Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

23 May 2019

SEC-OGC Opinion No. 19-19
Re: Section 23.2 of the Securities and Regulation Code

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Attention: Atty. Zenaida Ongkiko-Acorda

This refers to your letter dated 27 March 2018 requesting an opinion on the interpretation and application of Section 23.2 of the Securities Regulation Code (SRC).

You averred that a director, by himself or through a company or companies beneficially owned by him, buys and sells shares of stock of the issuer during a six-month period. The director earned profits from the purchase and sale transactions. It appears to you that the director committed a short-swing transaction in violation of Section 23.2 of the SRC. You request an opinion on whether it is necessary to prove that the director took advantage of or used material non-public information in buying and selling the shares during the sixth-month period before the director can be held liable under Section 23.2 of the SRC.

The pertinent portion of Section 23.2 of the SRC provides:

> "23.2. For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director or officer by reason of his relationship to the issuer, any profit realized by him from any purchase or sale, or any sale or purchase, of any equity security of such issuer

> within any period of less than (6) months unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, **irrespective of any intention of holding the security purchased or of not repurchasing the security sold for a period exceeding six (6) months.**" (Emphasis supplied)

This pertains to the "short-swing profit" rule which provides that any profit made by a director, an officer, or a 10% beneficial owner of a reporting company, in the purchase and sale, or sale and purchase, of an equity security of such company, within any period of less than six months, belongs to such company, as the issuer. [1]

The issue actually presented is whether it is necessary to prove that the director took advantage of or used material non-public information in buying and selling the shares during the six-month period before the director can be held liable under Section 23.2 of the SRC.

It is not required that there be "insider trading" as contemplated by SRC Section 27. It is sufficient that there be a purchase and sale, or sale and purchase, of an equity security within a period of less than six months. It is immaterial that there be an intention to hold the security purchased for more than six months, or not to repurchase the security sold for a period exceeding six months. [2]

The following elements must be present to sustain an SRC Subsection 23.2 action against a director, an officer, or a 10% beneficial owner, of a reporting company: (a) the transaction must involve an "equity security" of such company, and (b) there must be a matching purchase and sale, or sale and purchase. The defendant must have either purchased at a low price or bought back at a lower price.[3]

The U.S. Supreme Court[4] explained the strict liability of the short-swing profit rule, to wit:

> "The statute requires the insider, short-swing trader to disgorge all profits realized on all 'purchases' and 'sales' within the specified time period, without proof of actual abuse of inside information, and without proof of intent to profit on the basis of such information."

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[1] The Philippine Securities Regulation Code (Annotated), Rafael A. Morales (2005 Ed.), p. 177
[2] Ibid, p. 177
[3] Ibid, p. 178
[4] Kern County Land Co., 411 U.S., at 595

Based on the foregoing, neither intent nor actual use of inside information is required. All that is required is that profit was made from a matching purchase and sale of equity securities within a period of six months by the director, officer or beneficial owner in question.

It shall be understood that the foregoing opinion is rendered based solely on 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.[5] If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

CAMILO S. CORREA
General Counsel

[5] SEC Memorandum Circular 2003-15, No. 7.