



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

5 October 2011

SEC-OGC Opinion No. 11-41  
Availability of Pre-emptive Rights;  
Ownership Restrictions in the PSE

**JOSELITO V. BANAAG**

General Counsel

The Philippine Stock Exchange Inc.  
PSE Plaza, Ayala Triangle,  
Ayala Avenue, Makati City 1226

Sir:

This refers to your letter dated 12 August 2011 requesting for opinion on the availability of pre-emptive rights of existing shareholders of the Philippine Stock Exchange Inc. (PSE).

As disclosed in your letter and its attached documents, the PSE's authorized capital stock consisted of 36,800,000 common shares after the demutualization mandate of the Securities Regulation Code (SRC).<sup>1</sup> On May 17, 2008, stockholders owning at least 2/3 of the outstanding capital stock of the PSE approved the increase in authorized capital stock from 36,800,000 to 97,800,000 common shares, at least 25% of which would be subscribed and paid for by a 100% stock dividend equivalent to 15,277,511 shares of stock. On May 15, 2011, stockholders owning 2/3 of the outstanding capital stock approved 100% stock dividend, equivalent to 30,604,363. As a result of the stock dividend, 61,208,726 PSE common shares are presently issued and subscribed while 36,491,274 shares (or around 38% of the authorized capital stock) are unsubscribed and unissued.

Your letter also states (1) that PSE's Articles of Incorporation do not deny pre-emptive rights of its shareholders; (2) that the current stockholder structure of the PSE is as follows:

| Shareholders Category                                     | Ownership |
|-----------------------------------------------------------|-----------|
| Public                                                    | 30%       |
| Brokers                                                   | 32%       |
| Strategic investors:<br>a. Premiere Capital Venture Corp. | 9%        |

<sup>1</sup> Republic Act No. 8799 (2000).

|                         |     |
|-------------------------|-----|
| b. PLDT Retirement Fund | 9%  |
| c. GSIS                 | 9%  |
| d. SMC Retirement Plan  | 11% |

and (3) that there are two prospective investors, namely the Singapore Exchange and the International Finance Corporation, and each has manifested its intent to subscribe to shares representing 15% to 20% of the outstanding capital stock of PSE.

Given the foregoing, PSE seeks advice on whether:

- a. Pre-emptive rights are not available under the present case, because (1) the shares to be offered to the strategic investors are not new shares, but are sourced from the Exchange's unsubscribed capital stock and/or (2) the sale to the strategic investors is in furtherance of the ownership limits prescribed by Sec. 33.2(c) of the SRC, and thus falls under the exceptions recognized by Sec. 39 of the Corporation Code;<sup>2</sup> and
- b. Even assuming that pre-emptive rights are applicable under the circumstances, the pre-emptive right may not be exercised by those shareholders who have already exceeded the ownership threshold laid down by the SRC (i.e. broker-shareholders and strategic investors).

As to your first query, you assert that pre-emptive rights are recognized only with respect to new issues of shares and not with respect to unsubscribed authorized capital shares, pursuant to the doctrine enunciated in *Benito v. SEC*<sup>3</sup> (*Benito case*) and *Dee v. SEC*<sup>4</sup> (*Dee case*), as reiterated in SEC Opinion No. 05-03<sup>5</sup> and SEC-OGC Opinion No. 08-08.<sup>6</sup> You further assert that the sale to the strategic investors is in compliance with the legal limit provided under Section 33.2(c) of the SRC, and therefore, falls under the exceptions enumerated in Section 39 of the Corporation Code.

At the outset, Section 39 of the Corporation Code explicitly states that unless denied in the articles of incorporation or the issuance falls under any of the enumerated exceptions, all existing stockholders of record are entitled to exercise pre-emptive right to subscribe to all issues or disposition of shares of any class of a stock corporation, to wit:

"Section 39. Power to deny pre-emptive right. - All stockholders of a stock corporation shall enjoy pre-emptive right to subscribe to all issues or disposition of shares of any class, in proportion to their respective shareholdings, unless such right is denied by the articles of incorporation or an amendment thereto: Provided, That such pre-emptive right shall not extend to shares to be issued in compliance with laws requiring stock offerings or minimum stock ownership by

<sup>2</sup> Batas Pambansa Bilang 68 (1980).

