Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

09 December 2024

SEC-OGC Opinion No. 24-40
Re: Buy-Back of Shares after Automatic Delisting

PNOC EXPLORATION CORPORATION
PNOC Building 1, Energy Center
Rizal Drive, Bonifacio Global City,
Taguig, Philippines 1634

Attention: MR. FRANZ JOSEF GEORGE E. ALVAREZ
President and CEO

Dear Mr. Alvarez:

This refers to your letter[1] requesting for a legal opinion regarding the re-acquisition by the PNOC Exploration Corporation (PNOC EC) of its own shares after its involuntary delisting from the Philippine Stock Exchange (PSE) due to its failure to comply with the Amended Rules on Minimum Public Ownership (MPO Rules).

In said letter, you stated that the PNOC EC, acting on the government's instruction not to proceed with the sale of additional shares to comply with the MPO Rules, was automatically delisted from the PSE resulting in the suspension of trading of its shares on 1 July 2013. Subsequently, it sent a letter[2] to this Commission seeking clarification on the rules and procedures on the buy-back of shares of a company that has been involuntarily delisted. Then Director Justina F. Callangan of the Corporation Finance Department (CFD), in her letter dated 12 August 2013, informed the PNOC EC that it is not required to repurchase its shares and that its investors continue to be protected since PNOC EC remains to be a public company.

You noted in your letter that it might be impractical to go through the entire tender process considering the small number of shares and the small percentage of the public ownership in PNOC EC subject of the buy-back, *i.e.* 0.21% (99.79% being owned by PNOC), or about 1,300 individual shareholders.

Relative to this, you are requesting the Commission's opinion on the following:

1. Whether PNOC EC may buy-back its shares; and
2. Whether in such buy-back, the rules on tender offer under Rule 19 of the 2015 Implementing Rules and Regulations of the Securities Regulation Code (SRC IRR) may be applied analogously, especially Rules 19.6, 19.7, 19.8, and 19.2.6 to 19.6.2.8 thereof.

It is your position that PNOC EC is not prohibited from reacquiring its own shares since Section 41 of the Corporation Code (now Section 40 of the Revised Corporation Code or "RCC") grants every corporation the right to acquire its own shares provided that the corporation has unrestricted retained earnings and there is a legitimate corporate purpose. Therefore, since there are no specific rules to re-

[1] Dated 22 May 2017
[2] Dated 31 July 2013

acquire the shares of a corporation which has been involuntarily delisted before the PSE, the rules on tender offer under the Rule 19 of the SRC IRR may be applied analogously.

Section 40 of the RCC reads:

> "SEC. 40. Power to Acquire Own Shares. – **Provided that the corporation has unrestricted retained earnings** in its books to cover the shares to be purchased or acquired, a stock corporation shall have the power to purchase or acquire its own shares **for a legitimate corporate purpose or purposes,**_including the following cases: (a)To eliminate fractional shares arising out of stock dividends; (b)To collect or compromise an indebtedness to the corporation, arising out of unpaid subscription, in a delinquency sale, and to purchase delinquent shares sold during said sale; and (c)To pay dissenting or withdrawing stockholders entitled to payment for their shares under the provisions of this Code."

On the basis of the afore-quoted provision, any stock corporation is expressly empowered by the RCC to acquire its own shares provided that the following requisites are present: (1) existence of unrestricted retained earnings under the books of the corporation; and (2) said power is exercised for a legitimate corporate purpose, regardless of whether the same is expressly provided for in the corporation's Articles of Incorporation.

For public companies[3], Rule 19.4.1 of the SRC-IRR provides:

> "19.4. Tender Offer by an Issuer or Buy Back
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> 19.4.1. **A reacquisition or repurchase by an Issuer of its own securities shall only be made if such Issuer has unrestricted retained earnings** in its books to cover the amount of shares to be purchased, and is undertaken for any of the following purposes:
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> 19.4.1.1. To implement a stock option or stock purchase plan;
> 19.4.1.2. To meet short-term obligations which can be settled by the re-issuance of the repurchased shares;
> 19.4.1.3. To pay dissenting or withdrawing stockholders entitled to payment for their securities under the Corporation Code; and
> 19.4.1.4. Such other legitimate corporate purpose/s."

