Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT

In the Matter of:

BORACAY CAPITAL HOLDINGS INC. Company Registration No. 2022090068709-28 x---x	**SEC EIPD Case No. 2024-7699** For: Revocation of Certificate of Incorporation/Registration

ORDER

This resolves the ***Motion for Reconsideration*** dated 18 September 2024 filed by **BORACAY CAPITAL HOLDINGS INC.** (**"Boracay Capital",** for brevity) through its President, **CHRISTINE GRACE A. TOLENTINO,** and Treasurer, **ANTONIO V. ECHAVEZ** in connection with the Order dated 04 September 2024 issued by the Enforcement and Investor Protection Department (EIPD) revoking the company's Certificate of Incorporation/Registration for violation of Section 6(i)(2) and 3 of Presidential Decree 902-A and holding respondents administratively liable for fraudulent act, thus, disqualifying them from being directors of any corporation pursuant to Section 26 of the Revised Corporation Code (RCC).

The main issues raised by the respondents, which we quoted hereunder verbatim, that we find imperative to resolve in its Motion for Reconsideration, are as follows:

xxx "**A. Lack of Fraudulent Intent and Good Faith Actions**

1. **No Intent to Solicit Investments**

   The corporation did not intend to offer or sell securities to the public. The website cited by the SEC was merely a template under development, created by web designers to demonstrate functionality and aesthetic design. No finalized or approved solicitation materials were used, and at no point was the website operational for soliciting investments.

   Intent to Deceive is a Necessary Element of Fraud: Under Philippine law, fraud requires an element of intent to deceive. This is true even in cases involving the sale of securities without prior registration. The mere act of inviting investors, without any intent to deceive, does not constitute fraud.

   xxx

2. **Absence of Actual Fraud or Deception**

   Boracay Capital's business activities complied with the purposes stated in its Articles of Incorporation. The incomplete nature of the website, which was never used to solicit funds, demonstrates good faith. The corporation had no intention to defraud the public, and the evidence does not show any instances of individuals being misled or defrauded by Boracay Capital. Moreover, the absence of any formal complaint from the public further shows that no harm was done.

The SEC Headquarters, 7907 Makati Avenue
Salcedo Village, Brgy. Bel-Air, Makati City
(+63 2) 8818-6337
www.sec.gov.ph | epd@sec.gov.ph

B. Ultra Vires Acts Were Unintentional and Remedied

1. No harm to the Public

While Boracay Capital acknowledges that its initial website design may have conveyed the wrong impression, no actual public solicitation occurred. Any representations beyond the corporation's purpose were unintentional and have since been rectified. The corporation has also ceased any activities that could be interpreted as solicitation."

xxx

Based on the above explanation, respondents prayed for the following reliefs, *viz:*

1. RECONSIDER and REVERSE the Order of Revocation, as Boracay Capital is committed to rectifying any deficiencies and complying with the SEC Regulations;
2. ALLOW Boracay Capital to continue its corporate existence while undertaking corrective measures to meet SEC compliance standards;
3. LIFT the disqualification of CHRISTINE GRACE A. TOLENTINO and ANTONIO V. ECHAVEZ from serving as directors or officers of any corporation, as they are ready to comply with all regulatory requirements;
4. REMOVE any potential criminal liabilities arising from the SEC's findings, in recognition of Boracay Capital's good faith efforts to comply and rectify any violations;
5. IN THE ALTERNATIVE, if deemed necessary, IMPOSE a more lenient administrative penalty such as a fine or suspension, instead of the complete revocation of Boracay Capital's corporate registration. xxx

Based on the foregoing, we now resolve the instant case.

OUR RULING

We find the foregoing arguments to be completely without merit.

Respondents primarily set forth the defense that the website was merely a template under development which was created by web designers to demonstrate functionality and aesthetic design. They also claimed that no approved solicitation materials were used, and the contents on their "non-operational" website does not solicit investments.

Respondents also assert that they have no intention to commit fraud and argue that the mere act of inviting investors, without any intent to deceive, does not constitute fraud. Respondents contend that the absence of any formal complaint from the public indicates that no harm was done. Additionally, Boracay Capital reasons that while the website may have conveyed a wrong impression, there is no actual solicitation that occurred.

The above arguments are misplaced.

