Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

09 October 2024

SEC OGC Opinion No. 24-27
Re: Foreign Equity Ownership for Mineral Processing Companies

NICKEL PRIME INC.
27th Floor, Capital House Building
34th St., Cor. 9th Avenue, Bonifacio Global City, 1634
ccello.nickelprime@gmail.com

Attention: **Atty. Caleb P. Cello**
Legal Counsel

Dear Sir:

This pertains to your Letter dated 27 July 2023 and clarificatory email dated 16 August 2023,[1] requesting for opinion on the foreign equity ownership of mineral processing companies.

As stated in your Letter and email, the relevant facts and provisions of laws are as follows:

1. Nickel Prime, Inc. ("Nickel Prime") is looking to establish a mineral processing company in the Philippines. On the other hand, Nickel Prime's affiliate, Nickel Prime Solutions, Inc. ("Nickel Solutions"), shall be the owner of the said processing plant.

2. Foreign ownership is restricted for enterprises that undertake activities listed in the Foreign Investment Negative List ("FINL"). Under the Twelfth (12th) Regular FINL,[2] there exists up to forty percent (40%) foreign equity restriction to industries involved in the "exploration, development, and ***utilization*** of natural resources."

3. Republic Act ("R.A.") No. 7942, otherwise known as the "Philippine Mining Act of 1995," defines utilization as the "extraction, ***mineral processing*** and/or disposition of minerals."

In view of the foregoing, you would like to seek the Commission's opinion on whether a mineral processing company is subject to the forty percent (40%) foreign equity restriction under the relevant laws.

To answer your query, we have to *qualify* based on the type of mining activity to be pursued:

1. A corporation at least sixty per centum (60%) of whose capital is owned by Filipino citizens shall be deemed qualified to enter into the different modes of mining agreements with the State, *i.e. Co-production Agreement ("CPA"), Joint Venture Agreement ("JVA"), and Production-sharing Agreement ("PSA").*

2. A legally organized foreign-owned corporation shall be deemed a Qualified Person for the purposes of granting an Exploration Permit ("EP"), Financial or Technical Assistance Agreement ("FTAA"), or Mineral Processing Permit ("MPP").

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[1] As clarified in the email dated 16 August 2023, Nickel Solutions, which is an affiliate of Nickel Prime, will be the owner of the plant.
[2] Executive Order No. 175, promulgated on 27 June 2022.

I. *Forty percent (40%) foreign equity: Different Modes of Mining Agreements with the State— CPA, JVA, or PSA.*

The 1987 Constitution grants to the State the option to directly undertake mining activities, or to enter into CPA, JVA, or PSA with Filipino citizens, or corporations or associations *at least sixty per centum of whose capital is owned by Filipino citizens.*[3]

In relation to the foregoing, under R.A. No. 7942, a corporation, partnership, association, or cooperative at least sixty percent (60%) of the capital of which is owned by Philippine citizens are qualified as contractors in CPA, JVA, or PSA with the State. Sections 3 (g) and 3 (aq), in relation to Section 26 of the statute, provide:

Section 3
Definition of Terms

As used in and for purposes of this Act, the following terms, whether in singular or plural, shall mean:

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(g) 'Contractor' means a qualified person acting alone or in consortium who is a party to a mineral agreement or to a financial or technical assistance agreement.

xxx xxx xxx

(aq) 'Qualified person' means any citizen of the Philippines with capacity to contract, or a corporation, partnership, association, or cooperative organized or authorized for the purpose of engaging in mining, with technical and financial capability to undertake mineral resources development and duly registered in accordance with law ***at least sixty per cent (60%) of the capital of which is owned by citizens of the Philippines: Provided, That a legally organized foreign-owned corporation shall be deemed a qualified person for purposes of granting an exploration permit, financial or technical assistance agreement or <u>mineral processing permit</u>.***

xxx xxx xxx[4]

Section 26
Modes of Mineral Agreement

For purposes of mining operations, a mineral agreement may take the following forms as herein defined:

a. Mineral production sharing agreement is an agreement where the Government grants to the contractor the exclusive right to conduct mining operations within a contract area and shares in the gross output. The contractor shall provide the financing, technology, management and personnel necessary for the implementation of this agreement.

b. Co-production agreement is an agreement between the Government and the contractor wherein the Government shall provide inputs to the mining operations other than the mineral resource.

c. Joint venture agreement is an agreement where a joint-venture company is organized by the Government and the contractor with both parties having equity shares. Aside from earnings in equity, the Government shall be entitled to a share in the gross output.