Thus, to answer your first query, for as long as the foregoing conditions are complied with, PNOC EC may reacquire its shares.

As to your second query, please take note that the PSE issued the ***Consolidated Listing and Disclosure Rules[4](PSE Rules)***, Article III, Part G, Section 8 of which provides for the consequences for non-compliance with the post-listing requirement for issuers whose securities are listed by way of introduction, to wit:

> "SECTION 8. Consequences for Non-Compliance with the Post-Listing Requirement – In the event the Issuer is unable to conduct the required public offering within the one (1)-year period prescribed under Section 7 hereof, the Exchange shall impose **any one (1) or a combination** of the following sanctions at the discretion of the Exchange:
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> a) Suspend the trading of the Issuer's securities;
> b) Sanction the Issuer by, among others, doubling the annual listing maintenance fees payable by the Issuer; or
> c) Subject to the provisions of the Corporation Code and the rules and regulations of the Commission, **require the Issuer to buy-back its securities within ninety (90) days from the lapse of the one (1)-year period and delist the Issuer's securities from the official registry of the Exchange with prior written notice** to the Issuer and without necessity of a hearing. In case of a buy-back, the Exchange shall **require the company to employ an independent party to conduct a valuation of the class of securities** of the company that are to be delisted, which is in accordance with the Guidelines for Fairness Opinion and Valuation Reports."

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[3] *"Public Company"*, under Paragraph 3.1.16, Rule 3 of the 2015 SRC-IRR, "means any corporation with a class of equity securities listed on an Exchange, or with assets in excess of Fifty Million Pesos (PhP 50,000,000.00) and has two hundred (200) or more holders each holding at least one hundred (100) shares of a class of its equity securities."
[4] Published as of April 2024

In relation thereto, the PSE Rules describes the listing of securities by way of introduction as either of the following circumstances:

a) Where securities for which listing is sought are already listed or traded or will simultaneously be listed in another stock exchange or, subject to the approval of the Exchange, are listed on another trading market;
b) Where the securities of an unlisted Issuer are distributed by way of property dividend by a listed Issuer to shareholders of that listed Issuer;
c) Where a holding company is formed and its securities are issued in exchange for the securities of one or more listed Issuers and the listing of the listed Issuer or Issuers is withdrawn at the same time as the securities of the Issuer are listed;
d) Where listing of securities in an exchange is mandated by law or by the Commission, in the exercise of its powers under the SRC; or
e) Where public offering of securities is mandated by law or applicable regulations; *Provided That*, the Applicant Company secures a clearance from the relevant agency stating that such agency does not object to the listing by way of introduction of the securities of the Applicant Company; *Provided, further*, that an Applicant Company which is considered as a "closely-held corporation," as such term is defined under Section 127(B) of the National Internal Revenue Code of 1997, as amended, is not qualified to list by way of introduction under this subsection (e). A subsidiary company that is qualified to list under subsection (e) hereof cannot list its holding company which does not meet the requirements of this section.

Notwithstanding the above, the PSE Rules narrows down the issuers listed by way of introduction who are required to comply with the post-listing requirement, to wit:

> "SECTION 7. Post-Listing Requirement – **An Issuer whose securities are listed by way of introduction pursuant to Sections 1(d) or 1(e) hereof, shall undertake a public offering within one (1) year from the listing of its securities in the Exchange, and comply with the minimum public ownership requirement of the Exchange.** At the time of the initial listing, the Issuer should disclose the indicative terms and the timetable of its public offering. Notwithstanding the foregoing, the Exchange may require the Issuer to undertake the public offering at any time within the one (1) year period should there be a significant demand for the securities thereof. The required public offering shall be in accordance with the "Distribution of Initial Public Offering Shares Through the Exchange" under Article III, Part F of the Rules."