Respondent's excuse that their website was non-operational, that there were no approved solicitation materials, and that they had no intention to commit fraud by merely inviting investors is too lame and flimsy to be given credit.

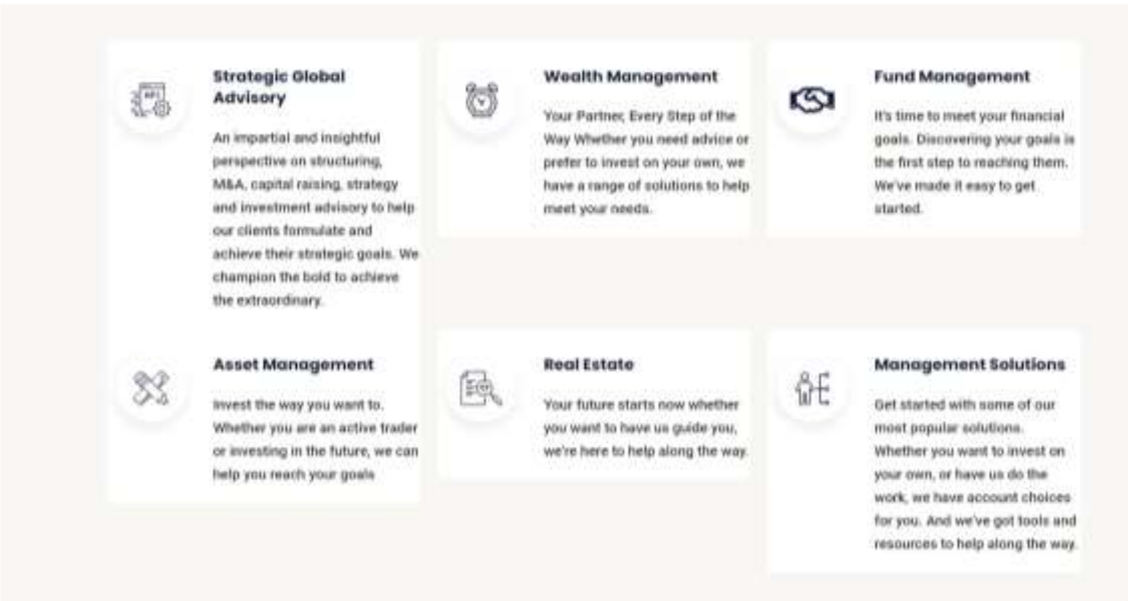
To reiterate, Section 3.1 of the Securities Regulation Code (SRC) defines securities as follows:

> **Section 3.1 – "Securities**" are shares, participation or interests 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:*
>
> (a) xxx;
>
> (b) ***Investment contracts,*** *certificates of interest or participation in a profit sharing agreement, certificates of deposit for a future subscription; xxx*

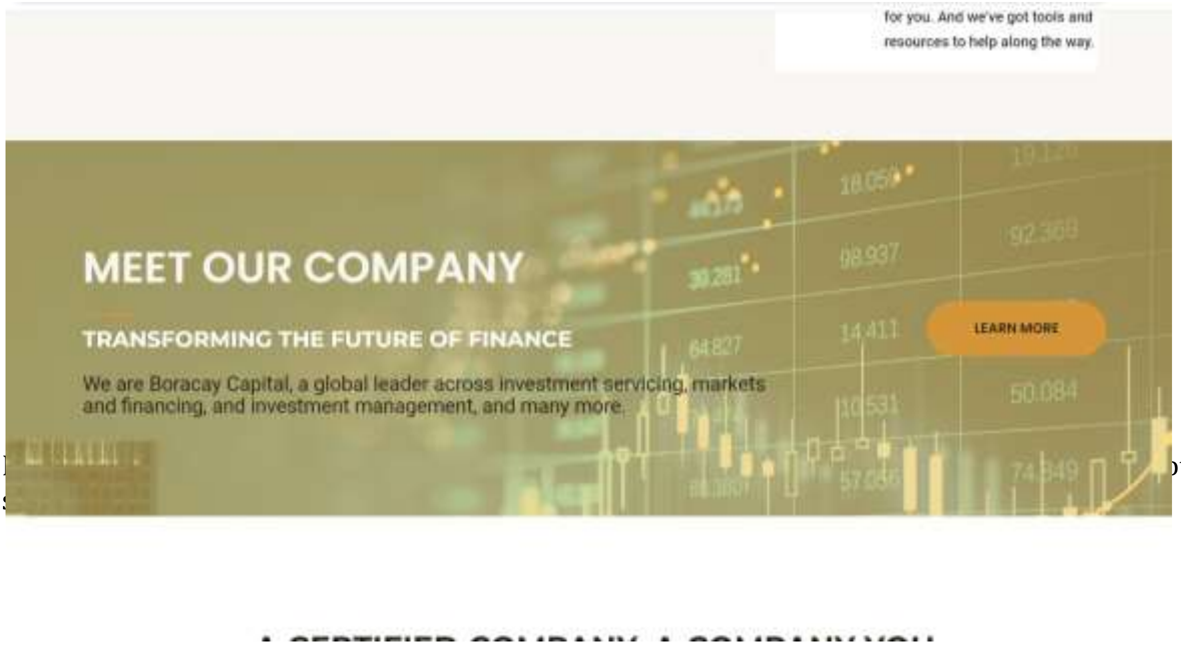
Moreover, Rule 26.3.5 of the SRC 2015 Implementing Rules and Regulations (SRC-IRR) defined an investment contract, to wit:

