Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City

ALLIANCE GLOBAL GROUP, INC.,
Appellant,

- versus -

SEC *En Banc* Case No. 05-08-131

CORPORATION FINANCE DEPARTMENT, now known as the Corporate Governance and Finance Department,
Appellee.

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DECISION

For the consideration of the Commission *En Banc* is the *Memorandum on Appeal*[1] filed by appellant Alliance Global Group, Inc. (Alliance Global) on 15 April 2008 assailing the *Order* (Assailed Order) dated 11 September 2007 issued by the then Corporation Finance Department (CFD), now known as the Corporate Governance and Finance Department (CGFD), of the Commission. The pertinent portion of the *Assailed Order*[2] of the CFD reads as follows:

> "In view of the foregoing, [Alliance Global's] pre-emptive stock rights offering cannot be considered an exempt transaction as contemplated under Section 10.1(e) of the SRC and [Alliance Global's] failure to comply with the registration requirements of the SRC prior to its pre-emptive rights offering renders it liable for violation of Sections 8 & 12 of the same law and its Implementing Rules and Regulations.
>
> Thus, [Alliance Global] is directed to comply with the registration requirements under the SRC and is directed to pay the penalty of Thirty Four Million Four Hundred Eighty One Thousand Fifty Two Pesos and Twenty Nine Centavos (P34,481,052.29) x x x"

Alliance Global registered with the Commission on 12 October 1993. Its primary purpose is to engage in the business as a holding company.[3]

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[1] *Memorandum on Appeal* dated 15 April 2008.
[2] *Id*, par. 3.06, and Annex "F" (Assailed Order, pp. 4-5).
[3] Per records the General Information Sheet for the year 2014 of Alliance Global states its primary purpose and that its registration number is AS093-7946, p. 1; Records, 137.

BDO Capital & Investment Corporation (BDO Capital) executed a Letter-Agreement[4] (Agreement) dated 2 January 2007 addressed to Alliance Global in which it agreed to provide the following services:

"**SCOPE AND RANGE OF SERVICES**

As Financial Advisor, [BDO Capital] shall perform the following services:

1. Advise [Alliance Global] in connection with its transformation into a holding company with investments in the various businesses set forth above;
2. Advise and assist in the valuation of its investments such as, but not limited to the [sic], distilled spirits, real estate development, and quick service restaurant businesses, and other businesses set forth above;
3. Assist and advise in finding a cost- and time-efficient means to effect the transaction(s);
4. **Assist in structuring and determining the terms, conditions, and manner or method of such fund-raising exercises of [Alliance Global], such as any *rights* and/or follow- on *offering*;**
5. **Assist in the Information Memorandum and/or prospectus and other offer materials (e.g., *Application to Subscribe*, *Terms and Conditions*, *Notice to Stockholders*) relative to and necessary in any of the foregoing activities;**
6. **Liaise and coordinate with regulatory agencies such as the Securities and Exchange Commission ("SEC"), Philippine Stock Exchange ("PSE"), Philippine Depository and Trust Corporation ("PDTC"), among others, for necessary approvals required in the transformation of, as well as asset infusion into, [Alliance Global] and any fund-raising activities;**
7. **Coordinate the activities of the Legal Counsel, Transfer Agent, Receiving Bank, and other third parties and professional advisors to any of the foregoing activities;**
8. **Assist [Alliance Global] in the computation of *entitlements* and in determining the *final allocations of shareholders*; and,**
9. **Coordinate the participation of *institutional shareholders of AGGI* in any fund-raising exercise.**

TERM

Our commitment and obligations hereunder shall be effective from the date of our receipt of a conformed copy of this Letter Mandate until one (1) year thereafter, or until the earlier of the date of: (i) completion of the transactions contemplated above, or (ii) your advice to us of your decision not to pursue the transactions contemplated above.

PROFESSIONAL FEES

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[4] Memorandum on Appeal, Annex "E" (Agreement).

