Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

18 June 2024

SEC-OGC Opinion No. 24-16
Re: Election of a Foreign Director

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Attention: Atty. Emilio A. Quiroz

Dear Atty. Quiroz:

This refers to your letter[1] requesting the Commission's opinion on the legality of electing a foreigner as director of World Aviation International Services Corporation (WAISCO), as the representative of Capricornus Shipping Services & Consulting Inc. (CSSCI) in the Board of Directors.

You stated in your letter that your client WAISCO is engaged in the business of general aviation with a Certificate of Public Convenience and Necessity (CPCN) from the Civil Aeronautics Board (CAB) to operate non-scheduled (air tax) air transportation services and to operate international non-scheduled air transportation services.

You also mentioned that the principal stockholders of WAISCO are: (1) Atty. Roberto P. Lozada, a Filipino national who owns 60% of the outstanding capital stock (OCS); and (2) CSSCI, a corporation duly organized and existing under the laws of the Philippines, which owns 40% of the OCS. You further stated that the principal stockholders of CSCCI are Mr. Mario Cavada, Mr. Jose Cublo and Mr. Vertillano Revelo who collectively own 60% of the OCS of CSCCI while Mr. Hironiro Abe, a Japanese national, owns 40% of the OCS.

You disclosed that two directors of WAISCO representing CSCCI resigned and that the CSCCI nominated a Filipino national and a Japanese national as their replacements. In this connection, one side is of the view that a foreigner, such as a Japanese national, cannot legally sit as Director in WAISCO as the representative of CSSCI since he has no direct investment. On the other hand, the others submit that with the passage of Republic Act (RA) No. 11659 which amends the Public Service Act (PSA), foreign investors are now allowed to own up to 100% of the ownership of a corporation engaged in the airline business; thus, the 60-40 equity restriction is no longer a barrier in electing a Japanese national as a director.

Relative thereto, you are requesting the Commission's opinion on whether a foreigner, such as a Japanese national, can be legally elected as director of WAISCO as the representative of CSSCI, on the ground that WAISCO is no longer a public utility under the amended PSA.

[1] dated 18 August 2022

Qualifications of Directors

The Revised Corporation Code (RCC)[2] provides for the minimum qualifications of the Board of Directors, to wit:

> "SECTION 22. *The Board of Directors or Trustees of a Corporation; Qualification and Term.* – xxx xxx xxx
>
> ... A director who ceases to **own at least one (1) share of stock** or a trustee who ceases to be a member of the corporation shall cease to be such. xxx
>
> xxx xxx xxx
>
> SECTION 26. *Disqualification of Directors, Trustees or Officers.* – A person shall be **disqualified from being a director**, trustee or officer of any corporation if, within five (5) years prior to the election or appointment as such, the person was:
>
> (a) Convicted by final judgment:
>   (1) Of an offense punishable by imprisonment for a period exceeding six (6) years;
>   (2) For violating this Code; and
>   (3) For violating Republic Act No. 8799, otherwise known as "The Securities Regulation Code";
>
> (b) Found administratively liable for any offense involving fraudulent acts; and
>
> (c) By a foreign court or equivalent foreign regulatory authority for acts, violations or misconduct similar to those enumerated in paragraphs (a) and (b) above.
>
> The foregoing is without prejudice to qualifications or other disqualifications, which the Commission, the primary regulatory agency, or the Philippine Competition Commission may impose in its promotion of good corporate governance or as a sanction in its administrative proceedings." (Emphasis supplied)

In addition to the foregoing qualifications and disqualifications, Section 46 of the RCC further states the corporation may provide in its bylaws the qualifications of its directors or trustees:

> "SECTION 46. *Contents of By-Laws.* – A private corporation may provide the following in its bylaws:
>
> xxx xxx xxx
>
> (f) The **directors' or trustees' qualifications**, duties and responsibilities, the guidelines for setting the compensation of directors or trustees and officers, and the maximum number of other board representations that an independent director or trustee may have which shall, in no case, be more than the number prescribed by the Commission; xxx" (Emphasis supplied).

