Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

# OFFICE OF THE GENERAL COUNSEL

26 November 2024

**SEC-OGC Opinion No. 24-38**
Re: Mandatory Tender Offer Rule

**ROQUE & BUTUYAN LAW OFFICES**
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Makati City

**Attention:** **ATTY. JOEL RUIZ BUTUYAN**
**ATTY. ROGER R. RAYEL**
**ATTY. GEPEE ACERON GONZALES**

Dear Gentlemen:

This refers to your letter[1] requesting for an opinion in behalf of your client, Consolidated Mines, Inc. (the "CMI"), that is contemplating on raising funds to be used for corporate purposes.

You stated in your letter that CMI is a public company and, in order to raise capital, is considering calling on existing shareholders to subscribe to additional shares up to a maximum of 100% of their current shareholding. According to you, the shares to be issued will be taken from the unissued shares of the company. In addition, you mentioned that while the unissued shares are sufficient to cover 100% of the outstanding shares, the additional shares to be issued may not be of the same class as that currently owned by the shareholders. CMI has Class A and B common shares which have the same rights and privileges except that Class A shares are exclusive to Filipino citizens.

You likewise stated that one of the existing shareholders who might subscribe to said additional shares, Shareholder A, currently owns 49% of the outstanding shares of the company.

In relation to the proposed transaction, you are requesting guidance on the following:

1. If only Shareholder A responded to the request for additional subscription or if the resulting structure is that Shareholder A will own more than 50% of the outstanding shares of CMI, will the mandatory tender offer rule still apply? If so, is Shareholder A required to pay for all tendered shares, including those subscribed to after the call for additional subscription?
2. Are the shareholders who did not respond to the CMI's call for additional subscription considered to have waived their right in the tender offer?

[1] Dated 25 April 2017

3. Under the same transaction, may the shareholders assign their right to subscribe to their respective proportionate share to any other shareholder, including Shareholder A?
4. If instead of the additional subscription to be paid in cash, the advances of Shareholder A are converted to equity and as a result Shareholder A becomes the majority owner, will the mandatory tender offer rule apply? At what stage will Shareholder A have to comply with the tender offer rule? Upon application for approval of conversion or upon approval? Will the same conversion rate approved by the Commission be used in determining the purchase price for all tendered shares?
5. What procedural and substantive requirements must CMI and/or Shareholder A comply with in the options contemplated?

***Mandatory Tender Offers***

Tender offer is a publicly announced intention by a person acting alone or in concert with other persons to acquire equity securities of a public company.[2] Rule 19 of the Implementing Rules and Regulations (IRR)[3] of the Securities Regulation Code[4] defines tender offer:

> "**19.1.8.** "**Tender offer**" means a publicly announced intention by a person acting alone or in concert with other persons (hereinafter referred to as "person") to acquire outstanding equity securities of a public company[5] as defined in SRC Rule 3, or outstanding equity securities of an associate or related company of such public company which controls the said public company."

Rule 19.2 of the SRC IRR provides for the cases in which the mandatory tender offer rule applies, to wit:

> "**19.2. Mandatory Tender Offers**
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> 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.
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> 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.
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> 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 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.
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> 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

[2] CEMCO Holdings, Inc. vs. National Life Insurance Company of the Philippines, Inc., G.R. No. 171815, 7 August 2007.
[3] 2015 Implementing Rules and Regulations of the Securities Regulation Code, IRR of RA 8799, 4 August 2015
[4] Republic Act (RA) No. 8799, Securities Regulation Code, 19 July 2000.
[5] *Supra*, no. 3, Rule 3.1.16. Public company means any corporation with a class of equity securities listed on an Exchange, or with assets in excess of Fifty Million Pesos (PhP50,000,000.00) and has two hundred (200) or more holders, each holding at least one hundred (100) shares of a class of its equity securities.

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 be required to accept all securities tendered.**" *(Emphasis supplied)*

The purpose of mandatory tender offer is to ensure that minority shareholders get the same benefit for their shares as the controlling shareholders[6]. It gives the minority shareholders the chance to exit the company under reasonable terms, giving them the opportunity to sell their shares at the same price as those of the majority shareholders.[7]

Meanwhile, Rule 19.3 enumerates the exemptions from the mandatory tender offer requirement, to wit:

**"19.3. Exemptions from the Mandatory Tender Offer Requirement**

19.3.1. Unless the acquisition of equity securities is intended to circumvent or defeat the objectives of the tender offer rules, the mandatory tender offer requirement shall not apply to the following:

**19.3.1.1. Any purchase of securities from the <u>unissued capital stock</u>; <u>Provided, the acquisition will not result to a fifty percent (50%) or more ownership of securities by the purchaser or such percentage that is sufficient to gain control of the board;</u>**

xxx xxx xxx"

The mandatory tender offer rule does not apply only to direct acquisition of shares in the public company.[8] The legislative intent of Section 19 of the SRC[9] is to regulate activities relating to acquisition of control of the listed company and for the purpose of protecting the minority stockholders of a listed corporation. Whatever may be the method by which control of a public company is obtained, either through the direct purchase of its stocks or through an indirect means, mandatory tender offer applies.[10]

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[6] SEC Opinion No. 01-03, 7 January 2003.
[7] *Supra*, no. 2.
[8] *Id.*
[9] SEC. 19. Tender Offers. -19.1. (a) Any person or group of persons acting in concert who intends to acquire at least fifteen per cent (15%) of any class of any equity security of a listed corporation or of any class of any equity security of a corporation with assets of at least Fifty Million Pesos (P50,000,000.00) and having two hundred (200) or more stockholders with at least one hundred (100) shares each or who intends to acquire at least thirty per cent (30%) of such equity over a period of twelve (12) months shall make a tender offer to stockholders by filing with the Commission a declaration to that effect; and furnish the issuer, a statement containing such of the information required in Section 17 of this Code as the Commission may prescribe. Such person or group of persons shall publish all requests or invitations for tender, or materials making a tender offer or requesting or inviting letters of such a security. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may prescribe, and shall be filed with the Commission and sent to the issuer not later than the time copies of such materials are first published or sent or given to security holders.
[10] *Supra*, no. 2.

To answer your first query, based on the foregoing, a purchase of securities from the unissued shares of a public company is exempt from the mandatory tender offer requirement as long as the acquisition will not result to a fifty percent (50%) or more ownership of securities by the purchaser or such percentage that is sufficient to gain control of the board.

Thus, in your example, while the shares to be purchased by Shareholder A will come from the unissued capital stock, the same will still not fall under the exemptions to the mandatory tender offer requirements since Shareholder A will own more than 50% of the outstanding shares of the company. **As such, the mandatory tender offer rule under Rule 19.2.5 of the SRC IRR will apply** and Shareholder A will be required to make a tender offer for all the outstanding equity securities to all the remaining stockholders at a price supported by a fairness opinion issued according to the guidelines under the IRR. Shareholder A would be required to accept all the shares tendered within the period the offer was open, and either pay for, or return, the tendered shares not later than ten (10) business days after the termination of the tender offer.[11]

***Period and Manner of Making Tender Offers***

Rule 19.9 of the SRC IRR provides for the period and manner of making tender offers, to wit:

**"19.9. Period and Manner of Making Tender Offers**

**19.9.1.** A tender offer shall, unless withdrawn, remain open until the expiration of:

19.9.1.1. At least twenty (20) business days from its commencement; Provided, that an offer should as much as possible be completed within sixty (60) business days from the date the intention to make such offer is publicly announced; or

19.9.1.2. At least ten (10) business days from the date the notice of a change in the percentage of the class of securities being sought or in the consideration offered is first published, sent or given to security holders."

In relation to your second query, neither the SRC nor its IRR provides that the failure of the shareholder to respond to a corporation's call for additional subscription is considered a waiver of their right in the tender offer. Rather, Rule 19.11 of the SRC IRR states:

**"19.11. Withdrawal or Lapse of the Tender Offer**

Unless with the prior approval of the Commission, if an offer has been announced but has not become unconditional in all respects and has been withdrawn or has lapsed, **neither the Offeror** nor any person who acted in concert with it in the course of the offer **may, within six (6) months from the date on which such offer has been withdrawn or has lapsed, announce an offer for the target company nor acquire any securities of the target company which would require such person to make a mandatory tender offer** under this Rule and Section 19.1 of the Code."

The lapse of the offer shall prevent the offeror, within the stated 6-month period, to announce another offer or acquire any securities of the target company[12] which would require such person to make a mandatory tender offer under the SRC or its IRR, without prior approval from the Commission.