> *"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.*

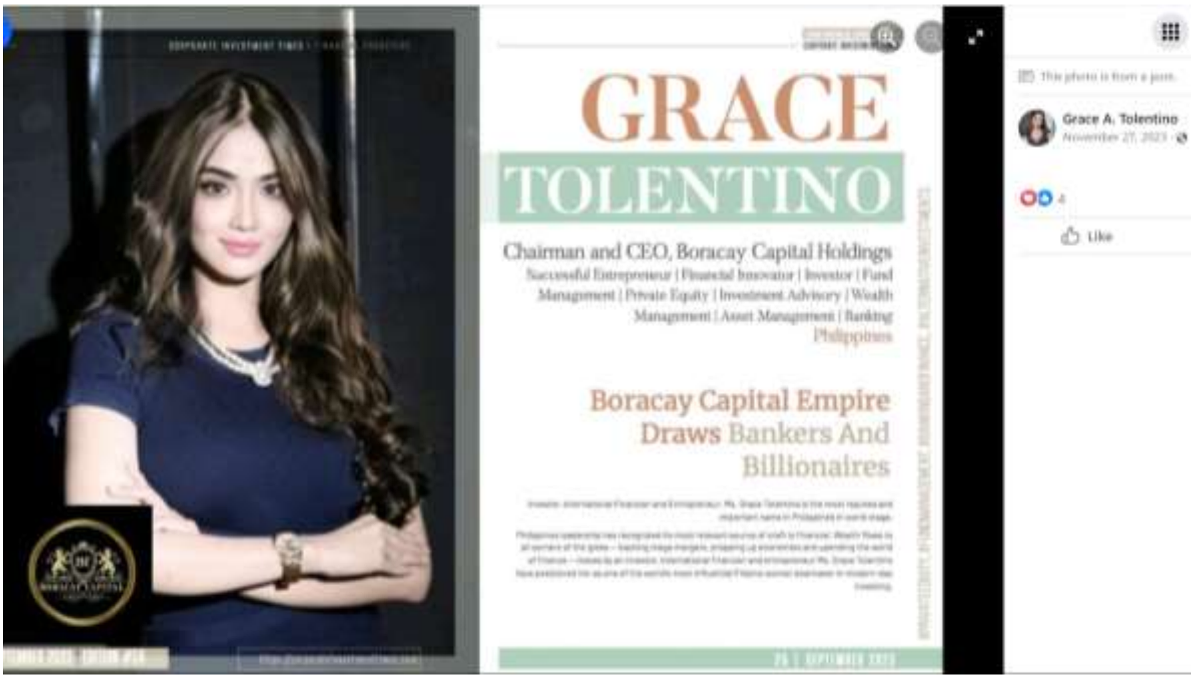
Consequently, Boracay Capital did not refute and, in fact, admitted that it indeed owns a website, then boracaycapital.com, which clearly shows that it is engaged in **Strategic Global Advisory, Asset Management, Wealth Management, Real Estate, Fund Management**, and **Management Solutions.**



Boracay Capital also represented in the said website that it is **a global leader across investment servicing, markets and financing, and investment management,** and many more.