In consideration of the services of [BDO Capital] as Financial Advisor, the fee to be charged will be on the basis of the following structure:

A Financial Advisory Fee (the "Fee") of Pesos Ten Million (P10,000,000.00) net of gross receipts tax ("GRT"), **which shall be for the account of [Alliance Global]**. For the avoidance of doubt, the Fee to be paid shall be computed as "Fee amount divided by 0.93" based on the present GRT of 7.0%, or such rate as may be applicable at the time of payment. Unless otherwise mutually agreed upon, **the said fees may be payable out of gross proceeds of any fund-raising exercise of [Alliance Global].**

Fees due to the legal counsel, external auditor, and other advisor/s to be engaged by [Alliance Global] shall be for the account of [Alliance Global]. Similarly, documentary stamp tax, capital gains tax, stock transaction tax, value-added taxes, broker's commission, fees due to the SEC, PSE, and PDTC, and all other out-of-pocket expenses shall be for account of [Alliance Global].

x x x

OTHER MATTERS

[Alliance Global] shall provide all information and submit all necessary documents and/or agreements necessary for BDO Capital or its designees to effect the terms of this Letter Mandate.

Should you be amenable to the above, kindly affix sign on the conforme portion of this letter. **This letter shall serve as our binding agreement of our commitment and exclusive mandate *relative to the Rights Offering* upon our receipt of an original of this letter, duly signed by you**. x x x" (Emphasis ours)

On 10 January 2007, Alliance Global filed SEC Form 10.1 (Notice of/Application For Confirmation Exempt Transaction)[5] with the Commission stating, among others, the following:

(i) The exception is based on Section 10.1(e) of the Securities Regulation Code[6] (SRC);

(ii) 2,205,181,000 common shares at Php 1.50 per share, or **an aggregate value of Php 3,307,771,500.00**, is being offered for sale or sold; and

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[5] *Reply Memorandum.*, par. 1. 1 and Annex "A" (SEC Form 10.1).
[6] Republic Act No. 8799 (2000).

(iii)The Offer Shares shall be offered on a pre-emptive rights basis to existing shareholders of Alliance Global and shall be in proportion of one share for every existing share.

On 19 February 2007, Alliance Global filed its Prospectus with the Commission relative to the pre-emptive rights offering to its shareholders.[7]

On 8 March 2007, the CFD, in its letter addressed to Alliance Global, stated that the latter engaged the services of BDO Capital as its financial advisor which is not without cost. Thus, the CFD directed Alliance Global to show cause why it should not be held liable for Sections 8 and 12 of the SRC for selling or offering for sale its securities without prior registration with the Commission.[8]

In response, Alliance Global in its letter dated 23 March 2007[9] stated the following:

a) Its engagement of BDO Capital as financial adviser was not specific to the Rights Offer but to the general corporate restructuring of Alliance Global.

b) The financial advisory fee that BDO Capital is entitled to is relatively minimal compared to the size of the Rights Offer of about Php 3.3 billion and the total value of the transactions involving Alliance Global's major subsidiaries;

c) The advisory fee paid to BDO Capital is not the type covered under Section 10.1 (e) of the Securities Regulation Code since it is not paid in connection with the sale of capital stock to the stockholders; and

d) The payment of the advisory fee did not prejudice any stockholder or the investing public since the rights shares were initially and exclusively offered to existing stockholders.

Thereafter, Alliance Global submitted a letter dated 16 July 2007 on even date reiterating its position that its Rights Offer is an exempt transaction and attached the above-mentioned Agreement with BDO Capital.[10]

On 11 September 2007, the CFD issued the assailed order stating that the explanations of Alliance Global is without merit, and ordered the latter to comply with the

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[7] *Id.*, par. 1.2 and Annex "B" (Prospectus of Alliance Global dated 14 February 2007).
[8] See Note 1, par. 3.03 and Annex "C" (Letter of CFD dated 8 March 2007).
[9] *Id.*, par. 3.04 and Annex "D" (Letter of Alliance Global dated 23 March 2007).
[10] *Reply Memorandum*, par. 1.5 and Annex "E" (Letter of Alliance Global dated 16 July 2007).

