock or by at least two-thirds (2/3) of the members in case of non-stock corporation must also be complied with.[12]

Thus, we are of the opinion that it is within the corporation's business judgment to determine what legitimate purposes are to be undertaken by it, provided Section 41 is complied with in the circumstances covered by the same.

It shall be understood that the foregoing opinion is rendered based solely on the facts, circumstances, and documents disclosed/submitted 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

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[10] SEC-OGC Opinion No. 24-18 dated 25 June 2024 addressed to Community Economic Ventures (A Microfinance NGO) Inc.
[11] De La Rama vs Ma-ao Sugar Central, G.R.No. L-17504&l-17506, February 26,1969.
[12] SEC-OGC Opinion No. 11-18 dated March 29, 2011 addressed to Angara Abello Concepcion Regala & Cruz Law Offices.

upon the courts whether of similar or dissimilar circumstances[13]. 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.

Very truly yours,

Romuald C Padilla
General Counsel

[13] Section 7, SEC Memorandum Circular No. 15, Series of 2003. 16 December 2003.