Securities and Exchange Commission
PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

SEC OGC Opinion No. 23-07
Re: Secondary license

09 May 2023

DR. KAMYLL ANNE Y. VICTORIA
#25 Broja Subdivision, Poblacion
San Ildefonso, Bulacan

Dear Dr. Victoria:

This refers to your letter dated 24 August 2022[1] requesting for an opinion on whether or not your intended marketing strategy of offering medical value cards would require a secondary license from the Commission.

In your letter, you disclosed the following matters:

a) You are "a group of professionals and businessmen who intend to set up a hospital facility";
b) You intend to offer "medical value cards" which can be purchased by anyone except that for minors, the card would be secured by the parents or guardians;
c) "The card may be paid through spot cash or by installment in terms and conditions (sic) to be provided by the Corporation";
d) "The holder of the card shall be entitled to discounts in board and lodging, laboratories, medical procedure and dental services, subject to certain terms, in participating hospitals to be specified in the value card";
e) "The card is transferable, subject to prior evaluation and approval by the Hospital. The benefits covered by the card may be availed of by the transferee after the said transfer is approved by the Hospital";
f) "The card may be used only by the holder thereof";
g) "The benefits available under the value card may be availed of by the holder thereof only upon full payment of the purchase value";
h) "The card has no expiration period. It may be used by the holder thereof in his lifetime. Upon the holder's death, the card loses its validity; (sic) and may no longer be used by any other individual"; and
i) "The discounts mentioned above are not cumulative and cannot be enjoyed together with other discounts. In case the cardholder is entitled to discounts granted by law, the cardholder shall choose the discount he wants to avail himself of."

You are now requesting for confirmation of your position that your "intended marketing strategy of offering medical value cards would be legally feasible for a corporation without a secondary license."

At the outset, it is important to determine whether or not the proposed activity involves securities. Sections 8 and 12 of Republic Act (R.A.) No. 8799 or the Securities Regulation Code (SRC) provide the

[1] Your letter was received by this Office on 17 October 2022 and the proof of payment was sent on 09 November 2022.

requirement of registration of securities before the same can be sold or offered for sale in the Philippines, to wit:

> SEC. 8. ***Requirement of Registration of Securities.*** — 8.1. 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. Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser.[2]
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> SEC. 12. ***Procedure for Registration of Securities.*** — 12.1. 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. The registration statement shall include any prospectus required or permitted to be delivered under Subsections 8.2, 8.3 and 8.4. [3]

Securities are defined under Section 3.1 of the SRC as follows:

> 3.1 "Securities" are shares, participation or interest in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character. It includes:
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> (a) Shares of stocks, bonds, debentures, notes, evidences of indebtedness, asset-backed securities;
> (b) ***Investment contracts, certificates of interest or participation in a profit-sharing agreement, certificates of deposit for a future subscription***;
> (c) Fractional undivided interests in oil, gas or other mineral rights;
> (d) Derivatives like option and warrants;
> (e) Certificates of assignments, certificates of participation, trust certificates, voting trust certificates or similar instruments;
> (f) Proprietary or non-proprietary membership certificates in corporations; and
> (g) Other instruments as may in the future be determined by the Commission.[4] (Emphasis supplied)

Meanwhile, an investment contract is defined under SRC Rule 26.3.5 of the 2015 Implementing Rules and Regulations of the Securities Regulation Code (SRC-IRR), as follows:

> An investment contract means a contract, transaction or scheme (collectively "contract") whereby a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others. An investment contract is presumed to exist whenever a person seeks to use the money or property of others on the promise of profits.
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> A common enterprise is deemed created when two (2) or more investors "pool" their resources, creating a common enterprise, even if the promoter receives nothing more than a broker's commission.[5]

In ***Roberto Yupangco and Regina De Ocampo vs. OJ Development and Trading Corporation, et. al.***, the Court reiterated the use of the **Howey Test** to determine whether or not an agreement is an investment contract, to wit:

> In our jurisdiction, the "Howey Test" is employed to determine whether an agreement is an investment contract. It requires the concurrence of the following for an investment contract to exists:
>
> (1) a contract, transaction, or scheme;
> (2) an investment of money;
> (3) investment is made in a common enterprise;
> (4) expectation of profits; and
> (5) profits arising primarily from the efforts of others.[6]

One of the key elements of an investment contract is the ***expectation of profits*** which is absent under the disclosed features of the card as the same would only give a lifetime discount to the cardholders in board and lodging, laboratories, medical procedure, and dental services. The nature of investment contract entails that a person seeks to use the money or property of others on the promise of profits. This is absent in your proposed marketing scheme. Further, there is no common enterprise since the "investors," in this case, the purchasers, do not pool their "investments," i.e. the purchase price, in order to derive benefits or profits therefrom. As such, your proposed scheme does not fall under an investment contract for lack of concurrence of all the elements of the Howey Test.

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[2] Section 8.1, Republic Act (R.A.) No. 8799 or the Securities Regulation Code (SRC), 19 July 2000.
[3] Section 12.1, *ibid.*
[4] Section 3.1, *ibid.*
[5] Rule 26.3.5, 2015 Implementing Rules and Regulations of the Securities Regulation Code (SRC-IRR), 04 August 2015.
[6] *Roberto Yupangco and Regina De Ocampo vs. OJ Development and Trading Corporation, et. al.*, G.R. No. 242074, 10 November 2021.

Moreover, the offering of medical value cards does not fall under the other types of securities under Section 3.1 of the SRC.

Considering the foregoing, the offering of medical value cards does not require a secondary license from the Commission.

Nevertheless, please note that this Opinion is without prejudice to the opinion and/or evaluation of other regulatory agencies if the proposed product or activity falls within their jurisdiction.[7]

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 upon the courts whether of similar or dissimilar circumstances.[8] 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

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[7] For example, the medical value cards seem to share features similar to pre-need products and Health Maintenance Organizations (HMOs) which are under the primary and exclusive supervision and regulation of the Insurance Commission and not this Commission. For further clarification, you may also obtain an Opinion from the Insurance Commission. (Section 5, Chapter II, R.A. No. 9829 or the Pre-Need Code, 27 July 2009., See also Section 2 and Section 4(b), Executive Order (E.O.) No. 192, Series of 2015, 12 November 2015.)

[8] Section 7, SEC Memorandum Circular No. 15-03, 16 December 2003.