Likewise, respondent Christine Grace Tolentino blatantly stated on her Facebook account that she is the Chairman and CEO of Boracay Capital Holdings. Respondent Grace Tolentino also showcased that she is a successful entrepreneur, financial innovator, and investor, and she engages in fund management, private equity, investment advisory, wealth management, asset management, and banking, as shown below:



Moreover, Boracay Capital's Motion for Reconsideration claimed that the initial design of its website may have conveyed a wrong impression. Therefore, any representations beyond the corporation's purposes were unintentional and have been fully rectified. Respondent also averred that the company has ceased any activities that could be interpreted as solicitation. In fact, following the issuance of the Show Cause Order[1], its website now displays a message indicating its email address at contactus@boracaycapital.com.

As shown below, Boracay Capital claimed to be an investment management company.

1 Dated 29 February 2024.

Thank you for your query and interests in our services.

To open an account in Boracay Capital, you can submit the following SIGN UP CHECKLIST NOW. Prepare:

- 1 valid gov't ID
- 3 signatures on paper
- Proof of preferred address (local/foreign)
- Proof of bank financial statement account (any bank) and bank certificate showing oroof of funds
- 3 Business cards of the bank officers
- Proof of net worth (any documents of assets, investments, properties, business)
- TIN &
- P5,000,000/$5100K initial deposit w/c can be used to buy stocks, investment funds, or bonds. No maintaining balance required.

You'll have 7 days to complete the requirements.
Limited time offer. Limited slots.

Sincerely,
Atty. Charly Ricafort
Head of Compliance and Senior Advisor - KYC and Protection Division
Boracay Capital Holdings

As can be gleaned above, the details indicate that Boracay Capital requires an investment of at least Php5,000,000.00 initial deposit which will be used to buy stocks, investment funds, or bonds.

Meanwhile, this Commission's Company Registration and Monitoring Department (CRMD) certified that:

> *xxx* "records of BORACAY CAPITAL HOLDINGS INC. *xxx* show that it has not been issued a secondary license as a Lending Company, Broker and/or Dealer of Securities, Dealer in Government Securities, Investment Adviser of an Investment Company, Investment House and Transfer Agent. Further, it has not filed nor has any pending application for a secondary license with this Department" xxx

while the Markets and Securities Regulation Department (MSRD) certified that:

> *xxx* "BORACAY CAPITAL HOLDINGS INC., AKAMAI HOLDINGS INC., and BORACAYBEACH INC. have not been issued any license to act as Broker and/or Dealer of Securities, Dealer in Government Securities, Investment Adviser of an Investment Company, Investment House, Transfer Agent and Fund Manager. Also, said entities have not filed Registration Statements that would allow it to sell, offer for sale or distribute securities to the public including Real Estate Investment Trust. Furthermore, no application for said Certificates of Registration or Licenses have been filed or is currently pending with this Department.

Likewise, GRACE A. TOLENTINO, CHRISTINE GRACE A. TOLENTINO and CHRISTINE GRACE ABROGENA TOLENTINO have not been issued Certificates of Registration or Licenses as Capital Market Professionals, such as Associated Persons, Compliance Officers, Salesman of Securities, and/or Certified Investment Solicitors, Dealer in Government Securities, Investment Adviser of an Investment Company, Investment House, Underwriter of Securities, and/or Mutual Fund Distributor. Further, they have not filed nor has any pending application for said Certificate of Registration or License with this Commission.

Accordingly, said entities and individuals are not, under any circumstance, authorized or licensed to engage in activities and/or solicit investments necessarily connected with or incidental to the pursuit of and carrying on the above-mentioned type of business which are required to secure secondary licenses from this Commission" xxx

Also, the Corporate Governance and Finance Department (CGFD) likewise certified that:

xxx "BORACAY CAPITAL HOLDINGS INC., AKAMAI HOLDINGS, INC. and BORACAYBEACH INC. are not registered issuers of mutual funds, exchange traded funds and proprietary/non-proprietary shares or membership certificates and timeshares pursuant to Sections 8 and 12 of the Securities Regulation Code and therefore not licensed to offer or sell securities to the public" xxx