***Subscription of Shares***

The Revised Corporation Code (RCC)[13] provides that shares of stock are **personal property** and may be transferred by delivery of the certificate or certificates indorsed by the by the owner, his attorney-

[11] *Supra*, no. 3, Rule 19.9.7.
[12] *Ibid*., Rule 19.1.7. "Target company" means any Issuer whose equity securities are sought by an offeror pursuant to a tender offer.
[13] Revised Corporation Code of the Philippines, Republic Act (R.A.) No. 11232, 20 February 2019.

in-fact, or any other person legally authorized to make the transfer.[14] The by-laws may prescribe the procedure regarding transfer of shares of stock. However, no transfer of stock shall be valid except as between the parties, until the transfer is recorded in the books of the corporation.[15]

The pre-emptive right under Section 38 of the RCC refers to the right of a stockholder to subscribe to all issues or disposition of shares of any class, in proportion to their respective shareholdings.[16] The right may be restricted or denied under the articles of incorporation, and is subject to certain exceptions and limitations. The stockholder must be given a reasonable time within which to exercise their preemptive rights. Upon the expiration of said period, any stockholder who has not exercised such right will be deemed to have waived it.[17]

If a stockholder sells his shares to another, the transferee acquires, as an incident to the stock, the same right to a preference in subscribing for or purchasing new stocks issued by the corporation. The transferee steps into the transferor's right to exercise the pre-emptive right attached to the original stock only if the latter failed to exercise such right before the transfer was effected. To rule otherwise would allow the pre-emptive right attached to the original stock to be exercised twice.[18]

Thus, to answer your third query, shareholders cannot assign their preemptive right to acquire their proportionate share to other stockholders. To allow otherwise would in effect violate the underlying foundation or underlying basis of this right which is to maintain the proportionate voting strength and control of existing stockholders, that is, the existing ratio of their interest and voting power in the corporation.[19]

However, a shareholder may assign his shares and the corresponding right to subscribe to his proportionate share; provided that the pre-emptive right can no longer be exercised by the assignee if the assignor has already previously exercised such right.

***Tender Offer Price or Consideration***

As to your main question under your fourth query, pursuant to the discussion on the first query, whether the additional subscriptions of Shareholder A are to be paid in cash or by way of converting Shareholder A's advances to equity, as long as this transaction results in the acquisition of ownership of the indicated threshold percentage of the total outstanding equity securities of the public company, the mandatory tender offer rule applies.

As to your sub-question under your fourth query regarding the purchase price for all tendered shares, the SRC IRR provides:

> "19.9.2. In a mandatory tender offer, the Offeror shall be compelled to offer the highest price paid by him for such securities during the preceding six (6) months. If the offer involves payment by transfer or allotment of securities, such securities must be valued on an equitable basis.
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> 19.9.6. In the event the Offeror in a tender offer increases the consideration offered after the tender offer has commenced, the Offeror shall pay such increased consideration to all security holders whose tendered securities have been accepted for payment by such

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[14] RCC, Section 62.
[15] *Ibid.*
[16] RCC, Section 38. Power to Deny Preemptive Right. - All stockholders of a stock corporation shall enjoy preemptive 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 issued in compliance with laws requiring stock offerings or minimum stock ownership by the public; or to shares 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.
[17] G.R. No. 165887, Majority Stockholders of Ruby Industrial Corporation vs. Lim, 6 June 2011.
[18] SEC Opinion addressed to Del Rosario, Lim De Vera dated 28 November 1990.
[19] *Id.*

Offeror, whether or not the securities were tendered prior to the variation of the tender offer's terms."

As to your remaining sub-questions under your fourth query, the rules on tender offer shall govern the transaction upon the announcement of the person making a tender offer of his/its intention to purchase the subject shares.[20] As to the period of payment, whether in cash or otherwise, the SRC IRR states:

> 19.9.7. The Offeror in a tender offer shall either pay the consideration offered, or return the tendered securities, not later than ten (10) business days after the termination or the withdrawal of the tender offer."

Lastly, the procedural and substantive requirements for the mandatory tender offer rules are found in the SRC, SRC-IRR and processes implemented by the Commission's Markets and Securities Regulation Department (MSRD).[21] We advise that you consult the MSRD, which is the operating department that reviews and processes applications for registration and exemption from registration of securities, exemptive relief, tender offer and other SRC-related applications.

It shall be understood that the foregoing opinion is rendered solely on the basis of the facts, circumstances and documents disclosed/submitted, and should be considered 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.[22] If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Yours most respectfully,

**ROMUALD C. PADILLA**
General Counsel

[20] *Supra*, note 3. Rule 19.5.
[21] You may contact MSRD at the following contact details: https://www.sec.gov.ph/contact-us/
[22] Section 7, SEC Memorandum Circular 2003-15, 16 December 2003.