registration requirements under the SRC and pay the imposed penalty in the amount of Thirty Four Million Four Hundred Eighty One Thousand Fifty Two Pesos and Twenty Nine Centavos (Php 34,481,052.29).[11]

Alliance Global submitted its letter dated 19 October 2007 on even date requesting a reconsideration of the imposition of penalties and the compliance of the registration requirement.[12] The Commission notified Alliance Global that the latter's letter is treated as an appeal and an appeal must be taken by filing, among others, a Memorandum on Appeal.[13]

On 15 April 2008, Alliance Global filed its *Memorandum on Appeal* praying that the Commission reverse the Assailed Order of the CFD and that a new order be issued stating that the former did not violate Sections 8 and 12 of the SRC.

On 2 September 2008, the CFD filed its *Reply Memorandum* dated 27 August 2008 praying that the Commission dismiss the appeal of Alliance Global for lack of merit.

The sole issue to be resolved is whether or not Alliance Global is exempt under Section 10.1(e) of the SRC from the registration requirements under Sections 8 and 12 of the said law.

Section 8.1 of the SRC provides that securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission. In connection therewith, Section 12.1 of the SRC states that all securities required to be registered under Subsection 8.1 shall be registered through the filing by the issuer in the main office of the Commission, of a sworn registration statement with respect to such securities, in such form and containing such information and documents as the Commission shall prescribe.

However, Section 10.1(e) of the SRC provides an exemption to the registration requirements under Sections 8.1 and 12.1 of the said law, to wit:

> "**Section 10.** *Exempt Transactions.* – 10.1. The requirement of registration under Subsection 8.1 shall not apply to the sale of any security in any of the following transactions: x x x

[11] Memorandum on Appeal, par. 3.06 and Annex "F" (Assailed Order dated 11 September 2007).
[12] *Reply Memorandum*, par. 1.7 and Annex "G" (Letter of Alliance Global dated 19 October 2007).
[13] *Id.*, Annex "H" (Order of the Commission dated 28 February 2008).

(e) The sale of capital stock of a corporation to its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly ***IN CONNECTION WITH*** the sale of such capital stock. x x x"

In the case at bar, Alliance Global cites Section 3(a)(9) of the U.S. Securities Act[14] and claims that Section 10.1(e) of the SRC is substantially patterned after and is almost identical to the said U.S. law.[15] Section 3(a)(9) of the U.S. Securities Act provides, to wit:

"EXEMPTED SECURITIES

SEC. 3. (a) Except as hereinafter expressly provided, **the provisions of this title shall not apply to any of the following classes of securities**: x x x

(9) Except with respect to a security exchanged in a case under title 11, **any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly *FOR SOLICITING* such exchange**" (Emphasis ours)

Alliance Global, in citing a No-Action Letter of the U.S. Securities and Exchange Commission (U.S. SEC), states that "commission" and "remuneration" used in Section 3(a)(9) of the U.S. Securities Act has never been construed as prohibiting an issuer from compensating those who assume ordinary transactional expenses.[16] Moreover, Alliance Global states that "commission" and "remuneration" used in the said provision of the U.S. Securities Act cannot be construed as payment for services in effecting the sale of capital stock but rather in the *promotion* or *solicitation* of the sale of capital stock.[17] In which case, Alliance Global concludes that the "commission" and "remuneration" used Section 10.1(e) of the SRC should not be interpreted to mean "all" forms of commission or remuneration.[18]

It must be pointed out that the original proposed language in Section 3(a)(9) of the U.S. Securities Act prohibited all payments made "*in connection with*" an exchange. However, the statutory language that is enacted provided under Section 3(a)(9) of the U.S. Securities Act now limits only payments made "*for soliciting*" an exchange.[19]

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[14] 1933.
[15] See Note 1, par. 5.02.
[16] *Id.*, par. 5.05 which cites a SEC No-Action Letter dated 4 October 1989 addressed to Simpson Thatcher and Bartlett on behalf of Seaman Furniture Company, Inc.
[17] *Id.*, par. 5.13 which cites "Distribution of Securities to Existing Security Holders as 'Sales to the Public'". 46 Yale L.J. 1071-1077.
[18] *Id.*, par. 5.03
[19] 29-MAR Bull. Bus. L. Sec. St. B. Tex. 27.