<sup>3</sup> G.R. No. L-56655, July 25, 1983.

<sup>4</sup> G.R. No. L-60502, July 16, 1991.

<sup>5</sup> Addressed to Atty. Zenaida O. Balmas dated April 27, 2005; in Lex Libris, this is No. 03-05, but per the Commission's filing system, it is No. 05-03.

<sup>6</sup> Addressed to Mr. Haziel Mark Z. Aguayo dated March 31, 2008.

the public; or to shares to be issued in good faith with the approval of the stockholders representing two-thirds (2/3) of the outstanding capital stock, in exchange for property needed for corporate purposes or in payment of a previously contracted debt."

Since Section 39 uses the phrase "all issues or disposition of shares of any class," pre-emptive right extends not only to issuance of new shares resulting from an increase in capital stock, but also to issuance of previously unsubscribed shares which form part of the existing authorized capital stock, as well as to disposition of treasury shares.<sup>7</sup> *Ubi lex non distinguish nec nos distinguere debemos.*<sup>8</sup> Where the law does not distinguish, courts should not distinguish.

Considering that Section 39 of the Corporation Code does not distinguish between newly issued shares and previously unsubscribed shares, we opine that pre-emptive right is available to existing shareholders of PSE upon its issuance of unsubscribed authorized capital stock to potential strategic investors.

Although the Supreme Court held in the Benito case and Dee case that pre-emptive rights are recognized only with respect to new issues of shares, it must be emphasized that the events which gave rise to said cases (i.e. the issuance of shares) took place under the old Corporation Law<sup>9</sup> wherein pre-emptive right is not expressly provided. Thus, when the Corporation Code expressly granted and broadened the extent of pre-emptive right, the principles stated in said two cases no longer apply.

Further, availability of pre-emptive rights in unsubscribed authorized capital stock was not the issue addressed in SEC Opinion No. 05-03 where the query was on the Board of Directors' approval for the unissued portion of the authorized capital stock, and in SEC-OGC Opinion No. 08-08 where one of the issues was the effect of the waiver of pre-emptive rights by votes representing more than 2/3 of the outstanding capital stock over the remaining who did not wish to waive their pre-emptive rights.

More in point are SEC Opinion dated 30 September 1992 addressed to Industrial Security Consultancy and Management Inc. and SEC Opinion dated 10 March 2000 addressed to Radio Philippines Network Inc. (RPN). In both opinions, the Commission opined that the issuance of shares referred in the Benito and Dee cases occurred under the old Corporation Law (Act No. 1459, as amended) where pre-emptive right of existing stockholders to subscribe to new issuances is not expressly provided. Under the present law, the Corporation Code now expressly mandates the grant of pre-emptive right except in those situations falling under the exceptions enumerated therein. It was further opined in SEC Opinion dated 10 March 2000 to RPN that all issuances or disposition of shares by a corporation after the effectivity of the Corporation Code shall be subject to Section 39 of the Corporation Code.

<sup>7</sup> J. Campos Jr. and M.C. Lopez-Campos, *The Corporation Code: Comments, Notes and Selected Cases* 54 (Vol. II 1990).

<sup>8</sup> *United BF Homeowners Association v. The Brgy Chairman and Sangguniang Barangay of BF Homes Paranaque*, G.R. No. 140092, 08 September 2006.

<sup>9</sup> Act No. 1459 (March 01, 1906).

