Securities and Exchange Commission
PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

10 February 2025

SEC-OGC Opinion No. 25-02
RE: Qualifications and Disqualifications of Independent Directors

Marsha Lourdes P. Conanan-Morato
Corporate Secretary
Asia Pacific Medical Center - Aklan, Inc.
Judge Martelino Road
Andagao, Kalibo, Aklan

Dear Ms. Conanan-Morato:

This refers to your letter dated 29 January 2024 requesting an opinion on whether a hospital consultant in a private hospital is qualified to be an independent director of a corporation operating said hospital.

As disclosed in your letter, Asia Pacific Medical Center - Aklan, Inc. (formerly known as "Allied Care Experts (ACE) Medical Center - Aklan, Inc." and hereinafter referred to as "APMC - Aklan") is a domestic corporation created to establish, maintain, operate, own, and manage hospitals and other related healthcare facilities. Additionally, APMC - Aklan was granted a secondary license to issue securities on 29 June 2021, which required it to have independent directors in its Board of Directors ("Board").

You also stated in your letter that some independent directors of APMC – Aklan, who are also medical doctors, intend to practice as hospital consultants in the same hospital. Thus, the Board wishes to clarify whether the engagement of independent directors as hospital consultants is prohibited under the SEC Memorandum Circular (MC) No. 24, Series of 2019 (MC 24) or the Code of Corporate Governance of Public Companies and Registered Issuers or if it falls under the exemption of "transactions which are conducted at arms' length and are immaterial." The Board is of the position that, since hospital consultants are not hospital employees, the engagement of independent directors as hospital consultants will not affect their independent judgment as directors of the corporation.

We answer your query in the negative.

Independent Director: Definition; Qualifications; Disqualifications

The 2015 Implementing Rules and Regulations of the Securities Regulation Code ("SRC IRR")[1] and MC 24 both define an independent director as "a person who is **independent of management** and the controlling shareholder, and is **free from any business or other relationship which could, or could reasonably be perceived to, materially interfere with his exercise of independent judgment** in carrying out his responsibilities as a director."

[1] Section 38.2 of the 2015 Implementing Rules and Regulations of the Securities Regulation Code.

The presence of independent directors in the Board ensures the exercise of independent judgment on corporate affairs and proper oversight of managerial performance, including prevention of conflict of interests and balancing of competing demands of the corporation.[2]

To this end, it is the Board's duty to "ensure that its independent directors possess the necessary qualifications and none of the disqualifications for an independent director to hold the position."[3] As guidance, MC 24 provides that an independent director is a person who, ideally:

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> h. Is **not retained**, either in his personal capacity or through a firm, as a **professional adviser**, auditor, **consultant**, agent or counsel **of the covered company**, any of its related companies or substantial shareholder, or is otherwise independent of Management and free from any business or other relationship within the two (2) years immediately preceding the date of his election;
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> i. **Does not engage or has not engaged**, whether by himself or with other persons or through a firm of which he is a partner, director or substantial shareholder, **in any transaction with the covered company** or any of its related companies or substantial shareholders, **other than such transactions that are conducted at arm's length and could not materially interfere with or influence the exercise of his independent judgment** within the two (2) years immediately preceding the date of his election;
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> xxx"[4]

Although MC 24 does not provide a definition for an arm's length transaction, the Commission, in its MC No. 11, Series of 2018, otherwise known as the "Rules on the Administration of Government Securities Benchmarks," defines an arm's length transaction as "a transaction between two parties that is concluded on terms that are not influenced by a conflict of interest (e.g., conflicts of interest that arise from a relationship such as a transaction between affiliates)."[5] Thus, for the exemption to apply, an independent director's engagement or transaction with the covered company must not be shrouded by conflict of interest.

Hospital Consultant: Functions; Scope of Work

To determine whether the engagement of APMC – Aklan's independent directors as hospital consultants is prohibited or covered by the exemption under MC 24, an examination of the duties of a hospital consultant must be conducted.