In which case, the exemption under 3(a)(9) of the U.S. Securities Act only applies to payment for services in the *promotion* or *solicitation* in the exchange of securities, and that the corporation's financial advisor must not make any recommendation to any security holder regarding the acceptance or rejection of such an exchange.[20]

Section 10.1(e) of the SRC, on the other hand, did not adopt the phrase *"for soliciting"* that is currently used in the said Section 3(a)(9) of the U.S. Securities Act. Instead, Section 10.1(e) of the SRC broadens the services to be provided by employing the phrase "*in connection*" as in the case of the original proposed language in Section 3(a)(9) of the U.S. Securities Act. In which case, the phrase "*in connection with the sale of capital stock*" refers to any activity or service that is provided which has a logical relation to the sale of capital stock; while "soliciting" refers to an activity of asking for the purpose of receiving or trying to obtain.[21] In which case, Section 10.1(e) of the SRC does not exempt transactions in which payments were made for the services or activities "*in connection*" or that has a logical relation to the sale of the capital stock.

Moreover, as correctly pointed out by the CFD,[22] Section 10.1(e) of the SRC also employs the word "INDIRECTLY" which can be construed as payments made for services or activities which are attributable to the offering or sale of capital stock.

Further, contrary to the argument of Alliance Global that the provision should be interpreted as to refer to payments for promotion or solicitation, the language of Section 10.1(e) of the SRC is clear and cannot be interpreted in such manner under the cardinal rule in statutory construction known as the "plain meaning rule" or *verba legis*. The "plain meaning rule" or *verba legis* provides that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application. As the statute is clear, plain, and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation.[23]

In which case, the phrase "*in connection with*" mentioned Section 10.1(e) of the SRC is clear and free from any doubt or ambiguity. There is no room for further interpretation of the phrase "*in connection with*" and such phrase must be given its literal meaning. Moreover, the said phrase must be applied without any other interpretation and should not be interpreted to only to refer to "*soliciting*" as argued by Alliance Global.

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[20] 24 Loy. L.A. L. Rev. 527.
[21] Black's Law Dictionary, Fifth Edition (1979), p. 1248.
[22] *Reply Memorandum*, p. 8.
[23] Bolos v. Bolos, G.R. No. 186400, 20 October 2010.

Lastly, there is a commitment by BDO Capital to render services "*in connection*" with the sale or Rights Offering of shares of Alliance Global to its existing shareholders based on the following provisions of the Agreement:

"**SCOPE AND RANGE OF SERVICES**

As Financial Advisor, [BDO Capital] shall perform the following services: x x x

4. Assist in structuring and determining the terms, conditions, and manner or method of such fund-raising exercises of the Company, such as any *rights* and/or follow- on *offering*;

5. Assist in the Information Memorandum and/or prospectus and other offer materials (e.g., *Application to Subscribe*, Terms and Conditions, *Notice to Stockholders*) relative to and necessary in any of the foregoing activities;

6. Liaise and coordinate with regulatory agencies such as the Securities and Exchange Commission ("SEC"), Philippine Stock Exchange ("PSE"), Philippine Depository and Trust Corporation ("PDTC"), among others, for necessary approvals required in the transformation of, as well as asset infusion into, the Company and any fund-raising activities;

7. Coordinate the activities of the Legal Counsel, Transfer Agent, Receiving Bank, and other third parties and professional advisors to any of the foregoing activities;

8. Assist the Company in the *computation of entitlements* and in determining the *final allocations of shareholders*; and

9. Coordinate the participation of *institutional shareholders of AGGI* in any fund-raising exercise.

x x x

Should you be amenable to the above, kindly affix sign on the conforme portion of this letter. **This letter shall serve as our binding agreement of our commitment and *exclusive mandate relative to the Rights Offering* upon our receipt of an original of this letter, duly signed by you**. x x x"