Nominee Director

While Section 22 of the RCC requires that a director must be a stockholder of the corporation, the Commission had occasions to rule that "***beneficial ownership***" is not necessary and that a person who holds the legal title to stock on the books of the corporation is qualified, although the beneficial ownership may be in another.[3] **In other words, it is sufficient that the title to the stock, as it appears on the books of the corporation, is in the nominee director, since the legal title is what counts and it is the person whose name appears as owner of the books of the company who is the stockholder and is eligible as director.**[4]

For instance, a director may hold his stock as trustee and yet be legally qualified. **A person to whom one share of stock has been transferred for the express purpose of qualifying him as a director is eligible.** Thus, a non-stockholder may qualify as nominee director. However, in order to be qualified as such, **the owner of the shares represented must assign *at least one qualifying share* to the nominee for purposes of qualifying him to be a member of the Board, which assignment must be properly recorded in the corporate books**.[5]

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[2] Republic Act (R.A.) No. 11232, 23 February 2019.
[3] SEC-OGC Opinion No. 09-10, Re: Foreigners as Corporate Directors, 20 January 2010.
[4] *Id.*
[5] *Id*, citing SEC Opinion dated 10 July 1995 addressed to Mr. Jerome M. Tang.

Foreign Citizenship; Foreign Ownership of Airline Industries

Notably, in general, there is no citizenship requirement for directors in the RCC. However, a citizenship requirement may be provided in the bylaws of the corporation.[6] Further, when the corporation is a nationalized or party nationalized corporation, it is also subject to the allowable participation of foreigners in the board of directors and/or management in proportion to their allowable share in its capital as provided under the 1987 Constitution, special laws, and/or special rules implemented by the regulatory authority of the industry. Section 2 of the Anti-Dummy Law[7] provides:

> "Section 2-A. Unlawful use, Exploitation or enjoyment — Any person, corporation, or association which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by a the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the Constitution, or the provisions of the existing laws; or in any manner permits or allows any person, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, and any person who knowingly aids, assists or abets in the planning consummation or perpetration of any of the acts herein above enumerated shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, That the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act: And provided, finally, **That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities."**

RA No. 11659[8] or the amendment to the PSA, limits the definition of a public utility as a public service that operates, manages or controls for public use any of the following services: 1) distribution of electricity; 2) transmission of electricity; 3) petroleum and petroleum products pipeline transmission systems, 4) water pipelines distribution systems and wastewater pipeline systems, 5) seaports, and 6) public utility vehicles[9]. The limitation on foreign ownership does not apply to those performing public service not included in the list, such as corporations engaged in the airline business. Based on the foregoing, the foreign equity restrictions for public utilities under the amended PSA no longer apply to WAISCO.

Hence, subject to the other provisions of the 12th Foreign Investment Negative List[10] and provided that the Japanese national possesses all of the qualifications (*e.g. owns one qualifying share*) and none of the disqualifications provided under the RCC and WAISCO's by-laws, we answer your query in the affirmative.

All the above notwithstanding, it is worth noting that under Section 4 of RA No. 11659, and Sections 3, 4 and 6 of its Implementing Rules and Regulations (IRR), the **relevant administrative agency shall have jurisdiction and exercise supervision over the respective relevant public services or public utilities, as the case may be.[11] By reason of the foregoing, we recommend that you also consult with the CAB.**

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[6] Section 46(f), RCC.
[7] Commonwealth Act (CA) No. 108, Anti-Dummy Law, 30 October 1936.
[8] Republic Act (R.A.) No. 11659, An Act Amending Commonwealth Act No. 146, Otherwise Known as the Public Service Act, as amended, 21 March 2022.
[9] Ibid, Section 4.
[10] Executive Order No. 175, 27 June 2022.
[11] Supra, Footnote no. 8, "SECTION 4. Section 13 of Commonwealth Act No. 146, as amended, is hereby further amended to read as follows: xxx (e) Upon the recommendation of the National Economic and Development Authority (NEDA), the President may recommend to Congress the classification of a public service as a public utility on the basis of the following criteria:
xxx

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.[12] 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.

Very truly yours,

ROMUALD C. PADILLA
General Counsel

"All public services, including those classified as public utilities under this Act, shall continue to be regulated and supervised by the relevant Administrative Agencies under existing laws.
"A public service which is not classified as a public utility under this Act shall be considered a business affected with public interest for purposes of Sections 17 and 18 of Article XII of the Constitution.
"Notwithstanding any law to the contrary, nationality requirements shall not be imposed by the relevant Administrative Agencies on any public service not classified as a public utility."; *Also*, Implementing Rules and Regulations of the RA No. 11659. Section 6 Non-imposition of Nationality Requirements- The relevant Administrative Agency shall not impose nationality requirements on the public service not classified as public utility under its jurisdiction or supervision.
[12] Section 7, SEC Memorandum Circular 2003-15, 16 December 2003.