Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

10 February 2025

SEC OGC Opinion No. 25-01
Re: Capacity to sit as President

KAIKAI WU
President/CEO, PTO Air Express
555 Carlos Palanca, San Miguel, Manila
hrpto.2022@gmail.com

Dear Ma'am/Sir:

This refers to your letter dated 25 May 2023, requesting for an opinion on whether you can sit as President of PTO Air Express Corp. (PTO Air).[1]

In your letter, you stated that you are "one of the [stockholders] of [PTO Air] who is responsible for the strategic decision that fundamentally affect (sic) the business practices or general direction of the corporation and exercising executive control over the daily or regular affairs of the corporation." You also attached PTO Air's Articles of Incorporation (AOI) which indicates that you are a foreigner, particularly a Chinese national.

Hence, your query.

Qualifications of a Corporate President

In ***SEC-OGC Opinion No. 15-13***,[2] the Commission discussed the nature and qualifications of a corporate President, *viz.*:

> Generally, a president of a corporation is defined as the one placed in authority over others, a chief officer, a presiding or managing officer; a governor, ruler, or director. Customarily, he is given general supervision and management of the business affairs of the corporation.
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> The Supreme Court ruled in the case of *People Aircargo and Warehousing Co. Inc. v. C.A,* that:
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> > Inasmuch as a corporate president is often given general supervision and control over corporate operations, the strict rule that said officer has no inherent power to act for the corporation is slowly giving way to the realization that such officer has certain limited powers in the transaction of the usual and ordinary business of the corporation. In the absence of a charter or bylaw provision to the contrary, the president is presumed to have the authority to act within the domain of the general objectives of its business and within the scope of his or her usual duties.
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> ***Because of the importance of his position, the law prescribes some qualifications/disqualifications of a President, among which are that (1) he [or she] must be a director of the corporation, and (2) he [or she] must not concurrently hold the positions of Secretary or Treasurer.***

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[1] On 29 April 2024, we sent a clarificatory letter where we asked for further details on the actual activities undertaken by PTO Air. Specifically, we asked "whether or not the cargo and freight forwarding activity is (1) limited to port-to-port transportation via air; or (2) involves port-to-port transportation via air and sea; or (3) involves transportation via air or sea until last-mile delivery via land." In that letter, we also asked for the issuing authority of the Certificate of Public Convenience. However, we did not receive a response to the aforementioned letter.

[2] This restriction banning the President from concurrently holding the position of Secretary or Treasurer was based on Section 25 of Batas Pambansa (B.P.) No. 68 or the Corporation Code. This is reproduced in Section 24 of the Republic Act (R.A.) No. 11232 or the *Revised Corporation Code of the Philippines* (RCCP), 23 February 2019.

> From the foregoing, it can be inferred that the position of a corporate president is reposed with duties and responsibilities provided by the law and jurisprudence, which can be further expanded by its by-laws. Therefore, it serves not merely as a title of prestige or status, but also serves as a basis for its stockholders and the other persons/entities transacting with it to determine whether such person is clothed with authority to perform the duties conferred by the law and the functions given by the by-laws, within the general objectives of the corporation's business. (Citations omitted, emphasis supplied)

Evidently, other laws may provide for other restrictions aside from those provided under the RCCP and the corporation's by-laws. For instance, while Republic Act (R.A.) No. 11232 or the Revised Corporation Code of the Philippines (RCCP) does not ***expressly*** contain a citizenship nor residency requirement for a president of a corporation,[3] such requirements may be prescribed for certain corporations under other applicable laws.

Section 2-A of the Commonwealth Act (CA) No. 108 or the Anti-Dummy Law, as amended,[4] clearly prohibits aliens to "intervene in the management, operation, administration or control" of corporations whose activities are reserved for Filipinos. Thus, a foreigner sitting as president of that corporation engaged in nationalized or partly-nationalized activity cannot be sustained.[5]

As such, a director of a corporation, possessing all the qualifications and none of the disqualifications under the RCCP, other laws like the Anti-Dummy Law, and the by-laws, may sit as the President, ***provided*** that he or she must not concurrently hold the positions of Secretary or Treasurer.

PTO Air's Purpose Clause

It is then necessary to examine the corporation's purpose clause to determine whether or not the activities listed therein are nationalized or partly nationalized activities which would warrant the application of the restriction under Section 2-A of the Anti-Dummy Law.