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Item No. 16, "List A: Foreign Ownership is Limited by Mandate of the Constitution and Specific Laws" of the 12th FINL also allows forty percent (40%) foreign equity for corporations engaged in the exploration,[5] development,[6] and utilization of natural resources. Department of Environment and Natural Resources ("DENR") Administrative Order ("DAO") No. 2010-21, otherwise known as the "Revised Implementing Rules and Regulations of R.A. No. 7942, or the Philippine Mining Act of 1995" defines **utilization** as "the extraction, ***mineral processing*** and/or disposition of minerals."[7]

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[3] 1987 Constitution, Article XII, Section 2.
[4] Emphasis, italics, and underscoring supplied.
[5] "Exploration" means searching or prospecting for mineral resources by geological, geochemical and/or geophysical surveys, remote sensing, test pitting, trenching, drilling, shaft sinking, tunneling or any other means for the purpose of determining their existence, extent, quality and quantity and the feasibility of mining them for profit. [DENR DAO No. 2010-21, Section 5(aj)]
[6] "Development" means the work undertaken to explore and prepare an ore body or a mineral deposit for mining, including the construction of necessary infrastructure and related facilities. [DENR DAO No. 2010-21, Section 5(s)]
[7] DENR DAO No. 2010-21, Section 5(cu).

Thus, as a general rule, the forty percent (40%) foreign equity restriction is applicable for the exploration, development, and utilization of natural resources.

II. Foreign-owned Corporation: Qualified Person for purposes of granting an EP, FTAA, or MPP.

The last proviso of the aforequoted Section 3(aq) of R.A. No. 7942 provides that, **by way of exception**, "***a legally organized foreign-owned corporation*** shall be deemed a qualified person for purposes of granting an exploration permit, financial or technical assistance agreement[8] or **mineral processing permit.**"

Section 2, Article XII of the 1987 Constitution provides that "[t]he President may enter into agreements *with **foreign-owned corporations involving either technical or financial assistance for large-scale** exploration, development, and utilization of minerals, petroleum, and other mineral oils* according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country." The foregoing is likewise provided as a *footnote reference* for Item No. 16, "List A: Foreign Ownership is Limited by Mandate of the Constitution and Specific Laws" of the 12th FINL, which allows **full foreign participation** through FTAA entered into with the President.[9]

On the other hand, "mineral processing" is defined as the milling, beneficiation, leaching, smelting, cyanidation, calcination or upgrading of ores, minerals, rocks, mill tailings, mine waste and/or other metallurgical byproducts or by similar means to convert the same into marketable products.[10] Consequently, an MPP shall be granted to a Qualified Person for mineral processing.[11]

Apropos to the above, "Foreign-owned Corporation" means any corporation, partnership, association or cooperative duly registered in accordance with law in which ***less than fifty percent (50%) of the capital is owned by Filipino citizens.***[12]

Based on the foregoing, for purposes of granting an MPP, the forty percent (40%) foreign equity restriction shall not apply.

It shall be understood that the foregoing opinion is rendered solely on the basis of 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.[13] 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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[8] "Financial or Technical Assistance Agreement (FTAA)" means a contract involving financial or technical assistance for large-scale exploration, development and utilization of mineral resources. [DENR DAO No. 2010-21, Section 5(ak)]
[9] An FTAA may be entered into for the exploration, development and utilization of gold, copper, nickel, chromite, lead, zinc and other minerals: *Provided*, That no FTAAs may be granted with respect to cement raw materials, marble, granite, sand and gravel and construction aggregates. (DENR DAO No. 2010-21, Section 50.)
[10] DENR DAO No. 2010-21, Section 5(bd).
[11] DENR DAO No. 2010-21, Section 5(be).
[12] DENR DAO No. 2010-21, Section 5(am).
[13] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.