Clearly, Boracay Capital is/has engaged in investment-solicitation without the requisite secondary licenses from this Commission which is in violation of Sections 8 and 12 of the SRC. To give emphasis, mere offering of unregistered securities is already a violation of the SRC. Borrowing the wordings of the Supreme Court as held in the case of *People vs. Oudine Santos (G.R. No. 195542, 19 March 2014),* it instructed that:

"Solicitation is the act of seeking or asking for business or information; it is not a commitment to an agreement." xxx

xxx "Santos, by the very nature of her function as what she now unaffectedly calls an information provider, brought about the sale of securities made by PIPC Corporation and/or PIPC-BVI to certain individuals, specifically private complainants Sy and Lorenzo by providing information on the investment products of PIPC Corporation and/or PIPC-BVI with the end in view of PIPC Corporation closing a sale." xxx

xxx "Individual complainants and the SEC have categorically alleged that Liew and PIPC Corporation and/or PIPC-BVI is not a legitimate investment company but a company which perpetrated a scam on 31 individuals where the president, a foreign national, Liew, ran away with their money. Liew's absconding with the monies of 31 individuals and that PIPC Corporation and/or PIPC-BVI were not licensed by the SEC to sell securities are uncontroverted facts.

The transaction initiated by Santos with SY and Lorenzo, respectively, is an investment contract or participation in a profit-sharing agreement that falls within the definition of the law. When the investor is relatively uninformed and turns over his money to others, essentially depending upon their representations and their honesty and skill in managing it, the transaction generally is considered to be an investment contract. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.

At bottom, the exculpation of Santos cannot be preliminarily established simply by asserting that she did not sign the investment contracts, as the facts alleged in this case constitute fraud perpetrated on the public. xxx"

The investment scheme of **BORACAY CAPITAL** *vis-a-vis* **CHRISTINE GRACE A. TOLENTINO** also operates to defraud investors as it deceives the investing public by making it appear that they have the authority to deal in securities. This also amounts to serious misrepresentation as to what the corporation can do or is doing to the damage and prejudice to the investing public.

In the case of *SEC vs. CJH DEVELOPMENT CORPORATION* (G.R. No. 210316, 28 November 2016) the Supreme Court held that:

> **"The act of selling unregistered securities would necessarily operate as a fraud on investors as it deceives the investing public by making it appear that respondents have authority to deal on such securities.** Section 8.1. of the SRC clearly states 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 SEC and that prior to such sale, information on the securities in such form and with such substance as the SEC may prescribe, shall be made available to each prospective buyer."

Furthermore, the afore-quoted doctrine is apparently anchored on the fact that in our jurisdiction, "fraud" in its general sense, "*[i]s deemed to comprise anything calculated to deceive, including all acts, omissions, and concealment involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another, or by which an undue and unconscientious advantage is taken of another. It is a generic term embracing all multifarious means which human ingenuity can device, and which are resorted to by one individual to secure an advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated. On the other hand, deceit is the false representation of a matter of fact whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed which deceives or is intended to deceive another so that he shall act upon it to his legal injury.*"[2]

Section 26.3 of the SRC, in relation to Rule 26.1 of the 2015 Implementing Rules and Regulations of the Securities Regulation Code (R.A. No. 8799), provide:

> ***"Sec. 26. Fraudulent Transactions****. It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of any securities to:*
>
> ***26.1. Employ any device, scheme or artifice to defraud****;*
>
> ***26.2 Obtain money or property by means of any untrue statement of a material fact of any omission to state a material fact*** *necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or*

[2] People vs. Priscilla Balasa, et. al. (G.R. 106357, September 3, 1998)

> ***26.3. <u>Engage in any act, transaction, practice or course of business which operates or would operate as fraud or deceit upon any person.</u>***"

In addition, the **Financial Products and Services Consumer Protection Act (FCPA**) specifically provides that **any form of deceptive solicitation such as offering or selling of investment scheme from the public without a secondary license or permit** from the Commission already constitutes ***<u>investment fraud</u>*** and is an unlawful activity in violation of Section 11 of the said Act.