PTO Air's primary purpose is as follows:

> To engage in the business of ***cargo and freight forwarding both domestic and international***, cargo consolidation, non-vessel operating common carrier,[6] breakbulk agency,[7] hauling, handling, distributing of general cargoes and all classes of goods, wares and merchandise, to collect/receive fees for such service.[8] (Emphasis and underscoring supplied)

While the foregoing does not specifically mention that PTO Air is an air freight forwarder, we note that the corporate name has "Air" which warrants the assumption that it pertains to air freight forwarding. This is based on Item No. 2 of SEC Memorandum Circular (MC) No. 13, Series of 2019 or the ***Amended Guidelines on the Use of Corporate and Partnership Names***, to wit:

> A term that described the business of a corporation in its name should refer to its primary purpose. If there are two such terms, the first should refer to the primary purpose and the second to the secondary purpose.

For airfreight forwarders, the Civil Aeronautics Board (CAB) issued ***CAB Guidelines Implementing [C.A.] No. 146 As Amended by [R.A.] No. 11659, Otherwise Known as the [PSA]*** on 20 May 2024. Section 4, Rule II of the CAB Guidelines[9] provide the following rule on nationality requirements, to wit.:

> **SECTION 4. NATIONALITY REQUIREMENTS** – Requirements limiting foreign ownership of and participation of foreign investors in the governing boards of public services are ***no longer imposed*** on those not qualified as a public utility by the Act.

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[3] Section 24, RCCP.

[4] Section 2-A, Commonwealth Act (C.A.) No. 108, as amended, *Anti-Dummy Law*, 30 October 1936.

[5] SEC-OGC Opinion No. 09-14 addressed to Royal Cargo Combined Logistics Inc. dated 04 June 2009.

[6] Non-vessel operating common carrier is defined by the Black's Law Dictionary as "a freight forwarder or shipment consolidator who does not have ownership of the vessel, but assumes responsibilities for the shipments and issuing its own bills of lading and airway bills." Retrieved from: https://thelawdictionary.org/non-vessel-operating-common-carrier-nvocc/

[7] Breakbulk cargo is defined by the Black's Law Dictionary as "Non-containerized general cargo stored in boxes, bales, pallets or other units to be loaded onto or discharged from ships or other forms of transportation." Retrieved from: https://thelawdictionary.org/?s=breakbulk+cargo

[8] Lifted from the AOI attached to your letter.

[9] Section 4, Rule II, *CAB Guidelines Implementing [C.A.] No. 146 As Amended by [R.A.] No. 11659, Otherwise Known as the [PSA]*, 20 May 2024.

> As a consequence, the provisions of R.A. No. 776, as amended, that limits foreign ownership and participation of foreign investors in the governing body of air carriers, general sales agents, cargo sales/breakbulk agents, and ***airfreight forwarders*** are no longer applicable. (Emphasis and underscoring supplied)
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Please be informed, however, that the Commission does not render opinions on matters which involve ***interpretation of 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.[10]

However, ***for purposes of information only***, we impart the following:

Definition of Freight Forwarding

In ***Unsworth Transport International (Phils.), Inc. vs. Court of Appeals (CA)***,[11] the Court, citing the United States case of ***Chemsource Inc. vs. Hub Group Inc.,***[12] defined a "freight forwarder" as follows:

> The term "**freight forwarder**" refers to a firm holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and, in the ordinary course of its business, (1) to assemble and consolidate, or to provide for assembling and consolidating, shipments, and to perform or provide for break-bulk and distribution operations of the shipments; **(2) to assume responsibility for the transportation of goods from the place of receipt to the place of destination**; and **(3) to use for any part of the transportation a carrier subject to the federal law pertaining to common carriers**. (Emphasis supplied, citations omitted)

Whether freight forwarding is a nationalized or a partly nationalized activity under Philippine Law

Prior to the issuance of R.A. No. 11659 which amended the C.A No. 146 or the Public Service Act (PSA),[13] ***a freight forwarder was considered as an operator of public utility*** as it falls under then definition of public utility which is one organized for hire or compensation to serve the public which is given the right to demand its service should they like to do so. It is 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.[14]

The classification of freight forwarding as public utility was crucial because as a public utility, the provision of Article XII, Section 11 of the 1987 Constitution[15] applies, to wit:

> **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 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 and underscoring supplied)

In ***SEC-OGC Opinion No. 23-03***,[16] we opined:

> By virtue of the foregoing provision, the Commission provided the following rules in determining the applicability of the constitutional prohibition on corporations engaged in the business of freight forwarding:
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> 1. A corporation engaged in purely local cargo and freight forwarding activities must be at least sixty percent (60%) owned by Filipino citizens;

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[10] SEC Memorandum Circular (MC) No. 15, Series of 2003, 16 December 2003.