Thus, only those issuers (1) who are mandated by law or by the Commission to list their securities in an exchange, or where public offering of securities is mandated by law or applicable regulations subject to the clearance from the relevant agency allowing the issuers to list their securities by way of introduction, and (2) who fail to comply with the post-listing requirement, may be required to buy-back their shares under the PSE Rules and follow the procedure prescribed thereunder.

Applying the foregoing, we are unable to offer a definitive conclusion on the application of the abovementioned provisions to PNOC EC, due to the incomplete nature of the information you provided. Thus, we recommend that you consult the PSE for guidance on this matter.

However, assuming that the requirement to buy-back under the foregoing PSE Rules does not apply to PNOC EC, we answer your second query as follows:

Rule 19.4.2 of the SRC IRR provides:

> "19.4.2. An Issuer that intends to reacquire its own securities **through active and widespread solicitation from the stockholders in general and in substantial amounts[5] as the Commission**

[5] Rule 19.2 Mandatory Tender Offers
19.2.1. Any person or group of persons acting in concert, who intends to acquire fifteen percent (15%) of equity securities in a public company in one or more transactions within a period of twelve (12) months, shall file a declaration to that effect with the Commission
19.2.2. Any person or group of persons acting in concert, who intends to acquire thirty five percent (35%) of the outstanding voting shares or such outstanding voting shares that are sufficient to gain control of the board in a public company in one or more transactions within a period of twelve (12) months, shall disclose such intention and contemporaneously make a tender offer for the percentage sought to all holders of such securities within the said period.
If the tender offer is oversubscribed, the aggregate amount of securities to be acquired at the close of such tender offer shall be proportionately distributed across selling shareholders with whom the acquirer may have been in private negotiations and other

> **may determine** shall comply with the disclosure and procedural requirements provided for in SRC Rules 19.4.3 and 19.4.4, and the preceding provisions of this Rule." (Emphasis supplied)"

Considering that the shares subject of the buy-back plan will not breach the percentage threshold provided under the SRC and its IRR (PNOC EC being the owner of 99.79 of the shares), we are of the opinion that the requirements under the afore-quoted Rule 19.4.2 do not apply.

However, PNOC EC may, at its option, apply the same by analogy, including Rules 19.6, 19.7, and 19.8 of the SRC IRR on the requirements on filing, disclosure and dissemination, respectively, and Rule 19.2.6 to 19.6.2.8 of the SRC IRR on the conduct of valuation and issuance of a fairness opinion by an independent firm.

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed 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.[6] 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.

ROMUALD C. PADILLA
General Counsel

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shareholders. For purposes of SRC Rule 19.2.2, the last sale that meets the threshold shall not be consummated until the closing and completion of the tender offer]

19.2.3. Any person or group of persons acting in concert, who intends to acquire thirty five percent (35%) of the outstanding voting shares or such outstanding voting shares that are sufficient to gain control of the board in a public company through the Exchange trading system shall not be required to make a tender offer even if such person or group of persons acting in concert acquire the remainder through a block sale if, after acquisition through the Exchange trading system, they fail to acquire their target of thirty five percent (35%) or such outstanding voting shares that is sufficient to gain control of the board.

19.2.4. Any person or group of persons acting in concert, who intends to acquire thirty five percent (35%) of the outstanding voting shares or such outstanding voting shares that are sufficient to gain control of the board in a public company directly from one or more stockholders shall be required to make a tender offer for all the outstanding voting shares. The sale of shares pursuant to the private transaction or block sale shall not be completed prior to the closing and completion of the tender offer.

19.2.5. If any acquisition that would result in ownership of over fifty percent (50%) of the total outstanding equity securities of a public company, the acquirer shall be required to make a tender offer under this Rule for all the outstanding equity securities to all remaining stockholders of the said company at a price supported by a fairness opinion provided by an independent financial advisor or equivalent third party. The acquirer in such a tender offer shall be required to accept all securities tendered.

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