Neither is the issuance of shares to potential strategic investors fall under the exceptions enumerated in Section 39 of the Corporation Code. It is apparent from Section 39 that pre-emptive right does not extend to the issue of shares made in compliance with laws requiring stock offerings or minimum stock ownership by the public. However, PSE's issuance of shares to potential strategic investors to comply with Section 33.2(c) of the SRC cannot be considered as one in compliance with laws requiring stock offerings or minimum stock ownership. Section 33.2(c) of the SRC clearly provides a maximum, not the minimum, limit on stock ownership, and does not necessarily require the issuance of shares to comply with the legal requirements provided therein, to wit:

"Section 33.2. Registration of an Exchange shall be granted upon compliance with the following requirements: x x x (c) Where the Exchange is organized as a stock corporation, that **no person may beneficially own or control, directly or indirectly, more than five percent (5%) of the voting rights of the Exchange and no industry or business group may beneficially own or control, directly or indirectly, more than twenty percent (20%) of the voting rights of the Exchange:** Provided, however, that the Commission may adopt rules, regulations or issue an order, upon application, exempting an applicant from this prohibition where it finds that such ownership or control will not negatively impact on the exchange's ability to effectively operate in the public interest." (Underscoring and Emphasis Supplied).

Further, it must be emphasized that when the statute itself enumerates the exceptions to the application of the general rule, the exceptions are strictly but reasonably construed.<sup>10</sup> The exceptions extend only as far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exceptions.

Accordingly, pre-emptive right is available to existing shareholders of PSE in the instant case because (1) the law in granting pre-emptive rights to existing shareholders makes no distinction between newly issued shares and unsubscribed original authorized capital stock; (2) PSE's Articles of Incorporation do not deny pre-emptive rights to its shareholders and (3) the issuance of shares to potential strategic investors does not fall among the exceptions enumerated in Section 39 of the Corporation Code.

As to your second query, please be advised that pre-emptive right may be exercised by existing PSE shareholders to the extent that individual or industry sector or business group ownership does not exceed the threshold laid down in Section 33.2(c) of the SRC.

While existing PSE shareholders may have pre-emptive right to subscribe to all issues or disposition of PSE shares, Section 33.2(c) of the SRC explicitly provides ownership restrictions that limit the ability of an individual or industry sector or business group to control an Exchange. It must be pointed out that such limitation has been included in the SRC to address possible abuses which may arise in connection with the

<sup>10</sup> Luis Lokin v. Comelec, G.R. Nos. 179431-32 and G.R. No. 180443, 22 June 2010.

control of the PSE so that it will develop and effectively operate in the public interest and to achieve better corporate governance.<sup>11</sup>

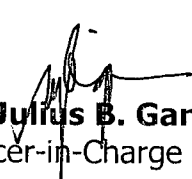
Further, it should be emphasized that Section 33.2 (c) of the SRC takes precedence over Section 39 of the Corporation Code. The specific public policy limiting industry ownership of an Exchange necessarily prevails over the pre-emptive right generally granted to shareholders of private companies. In fact, Section 40.2 of the SRC explicitly requires every self-regulatory organization including PSE to comply with the provisions of the SRC, notwithstanding the provision of the Corporation Code to the contrary, to wit:

"Section 40.2. Every self-regulatory organization shall comply with the provisions of this Code, the rules and regulations thereunder, and its own rules, and enforce compliance therewith, **notwithstanding any provision of the Corporation Code to the contrary**, by its members, persons associated with its members or its participants." (Underscoring and Emphasis Supplied).

Thus, pre-emptive right may not be exercised by PSE shareholders who have already exceeded the ownership threshold laid down by the SRC.

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 Commission whether of similar or dissimilar circumstances.<sup>12</sup> If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

  
**Vesper Julius B. Garcia**  
Officer-in-Charge

<sup>11</sup> History/Background of the Securities Regulation Code 55 (September 15, 2001), cited in R.A. Morales, The Philippine Securities Regulation Code (Annotated) 242 (2005).

<sup>12</sup> SEC Memorandum Circular No. 15, series of 2003.