[11] *Unsworth Transport International (Phils.), Inc. vs. Court of Appeals (CA),* G.R. No. 166250, 26 July 2010, citing *Chemsource, Inc. v. Hub Group, Inc.*, No. 96-2804, United States Court of Appeals, Seventh Circuit, Argued January 7, 1997, Decided 13 February 1997.

[12] 106 F.3d 1358 (7th Cir. 1997) as cited in Unsworth vs. CA, *ibid.*

[13] R.A. No. 11659, *An Act Amending C.A. No. 146, otherwise known as the Public Service Act, as amended.* 21 March 2022.

[14] *Rodolfo Albano vs. Hon. Raniero Reyes, et. al.*, G.R. No. 83551, 11 July 1989 as cited in SEC-OGC Opinion No. 18-16 addressed to Rodrigo Berenguer & Guno dated 24 August 2018 and SEC OGC-Opinion No. 19-52 addressed to Ms. Procy Fernandez dated 18 November 2019.

[15] Article XII, Section 11, The 1987 Constitution, 11 February 1987.

[16] SEC-OGC Opinion No. 23-03 addressed to Atty. Bernard G. Flores dated 23 February 2023.

2. A corporation engaged in mixed local and international cargo and freight forwarding activities must be at least 60% owned by Filipino citizens; and
3. A corporation engaged in purely international cargo and freight forwarding activities may be wholly-owned (100%) by foreigners. (Citations omitted)

In short, a corporation not engaged in purely international freight forwarding was clearly considered as a public utility.

After the passage of R.A. No. 11659, the concept of public utility was modified. Section 13(d) of C.A. No. 146[17] now reads as follows:

> (d) *Public Utility.* — Public utility refers to a public service that operates, manages or controls for public use any of the following:
> (1) Distribution of Electricity;
> (2) Transmission of Electricity;
> (3) Petroleum and Petroleum Products Pipeline Transmission Systems;
> (4) Water Pipeline Distribution Systems and Wastewater Pipeline Systems, including sewerage pipeline systems;
> (5) Seaports; and
> (6) ***Public Utility Vehicles.***
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> All concessionaires, joint ventures and other similar entities that wholly operate, manage or control for public use the sectors above are public utilities. (Emphasis supplied)

Section 2(k) of R.A. No. 11659[18] provides the following definition of "public utility vehicle," to wit:

> (k) ***Public Utility Vehicles (PUVs)*** refer to internal combustion engine vehicles that carry passengers and/or domestic cargo for a fee, offering services to the public, namely trucks-for-hire, UV express service, public utility buses (PUBs), public utility jeepneys (PUJs), tricycles, filcabs, and taxis: Provided, That transport vehicles accredited with and operating through transport network corporations shall not be considered as public utility vehicles.

As such, the scope of "public utility" is now limited to public service companies involved **in distribution and transmission of electricity, petroleum and petroleum products pipeline transmission systems, water pipeline distribution systems, wastewater and sewerage pipeline systems, seaports and Public Utility Vehicles (PUV).** The President, however, may, upon recommendation of the NEDA, recommend to Congress the classification of other public services as additional public utility.[19]

All the above notwithstanding, it is worth noting that under Section 4 of RA No. 11659, and Sections 3, 4 and 6 of its Implementing Rules and Regulations (IRR), the relevant administrative agency shall have jurisdiction and exercise supervision over the respective relevant public services or public utilities, as the case may be. By reason of the foregoing, we recommend that you consult with the CAB.

It shall be understood that the foregoing opinion is rendered solely on the basis of 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 upon the courts whether of similar or dissimilar circumstances.[20] 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, LLM, CESO III
General Counsel

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[17] Section 4, R.A. No. 11659, *supra* Note 12.
[18] Section 2(k), R.A. No. 11659, *supra* Note 12.
[19] Section 4, R.A. No. 11659, *supra* Note 12.
[20] Section 7, SEC MC No. 15, Series of 2003, *supra* Note 8.