Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

28 August 2019

SEC-OGC Opinion No. 19-29
Wholly or Partly Nationalized Activity; Anti-Dummy Law

AMBICA INTERNATIONAL CORPORATION
9 Amsterdam Extension, Merville Park Subdivision, Parañaque City

Attention: **Atty. Gener C. Sansaet and Atty. Marie Madeleine L.R. Victorino,** *Counsels for Ambica International Corporation*

Gentlemen:

This refers to your letters dated 20 March 2019 and 30 July 2019 requesting an opinion on whether Ambica International Corporation ("Ambica") is engaged in a wholly or partly nationalized activity under the Foreign Investments Act[1] ("FIA") and other applicable laws, and whether it is covered by the Anti-Dummy Law[2].

In your letter, you stated that Ambica is primarily engaged in the importation and trading of pharmaceutical products, cosmetics and food products with paid up capital of Php63,500,000.00. It is further disclosed that Ambica's customers are as follows: 1. Distributors – top local pharmaceutical companies from various regions with their own sales and marketing force; 2. Chain drugstores; 3. Hospitals – both private and government; 4. Wholesalers – top wholesalers who sell to independent drugstores; 5. Independent drugstores; and 6. Private and Government institutions.

To determine whether Ambica is engaged in wholly or partly nationalized activity, there must be an evaluation of its primary purpose. In the amended Articles of Incorporation (AOI) that you submitted on 07 August 2019, the primary purpose of Ambica is:

> "That the primary purpose of this corporation is to engage in the business of **wholesale trading, importing, exporting, and repackaging pharmaceutical, food supplements or functional cosmetic products, consumer goods, medical devices, molecular diagnostic household products, and other related items** as well as to act as trading consultant for other parties with respect to the business activities and the products mentioned herein." (Emphasis ours)

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[1] Republic Act No. 7042, Foreign Investments Act of 1991, 13 June 1991, as amended by Republic Act No. 8179
[2] Commonwealth Act No. 108, as amended, 30 October 1936

Pertinent to the evaluation of Ambica's purpose clause is the Retail Trade Liberalization Act of 2000 (RTLA)[3]. The RTLA defines retail trade as any act, occupation or calling of habitually selling to the general public merchandise, commodities and goods for consumption.[4]

For trading, which involves buying and selling, to be considered as retail, the following elements[5] should concur:

1. The seller should be habitually engaged in selling;
2. The sale must be direct to the general public; and
3. The object of sale is limited to merchandise, commodities, or goods for consumption.

In *SEC-OGC Opinion No. 14-12*[6], the Commission explained that the RTLA covers only the sale of goods **for consumption to the general public as end-user**. Thus, in *SEC-OGC Opinion No. 06-32*[7], the Commission opined that distributorship agreements with independent corporations who will sell such products to other corporate end-users, is not considered retail sale, to wit:

> "In the case at hand, NBPI represents that it will enter into Distributorship Agreements and wholesale marketing agreements with independent corporations, partnership and other business entities which will engage in the sales and marketing of NBPI's products to corporate and business end-users. x x x Based on the foregoing, it is the opinion of this Office that the proposed activities of NBPI are not embraced in the category of retail sale."

Moreover, Section 2 of the Implementing Rules and Regulations of the RTLA provides that the following sales are not considered retail:

> "Section 2. Sales Not Considered As Retail – The following sales are not considered as retail: xxx
>
> (e) Sales to industrial and commercial users who use the products bought by them to render service to the general public and/or produce or manufacture (of) goods which are in turn sold by them; or
>
> (f) Sales to the government and/or its agencies and government owned and controlled corporations."

Upon evaluation of Ambica's purpose clause and based on its disclosed customers, Ambica is deemed not to be engaged in retail trade because it is selling on a

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[3] Republic Act No. 8762, Retail Trade Liberalization Act of 2000, 07 March 2000
[4] *Ibid.* Section 3(1)
[5] SEC OGC Opinion No. 18-10 addressed to First Associated Medical Distribution Co., Inc. dated 4 June 2018
[6] SEC OGC Opinion No. 14-12 addressed to Reyes Esguerra Baluyut Benitez & Bongco Law Offices dated 2 June 2014
[7] SEC OGC Opinion No. 06-32 addressed to Cayetano Sebastian Ata Dado & Cruz dated 2 August 2006

wholesale basis; hence, its sales are not direct to the general public. As represented by Ambica, its sales are made to customers who are not the end-users of its products (i.e. distributors, drugstores, wholesalers). Meanwhile, sales to industrial and commercial users who use Ambica's products to render service to the general public (i.e. hospitals), and sales to government institutions, are considered not retail.

Ambica is also not subject to the foreign equity restriction for domestic market enterprises[8] under the FIA since its paid-up capital is P63,500,000.00 or more than the paid-in equity capital threshold of USD200,000.00[9].

Consequently, the Anti-Dummy Law[10] does not apply to Ambica, since it is not engaged in a wholly or partly nationalized activity.

It shall be understood, however, that the foregoing opinion is rendered based solely on facts and circumstances disclosed 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 in other cases or upon the courts whether of similar or dissimilar circumstances. [11] If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

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[8] Implementing Rules and Regulations of FIA of 1991, Section1k. **Domestic market enterprise** shall mean an enterprise which produces goods for sale, renders service, **or otherwise engages in any business in the Philippines.** (Emphasis ours)

[9] FIA, Section 8. List of Investment Areas Reserved to Philippine Nationals (Foreign Investment Negative List) – x x x **Small and medium-sized domestic market enterprises, with paid-in equity capital less than the equivalent two hundred thousand US dollars (US$200,000) are reserved to Philippine nationals**, x x x. (Emphasis ours) (Listed as Item no. 6, List B of the 11th FINL)

[10] Section 2-A of the Anti-Dummy Law, **which applies to corporations engaged in wholly or partially nationalized activity or business undertaking**, prohibits the employment of any person, corporation, or association of an alien, who shall intervene in the management, operation, administration or control thereof, whether as officer, employee, laborer, when the exercise or enjoyment of the property or of the franchise privilege, or business engaged in by such person, corporation or association "is expressly reserved by the Constitution or the law to the citizens of the Philippines" or "corporations or associations at least 60% of the capital of which is owned by such citizens". It, however, allows such alien to be elected as director in proportion to his allowable participation in the corporation's capital.

[11] SEC Memorandum Circular No. 15, s. of 2003, No.7, 16 December 2003