Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

25 June 2024

SEC OGC Opinion No. 24-18
Re: Anti-Dummy Law

COMMUNITY ECONOMIC VENTURES (A MICROFINANCE NGO) INC.
3rd Floor, CKU Building
Llorente Street, Cebu City 6000
Cebu, Philippines

Attention: **ATTY. MARIE NICKIE H. BOLOS**
nickie.bolos@gmail.com

Dear Atty. Bolos:

This refers to your letter dated 16 October 2018, requesting, on behalf of Community Economic Ventures (A Microfinance NGO) Inc. (CEVI), for an opinion on the application of Commonwealth Act (C.A.) No. 108, as amended, or the Anti-Dummy Law.

In your letter, you disclosed the following matters:

a) "[CEVI] is a non-stock and non-profit microfinance non-government organization [NGO] registered with the Securities and Exchange Commission (SEC)";
b) CEVI has the following purposes in its articles of incorporation (AOI) which was attached to your letter:
    1. To facilitate technical and financial support to small entrepreneurs to enhance their businesses through microfinance operations, pursuant to Republic Act (R.A.) No. 8425 of the Social Reform and Poverty Alleviation Act;
    2. To develop income-generating projects that will assist individuals/families in need;
    3. To promote programs that will sustain development activities in the communities;
    4. To promote knowledge of Christian values and precepts;
    5. To exercise any and all lawful powers in promoting the interest of the association or to enhance the value of the properties and to perform everything necessary and proper for attainment of its goals and objectives; and
    6. To acquire, hold, lease, purchase, exchange, borrow, mortgage, or otherwise deal in real and personal properties and to build, construct, acquire, lease, purchase, mortgage buildings and offices as may be necessary and useful; to solicit and receive contributions, grants, donations from any source, public and private, and to invest funds and utilize properties in such activities as may be necessary and useful to carry out the objectives of such association.
c) "CEVI has one (1) alien member in its nine [9]-seat Board of Trustees and four (4) aliens as members in its general assembly";
d) "[A]t present, no alien is sitting as an officer of CEVI"; and
e) "CEVI does not own land in the Philippines."

You are now asking for an opinion on whether or not CEVI is covered by the Anti-Dummy Law.

Application of the Anti-dummy Law

In all cases in which a constitutional or legal provision requires that, in order that a corporation or association may exercise or enjoy a right, franchise or privilege, not less than a certain per centum of its capital must be owned by citizens of the Philippines or of any other specific country, it shall be unlawful to falsely simulate the existence of such minimum of stock or capital as owned by such citizens, for the purpose of evading said provision.[1]

[1] Section 2-A, Commonwealth Act (C.A.) No. 108, Anti-Dummy Law, 30 October 1936.

It is clear that for the Anti-Dummy Law to apply, the corporation must be engaged in a ***nationalized or partly-nationalized activity***.[2] A list of activities which are deemed "nationalized" or "partly-nationalized" is provided under the 12th Foreign Investment Negative List (FINL).[3] Only the investment areas and/or activities listed in the 12th FINL shall be reserved for Philippine Nationals, subject to the exceptions and conditions indicated therein.[4]

Appointment of alien officer

The appointment of an alien officer in a corporation engaged in partly-nationalized activities was discussed in a previous opinion, particularly, ***SEC-OGC Opinion No. 14-05***[5], *viz*:

> In previous opinions, the Commission held that foreigners can be elected as directors in proportion to their participation or share in the capital of corporations engaged in activities that are reserved to Filipinos, ***but are prohibited from being elected as officers of a corporation***, such as the President, Vice-President, Treasurer and Secretary, *viz*. —
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>> On the citizenship requirement of corporate officers. Sec. 2-A of [C.A.] No. 108, as amended, bans foreigners from being elected or appointed to management positions as president, vice-president, treasurer, secretary, etc. in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege.
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>> xxxxxx
>>
>> However, while in nationalized business activities foreigners are ***prohibited from being elected or appointed as corporate officers***, they can be elected as directors in proportion to their participation or share in the capital of such business entities pursuant to [Presidential Decree (P.D.]] 715 which amends [C.A. No.] 108. Thus, the Department of Justice had opined that "in determining the representation of alien stockholders in the board of directors of corporations engaged in partially nationalized activities, the basis should be the actual share of the alien stockholders in the capital of the corporation which share, however, should not exceed the foreign equity ceiling prescribed by law for a particular corporation or association.
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> This is consistent with the previous rulings of the Department of Justice, stating that in firms engaged in wholly or partially nationalized activities, ***aliens are banned from being appointed as officers of the corporation,*** such as the president, vice-president, treasurer, auditor, etc. of said companies, although they can be elected directors in proportion to their allowable participation or share in the capital of such activities in accordance with the Anti-Dummy Law.
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> In this connection, please take note that only those who are given such character either by the Corporation Code, or the charter or its by-laws are considered as officers of a corporation, and if a corporation is covered by the Anti-Dummy Law, any corporate function which is specifically and/or specially spelled out and intended under its by-laws to be belonging to such officers of the corporation cannot be delegated to a foreigner because the same would be tantamount to a circumvention of the said law, *viz*. —
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>> The only officers of a corporation are those who are given that character either by the Corporation Code, specifically by Sections 24 and 25 thereof, or the charter or by-laws; the rest can be considered merely as employees or subordinate officials. The president, vice president, treasurer and secretary are commonly regarded as the principal or executive officers of the corporation. Additional offices may, however, be created as long as the same are so enumerated and authorized by the laws; this is the import of the term "officers" in the phrase "and such other officers as may be provided for in the by-laws" contained in paragraph one (1) of Section 25 of the Corporation Code [now Section 24 of the Republic Act (R.A.) No. 11232 (RCCP)]. (Citations omitted, emphasis and underscoring supplied)