Under Section 6 of Presidential Decree 902-A, the Commission has the power to suspend, or revoke, after proper notice and hearing, the franchise of certificate of registration or corporations, partnerships and associations, on the ground of serious misrepresentation as to what the corporation can do or is doing to the to the great prejudice of or damage to the general public. Likewise, Section 5.1 (m) of the SRC and Section 179 (j) of the Revised Corporation Code of the Philippines (RCCP) empower the Commission to revoke the franchise or Certificate of Incorporation/Registration of Corporations registered with it, to wit:

> Under the 2016 Rules of Procedure of SEC, the EIPD shall exercise authority over persons and entities, whether under the primary authority of other Operating Departments involved in the following:
>
> xxx "1. Investigations and administrative actions involving the following:
> xxx c) Selling, offering or transacting unregistered securities by entities without a secondary license;
> d) Ultra Vires acts committed in violation of the Revised Corporation Code;
>
> 2. Petition for revocation[3] of corporate registration in all cases, except those which fall under the original authority.
>
> 3. Administrative actions for fraudulent transactions involving securities;
>
> 4. Administrative actions for all other violations under PD 902-A, except those cases which fall under the original authority of other operating Departments;
>
> 5. All other matters involving investor protection filed by the public, referred by self-regulatory organizations, or referred by other operating departments after initial evaluation or findings that there is a possible violation of laws, rules or regulations that the Commission implements but do not fall under their respective original authority."

Further, SEC Admin Case No. 11-10-124 entitled *In re: PHILBIO Renewable Energy Resources Corp.,* promulgated on 27 April 2016, provides what constitute serious misrepresentation, to wit:

[3] Revocation refers to involuntary dissolution of corporate registration pursuant to Section 138 of the Revised Corporation Code.

> "From the foregoing, it is indubitable that PHILBIO misrepresented itself to the public that it can solicit investments despite the fact that it is **not one of the purposes of the corporation.** Worse, it **does not have a license to offer/sell securities**. PHILBIO operates an investment-taking scheme which is therefore considered an ***ultra vires* act.** These constitute serious misrepresentation as to what the corporation can do or doing to the great prejudice to the general public."

For this reason, the acts committed by the respondents demonstrate a lack of authority from this Commission to offer and/or sell securities. This constitutes serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damage to the general public.

On the issue of procedural due process, respondents argued that there was an incomplete clarificatory process due to their failure to attend in the scheduled conference, thus, this should not be interpreted as a waiver of their right to be heard. To recall, a Show Cause Order was issued by this Department on 29 February 2024 and received by the respondents on 02 March 2024. Subsequently, the respondents filed a Joint Verified Answer[4]. The EIPD then scheduled a Clarificatory Conference on 25 July 2024, however, suspension of work in the government offices was declared due to a typhoon, resulting in the cancellation of the said conference. In lieu of the canceled conference, the department sent another Clarificatory Conference set on 29 August 2024. Despite receipt of this notice, there was neither confirmation nor a request for rescheduling. It is only through this instant motion that the respondents have provided excuses for their failure to attend the rescheduled clarificatory conference.

Respondents' procedural infirmity allegations do not hold water.

Procedural due process is simply when one is given notice and opportunity to be heard or as applied to administrative proceedings, the opportunity to explain one's side or the opportunity to seek reconsideration of the adverse action or ruling.

As emphasized in the case of Primanila Plans, Inc. v. Securities and Exchange Commission (G.R. 193791, 02 August 2014*)*, the Supreme Court pronounced that: *"Due process, as a constitutional precept, does not always and in all situations require a trial type proceeding. Due process is satisfied when a person is notified of the charge against him and given an opportunity to explain or defend himself. In administrative proceedings, the filing of charges and giving reasonable opportunity for the person so charged to answer the accusations against him constitute the minimum requirements of due process. The essence of due process is simply to be heard, or as applied in administrative proceedings, an opportunity to explain one's side, or an opportunity to seek reconsideration of the action or ruling complained of".*

Verily, respondents were given wide latitude to explain their side by filing their Joint Verified Answer to the Show Cause Order and a Motion for Reconsideration on the Order of Revocation.