As per Department of Health ("DOH") Administrative Order (AO) No. 2016-0032 and AO No. 92, Series of 2003, a hospital consultant, who may either be visiting or honorary, is a Doctor of Medicine registered with the Professional Regulation Commission ("PRC") with a certificate as a Fellow and/or Diplomate of the relevant accredited specialty society or a doctor who has passed the DOH Medical Specialist Examination, given an appointment by the DOH Secretary or his authorized official and renders teaching, training, as well as consultancy services. Pursuant to DOH AO No. 1, Series of 1999, a hospital consultant is expected to perform the following functions:

1. Render consultative/guidance services to difficult, unusual, and/or complicated cases needing an expert's opinion and management.
2. Prescribe treatment protocols giving emphasis to precautions in acute/complicated cases.

[2] Recommendation 5.2 (Explanation), Code of Corporate Governance for Public Companies and Registered Issuers.
[3] Recommendation 5.3, Code of Corporate Governance for Public Companies and Registered Issuers.
[4] Recommendation 5.3 (Explanation), Code of Corporate Governance for Public Companies and Registered Issuers.
[5] Section 2(a) of SEC Memorandum Circular No. 11, Series of 2018.

3. Ensure proper supervision over resident staff and initiate prescribed corrective measures as indicated.
4. Conduct training for medical residents as well as medical and allied health workers including administrative staff.
5. Conduct regular clinical ward rounds and specialty/sub-specialty clinics.
6. Attend and participate in consultative /administrative conferences of the medical and allied health staff.
7. Coordinate, attend, and participate in clinical conferences and scientific meetings of the hospital or those accredited by the Department.
8. Conduct and actively participate in hospital research projects.
9. Maintain and update the professional standing in their respective specialties.
10. Render special duty in extreme emergency or in the exigency of service.
11. Render/perform other duties as may be required by the Chief of Hospital, Department Head or the Secretary of Health.

It bears emphasis that although the abovementioned DOH AOs specifically apply to public hospital consultants, the professional expectation and standards for private hospital consultants are fairly similar. In *Nograles vs. Capitol Medical Center,*[6] the Supreme Court held that "doctors who apply for [']consultant['] slots, visiting or attending, are required to submit proof of completion of residency, their educational qualifications; generally, evidence of accreditation by the appropriate board (diplomate), evidence of fellowship in most cases, and references." The Supreme Court likewise had the opportunity to discuss the scope of work of private hospital consultants, thus:

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> After a physician is accepted, either as a visiting or attending consultant, he is normally required to attend clinico-pathological conferences, conduct bedside rounds for clerks, interns and residents, moderate grand rounds and patient audits and perform other tasks and responsibilities, for the privilege of being able to maintain a clinic in the hospital, and/or for the privilege of admitting patients into the hospital. In addition to these, the physician's performance as a specialist is generally evaluated by a peer review committee on the basis of mortality and morbidity statistics, and feedback from patients, nurses, interns and residents.
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Commission's Position

A review of the abovementioned functions of a hospital consultant shows that these are not "transactions which are conducted at arms' length and are immaterial" as these necessitate involvement in a hospital's daily operations, management, and fulfillment of goals and policies. An exercise by a hospital consultant of these functions could reasonably be perceived to affect the independent director's objectivity considering that the consultant is expected to coordinate with the hospital staff and patients, and may even be required to perform other duties as instructed by management. As the Commission explained in a previous Opinion, "[A]ny relationship the independent director may have with the covered company must not compromise said director's objectivity and loyalty to the shareholders."[8]

Moreover, the argument that hospital consultants are not considered employees of the hospital is inconsequential considering that the proscribed relationship between the independent director and the covered company is not limited to an employer-employee relationship but covers all business or other relationships which could materially interfere with the exercise of independent judgment.

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[6] G.R. No. 142625, December 19, 2006, citing *Ramos v. Court of Appeals,* 378 Phil. 1198 (1999).
[7] *Id.*
[8] SEC-OGC Opinion No. 11-07 dated 24 May 2007 addressed to RASDizon Law Office.

Thus, the Commission is of the opinion that a hospital consultant is not qualified to be an independent director of the corporation operating the same hospital. In the event that incumbent independent directors of such corporation assume the positions of hospital consultants of the same hospital within the proscribed period, they shall be disqualified to hold the position of independent director.

It shall be understood that the foregoing opinion is rendered solely on the basis of the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the courts, or upon the Commission in other cases of similar or dissimilar circumstances.[9] If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Very truly yours,

ROMUALD C. PADILLA
General Counsel

[9] Section 7 of SEC Memorandum Circular No. 15, Series of 2003.