As can be gleaned above, BDO Capital is heavily involved in the Rights Offering by obliging itself to perform services "*in connection*" or which has a logical relation thereof. These services include, among others, the following: assisting in the determination of the matter of fund raising exercises such as rights offering; assisting in the Rights Offer materials to stockholders of Alliance Global such as the Application to Subscribe and Notice to Stockholders; coordinating the activities of the transfer agent and receiving bank in relation to the Rights Offer; assisting Alliance Global in the computation of entitlements or the shares to be offered to its stockholders; and coordinating the "participation" of institutional shareholders in the rights offering.

In fact, BDO Capital is the "*exclusive mandate relative to the Rights Offering*" which means that it is authorized by Alliance Global to take part in the said offering and will be involved therein as can be seen above. Moreover, BDO Capital will be acting "*exclusively*" on behalf of Alliance Global and no other investment house will be involved in the Rights Offering. Clearly, such services based on the Agreement are directly and indirectly in connection with the Rights Offering of the shares of Alliance Global.

Moreover, the Agreement provides for the payment of services rendered by Alliance Global as follows:

> **"PROFESSIONAL FEES**
>
> In consideration of the services of [BDO Capital] as Financial Advisor, the fee to be charged will be on the basis of the following structure:
>
> **A Financial Advisory Fee (the "Fee") of Pesos Ten Million (P10,000,000.00)** net of gross receipts tax ("GRT"), **which shall be for the account of [Alliance Global]**. For the avoidance of doubt, the Fee to be paid shall be computed as "Fee amount divided by 0.93" based on the present GRT of 7.0%, or such rate as may be applicable at the time of payment. Unless otherwise mutually agreed upon, **the said fees may be payable out of gross proceeds of any *fund-raising exercise* of [Alliance Global].**

Clearly, the Agreement provides an obligation on the part of Alliance Global to pay for the services of BDO Capital or the remuneration "*in connection*" or which has a logical relation to the Rights Offering of shares in the amount of Ten Million Pesos (Php 10,000,000.00). Importantly, the fees or remuneration may be payable out of the gross proceeds of the Rights Offering as provided for in the Agreement.

Hence, Alliance Global is in clear violation of Sections 8 and 12 of the SRC for its pre-emptive stock rights offering without a prior registration or permit to sell issued by the Commission. As a consequence, the penalty imposed by the CFD on Alliance Global is

MODIFIED,[24] and the latter is liable to pay the penalty in the amount of 1% of Three Billion Three and Seven Hundred Million Seven Hundred Seventy One Thousand Five Hundred Pesos (Php 3,307,771,500.00), or Thirty Three Million Seventy Seven Thousand Seven Hundred and Fifteen Pesos (Php 33,077,715.00), in accordance with the Consolidated Scales of Fines (SEC Memorandum Circular No. 6, Series of 2005) for its first offense thereof. Moreover, Alliance Global must comply with the registration requirements under Sections 8 and 12 of the SRC.

WHEREFORE, premises consider, the instant appeal is hereby **DENIED** for lack of merit. Appellant Alliance Global Group, Inc. is hereby ordered to settle the penalty in the amount of Thirty Three Million Seventy Seven Thousand Seven Hundred and Fifteen Pesos (Php 33,077,715.00), in accordance with the Consolidated Scales of Fines (SEC Memorandum Circular No. 6, Series of 2005), to be paid in cash or by Manager's or Cashier's check to this Commission within fifteen (15) days from receipt of this Decision. Further, Alliance Global is hereby directed to comply with the registration requirements under Sections 8 and 12 of Republic Act 8799, otherwise known as the Securities Regulation Code.

SO ORDERED.

FAIL NOT UNDER PENALTY OF LAW.

Mandaluyong City, Philippines; 30 June 2015.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner

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[24] Penalty imposed by the CFD on Alliance Global in the amount of Thirty Four Million Four Hundred Eighty One Thousand Fifty Two Pesos and Twenty Nine Centavos (P34,481,052.29).