It is worth emphasizing that the findings of this Department fall sharply within the doctrine of conclusiveness of administrative findings of facts, as established in the case of Navotas Industrial Corporation vs. Alberto C. Guazon, (G.R. No. 230931, 15 November 2021) to wit:

[4] Received on 15 March 2024.

xxx "Under the doctrine of conclusiveness of administrative findings of fact, factual findings of quasi-judicial and administrative bodies, when supported by substantial evidence, are accorded great respect and even finality by the courts. The rationale behind this doctrine is that administrative bodies are considered as specialists in their respective fields and can thus resolve the cases before them with dispatch." xxx

Further, in the same case above, mentioning the case Florally vs. Court of Appeals (*392 Phil. 146 (2000) [Per J. Pardo, En Banc*], it was ruled by the Supreme Court that:

"xxx. Well-settled is the rule in our jurisprudence that the findings of fact of an administrative agency must be respected, as long as such findings are supported by substantial evidence, even if such evidence might not be overwhelming or preponderant. xxx"

xxx. Substantial evidence is the quantum of evidence required to establish a fact in cases before administrative or quasi-judicial bodies. It has been defined as "such amount of relevant evidence [that] a reasonable mind might accept as adequate to justify a conclusion." This quantum of evidence "is established where there is reasonable ground to believe that [a person] is guilty of the act or omission complained of, even if the evidence might not be overwhelming. xxx"

To be candid, the respondents failed to present any evidence that would either support or contradict the findings of this Department, which indicate that Boracay Capital represented by its officers, is engaged in the offering and/or selling of securities to the public without the requisite licenses from the Commission.

On the other hand, their allegations that Boracay Capital has acted in good faith and has already initiated corrective actions to rectify its errors simply demonstrate the corporation's commitment to complying with the SEC regulations cannot prosper.

In the case of *Atty. Cabibihan vs. Allado et al.,* citing the case of *Office of the Ombudsman vs. Brillantes*, the Supreme Court said that:

Good faith necessitates honesty of intention, free from any knowledge of circumstances that ought to have prompted him to undertake an inquiry. xxx

In common usage, the term good faith is ordinarily used to describe that state of mind denoting honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry; an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. ***In short, good faith is actually a question of intention. Although this is something internal, a person's intention can be ascertained by relying not on his own protestations of good faith, which is self-serving, but on evidence of his conduct and outward acts***. (Emphasis supplied.)

Accordingly, after due consideration, it is clear that violations have already been committed by **BORACAY CAPITAL HOLDINGS INC.** and its officers, **CHRISTINE GRACE A. TOLENTINO** and **ANTONIO V. ECHAVEZ**. Therefore, we find no compelling reason to reverse the Order of Revocation or lift the disqualification imposed against its officers.

Moreover, pursuant to Section 54.1 of the SRC and its 2015 SRC-IRR, if after due notice and hearing, the Commission finds that there is violation of the Code, its rules, or its orders, states that:

Section 54.1 of the SRC and 54.1.2 of the IRR:

> xxx A fine of no less than Ten Thousand pesos (P10,000.00) nor more than One million pesos (P1,000,000.00) plus not more than Two Thousand pesos (P2,000.00) for each day of continuing violation." xxx

54.2 of SRC and its IRR:

> xxx "The imposition of the foregoing administrative sanctions shall be **without prejudice to the filing of criminal charges against the individuals responsible for the violation.**" Xxx

WHEREFORE, premises considered, the **Motion for Reconsideration** dated 18 September 2024 filed by **BORACAY CAPITAL HOLDINGS INC.,** and its officers, **CHRISTINE GRACE A. TOLENTINO** and **ANTONIO V. ECHAVEZ** is hereby **DENIED** for lack of merit. The respondents' disqualification from being a director of a corporation for a period of five (5) years, as ruled in the Order of Revocation dated 04 September 2024 is hereby **AFFIRMED.**

Consequently, **BORACAY CAPITAL HOLDINGS INC.** is administratively liable for violation of Section 8 of the Securities Regulation Code in relation to Section 54.1(a) of the 2015 Implementing Rules and Regulations of the SRC (R.A. No, 8799) for selling unregistered securities or investment contracts to the public and are hereby imposed a **FINE** in the amount of **ONE MILLION PESOS (Php1,000,000.00)** and pay the same **WITHIN FIFTEEN (15) DAYS FROM RECEIPT OF THIS ORDER.**

Finally, **respondents and all of its other related entities**, **agents or representatives** are hereby directed to **IMMEDIATELY CEASE AND DESIST FROM OFFERING AND/OR SELLING SECURITIES to the public.**

SO ORDERED.

09 October 2024, Makati City, Philippines.

FILBERT CATALINO F. FLORES III, MNSA, CESO IV
Director

E3/E2/E17/E54/I/M