Nature of Microfinance NGOs

Microfinance NGOs are defined as nonstock, nonprofit organizations duly registered with the SEC, with the primary purpose of implementing a microenterprise development strategy and providing microfinance programs, products, and services, such as microcredit and microsavings, for the poor and low-income clients.[6]

Microfinance is ***neither a nationalized nor a partly nationalized industry*** which would warrant the application of the Anti-Dummy Law, as it is not expressly reserved by the law or by the 12th FINL as one of the activities with foreign equity restrictions.

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[2] SEC-OGC Opinion No. 19-57 addressed to Atty. Gener Sansaet dated 26 November 2019.
[3] Executive Order (E.O.) No. 175, Twelfth (12th) Foreign Investment Negative List. 27 June 2022.
[4] Section 1, *ibid*.
[5] SEC-OGC Opinion No. 14-05 addressed to Atty. Rester John Nonato dated 25 April 2014.
[6] Republic Act (R.A.) No. 10693 or the Microfinance NGOs Act, 03 November 2015.

Corporate Powers: Ownership of Land

We note, however, that one of the purposes of CEVI in its AOI involves the ownership of real properties without the exclusion of land, to wit:

> 6. ***To acquire, hold, lease, purchase, exchange, borrow, mortgage, or otherwise deal in real and personal properties*** and to build, construct, acquire, lease, purchase, mortgage buildings and offices ***as may be necessary and useful***; to solicit and receive contributions, grants, donations from any source, public and private, and to invest funds and utilize properties in such activities as may be necessary and useful to carry out the objectives of such association.[7] (Emphasis and underscoring supplied)

Ownership of land is one of the activities reserved by law to Philippine nationals. Section 7, Article XII of the Constitution provides that save in cases of hereditary succession, no private lands shall be transferred or conveyed ***except*** to individuals, corporations, or associations qualified to acquire or hold lands of the public domain.[8] The List A of the 12th FINL provides the following:

> **Up to forty percent (40%) foreign equity**
>
> 17. Ownership of private lands (Section 7, Article XII of the Constitution; Section 22 of CA No. 141; Section 4 of RA No. 9182), except a natural born citizen who has lost his Philippine citizenship and who has the legal capacity to enter into a contract under Philippine laws (Section 10 of RA No. 7042, as amended by Section 5 of RA No. 8179).

To determine if a corporation is nationalized or partly-nationalized, the corporation's purpose clause must be examined because it confers, as well as limits, the powers which a corporation may exercise and the character of a corporation is usually determined by the ***objects of its formation and the nature of its business***. The primary purpose of the corporation, as stated in its AOI, is the first business to be undertaken by the corporation. Hence, the primary purpose determines its classification. Outside of the primary purpose, the secondary purposes might determine a corporation's classification ***on the condition that the corporation is actually engaged in the business stated therein.***[9]

In connection with this, Section 35(g) of Republic Act (R.A.) No. 11232 or the Revised Corporation Code of the Philippines (RCCP) provides that every corporation has the power and capacity to purchase, receive, take or grant, hold, convey, sell, lease, pledge, mortgage, and otherwise deal with such real and personal property, including securities and bonds of other corporations, as the transaction of the lawful business of the corporation may reasonably and necessarily require, subject to the limitations prescribed by law and the Constitution.[10]

Notably, this is a substantial reproduction of the then Section 36 of the Corporation Code [now Section 35(g) of the RCCP]. Hence, it simply affirms the general power of every corporation allowed under the law.[11]

In this relation, ***SEC-OGC Opinion No. 11-33***[12] discussed the nature of a corporation's powers under Section 35 of the RCCP, *viz.*:

> As to your third query, it should be noted that item 1 in West Spring's secondary purpose clause is ***substantially similar*** ***to Section 36 (7) of the Corporation Code[now Section 35(g) of the RCCP]*** ...In this regard, we have previously opined that: "Fletcher has regarded the power to acquire and convey property as an incident to every corporation although such power is expressly conferred to corporations incorporated in accordance with Section 36 (7) of the Corporation Code. ***Therefore, whether or not such power is included in what the corporation could do and perform under its [AOI], it is nevertheless, deemed to be within the scope of its corporate powers by express declaration of Section 36 of the Code.***" Section 36 contains an enumeration of powers expressly given to every corporation created under the general incorporation law. ***They may be exercised by the corporation whether or not any such powers are stated in the [AOI] or by-laws.*** Thus, even if West Spring's Articles does not so provide, it can still purchase and convey real property, as the transaction of the lawful business of the corporation may reasonably and necessarily require, because it is expressly allowed under Section 36 (7) of the Corporation Code.
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> Therefore, item 1 under the "secondary purpose" clauses of West Spring's Articles ***may not be strictly construed as a secondary purpose independent or distinct from its primary purpose of general construction because it is a general power of every corporation allowed under Section 36 (7).***
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> It would be different if the qualifying phrase in item 1 of West Spring's secondary clause "as may be necessary or incidental to the conduct of the corporate business" were not present, because the buying and selling of real estate,

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[7] Lifted from your letter-request.
[8] Section 7, Article XII, the 1987 Constitution. 02 February 1987.
[9] SEC-OGC Opinion No. 11-33 addressed to Mr. Jesus B. Lapuz dated 29 July 2011.
[10] Section 35(g), R.A. No. 11232 or the Revised Corporation Code of the Philippines (RCCP). 23 February 2019.
[11] SEC-OGC Opinion No. 19-26 addressed to Atty. Irineo J. Marasigan dated 22 July 2019.
[12] SEC-OGC Opinion No. 11-33, *supra* Note 9.; See also SEC-OGC Opinion No. 19-22 addressed to Mr. Juan Miguel Macapagal Arroyo dated 14 June 2019.

done in the ordinary course of business, would then be considered as a business in itself, distinct and separate from the primary purpose.

The right of a corporation to take and hold real property may be treated by the purpose to which said property was acquired and the ever-present intention of devoting it to a proper and necessary corporate use. ***Consideration should be given, in determining the right to the object of acquisition, to the intention with which the property is held, and the use to which it may be and is designated to be put, and the power of the corporation is to be limited to such real property as is reasonably necessary to such corporate purposes and uses.*** (Citations omitted, emphasis supplied)

Similar to ***SEC-OGC Opinion No. 11-33***[13], CEVI's purpose clause is limited by the clause, "as may be necessary and useful" which means that its ownership of land is not in its ordinary course of business and is only incidental or in furtherance of its main business.

To harmonize the corporate power to own land under Section 35 of the RCCP, the purpose clause of a corporation reaffirming this power, and the nationality requirement, ***SEC-OGC Opinion No. 16-12***[14] is instructive, to wit:

Thus, considering that PFI, based on its [AOI], is ***not engaged in any nationalized or partly nationalized business or industry, it may have an alien trustee in its board, and a foreigner as its President/Chairman.***

However, the purpose clause PFI's [AOI] allows, or does not exclude, ownership of land by the corporation. Hence, ***in the event that PFI owns land, it shall already be considered to have engaged in a partly nationalized activity***. As such, foreigners should not comprise more than 40% of its membership. 1 Consequently, PFI can elect foreign trustees in proportion to their allowable participation in the membership of the corporation. Otherwise stated, not more than 40% of the trustees should be foreigners. However, it cannot have a foreigner as President/Chairman of the board.

Conclusion

From the foregoing, the following can be gleaned:

a) A corporation's purpose clause which contains substantial reproduction of the general powers of a corporation granted under Section 35 of the RCCP should be taken merely as a re-affirmation of the latter and may not be strictly construed as a primary or secondary purpose. This means that the primary purpose in the ordinary course of business (in this case, as a Microfinance NGO) should still be examined to determine if the corporation is nationalized or partly-nationalized;
b) However, while a corporation is not outrightly banned from owning land based on a mere reproduction of Section 35(g) of the RCCP in its AOI, in the event that it owns land, it becomes a partly-nationalized corporation where aliens may own only up to forty percent (40%) foreign equity; and
c) Being a partly-nationalized corporation, the Anti-Dummy Law applies, i.e. foreigners can be elected as directors in proportion to their participation or share in the capital ***but they are prohibited from being elected or appointed as corporate officers.***

Applying the foregoing and relying on your representation that "CEVI does not own land in the Philippines," the Anti-Dummy Law does not apply to CEVI as it is a Microfinance NGO which is not a nationalized or partly-nationalized activity. However, ***in the event that it owns land***, the Anti-Dummy Law would now apply to it, i.e. aliens cannot be appointed or elected as corporate officers.

It shall be understood that the opinion rendered is 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 in other cases whether of similar or dissimilar circumstances.[15]

Please be guided accordingly.

Very truly yours,

ROMUALD C. PADILLA
General Counsel

[13] SEC-OGC Opinion No. 11-33, *supra* Note 9.
[14] SEC-OGC Opinion No. 16-12 addressed to Atty. John Rester Nonato dated 24 May 2016.; See also SEC-OGC Opinion No. 14-05 addressed to Atty. Rester John L. Nonato dated 25 April 2014.
[15] Section 7, SEC Memorandum Circular No. 15, Series of 2003. 16 December 2003.