Republic of the Philippines
Department of Finance
Securities and Exchange Commission
Pasay City, Philippines

IN THE MATTER OF:
SAN MIGUEL CORPORATION,
Appellant,

versus

CORPORATE GOVERNANCE AND FINANCE DEPARTMENT, formerly the Corporation Finance Department,
Appellee.

SEC EN BANC Case No. 04-12-255

For: Appeal from SEC-CFD's Letter dated 20 March 2012 on the imposition of Fine/Penalty for violation of SRC Rule 23 (Filing of SEC Forms 23-A and 23-B)

DECISION

For the consideration of the Commission *En Banc* is the *Memorandum on Appeal*[1] filed by appellant San Miguel Corporation (SMC) on 17 April 2012 assailing the *Letter-Order* dated 20 March 2012 (Assailed Order) issued by the then Corporation Finance Department (CFD), now the Corporate Governance and Finance Department (CGFD). The pertinent portions of the *Assailed Order* of the CFD read as follows:

> "Please be informed that the reasons cited therein are without merit. Reporting persons are strictly mandated to comply with the requirements of the Securities Regulation Code and its Implementing Rules and Regulations particularly SRC Rule 23.
>
> In view thereof, the company is hereby assessed a penalty of **Seven Hundred Sixty Nine Million Two Hundred Ninety Three Thousand Nine Hundred Sixty Eight Pesos and 1/100 (P769,293,968.10)**, in accordance with the **Consolidated Scales of Fines (SEC Memorandum Circular No. 6, Series of 2005)** x x x
>
> **San Miguel Corporation** is hereby directed to pay the assessed penalty by way of cash, Manager or Cashier's Check payable to the Securities and Exchange Commission within five (5) days from receipt of this letter."

[1] *Memorandum on Appeal* dated 17 April 2012.

Appellant SMC is a company duly registered with the Commission on 21 August 1926 with SEC Registration No. PW 00000277.[2]

Following the shareholders' approval in 2007, SMC diversified from its traditional core businesses and has made investments in industries such as power, energy, telecommunications, mining and infrastructure.[3]

On 27 October 2008, SMC alleges that it executed a Share Purchase Agreement (SPA) with Government Service Insurance System (GSIS) in which the former acquired the latter's Twenty-Seven Percent (27%) stake in Manila Electric Company (Meralco), or around Three Hundred Million Nine Hundred Sixty-Three Thousand One Hundred Eighty-Nine (300,963,189) common shares in Meralco (Meralco Shares) at Ninety Pesos (Php 90.00) per share or around Twenty-Seven Billion Eighty-Six Million Six Hundred Eighty-Seven Thousand Ten Pesos (Php 27,086,687,010.00), which was payable in three (3) years.[4] Moreover, the approval of the board of directors of SMC authorizing its management to enter into said SPA with the GSIS was disclosed to the Philippine Stock Exchange (PSE) on, as well as the CFD through SEC Form 17-C.[5]

In the meantime, on 11 May 2009, SMC was imposed a penalty of reprimand by the CFD for its failure to submit SEC Form 23-A (Initial Statement of Beneficial Ownership of Securities) and SEC Form 23-B (Statement of Changes in Beneficial Ownership of Securities), in relation to its acquisition of 817,189,000 shares in San Miguel Brewery, Inc. (SMB). Such failure is in violation of SRC Rule 23.[6]

Thereafter, in an Order dated 9 December 2010 of the Commission *En Banc*, SMC was imposed another penalty in the amount of Php 2,544,474.60 for its second violation of SRC Rule 23 due its late filing of SEC Form 23-B (Statement of Changes in Beneficial Ownership of Securities) when San Miguel Pure Foods Company, Inc. (SMPFC) issued 18% stock dividends in favor of SMC. The payment of stock dividends in favor

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[2] *Reply Memorandum* dated 7 May 2012 of the CFD, par. 1.
[3] *Memorandum on Appeal*, par. 9.
[4] *Memorandum on Appeal*, par. 10.
[5] *Id.*, pars. 12 .1 and 12.2, Annexes "D" (SMC's Letter to PSE dated 27 October 2008) and "E" (SEC Form 17-C filed on 29 October 2008).
[6] *Reply Memorandum*, par. 2, Annex "1" (Letter-Order of CFD dated 11 May 2009).

of SMC resulted in a change of beneficial ownership.[7] On 20 January 2011, SMC paid the assessed penalty.[8]

On 5 August 2011, SMC completed the purchase of the Meralco shares upon full payment of the purchase price pursuant to the above-mentioned SPA executed on 27 October 2008. The completion of the payment of the Meralco shares was disclosed to the PSE and to the CFD through the SEC Form 17-C.[9]

On 12 August 2011, SMC reported to the PSE that its board of directors had approved the sale to its subsidiary, SMPFC, Fifty-Nine Million Ninety Thousand Nine Hundred Nine Hundred Nine (59,090,909) common shares in Meralco at Two Hundred Twenty (Php 220.00) per share, or for around Twelve Billion Nine Hundred Ninety-Nine Million Nine Hundred Ninety-Nine Thousand Nine Hundred Eighty Pesos (Php 12,999,999,980.00) which was evidenced by the execution of a SPA between them. The execution of the SPA between SMC and SMPFC was again disclosed to the PSE, and the CFD through the SEC Form 17-C.[10]

On 22 February 2012, SMC filed with the CFD SEC Form 23-A (Initial Statement of Beneficial Ownership of Securities) and SEC Form 23-B (Statement of Changes in Beneficial Ownership of Securities) which provided the initial acquisition of more than ten percent (10%) beneficial ownership in Meralco, and the subsequent change in beneficial ownership.[11]

On 14 March 2012, SMC received a *Letter* from the CFD informing the former that it belatedly filed its SEC Form 23-A relative to its initial acquisition of more than ten percent (10%) beneficial ownership in Meralco. The CFD stated that said belated filing is in violation of SRC Rule 23(1)(A) which provides that SEC Form 23-A must be filed within ten (10) days after it becomes a beneficial owner. Thus, SMC was directed to show cause, within five (5) days from receipt of such letter, why it should not be held liable for violation of SRC Rule 23(1)(A).[12]

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[7] *Id.*, par. 7, Annex "3" (Decision of the Commission *En Banc* dated 9 December 2010).
[8] *Id.*, par. 8.
[9] *Memorandum on Appeal*, par. 13, Annexes "L" (SMC's Letter to PSE dated 12 August 2011) and "M" (SEC Form 17-C filed on 15 August 2011).
[10] *Id.*, pars. 15 to 15.4, Annexes "L" (SMC's Letter to PSE dated 12 August 2011), "N" (SMC's Letter to PSE dated 16 August 2011) and "O" (SEC Form 17-C filed on 17 August 2011).
[11] *Id.*, par. 17, Annexes "P" (Initial Statement of Beneficial Ownership of Securities – SEC Form 23-A) and "Q" (Statement of Changes in Beneficial Ownership of Securities - SEC Form 23-B).
[12] *Id.*, par. 18, and Annex "R" (*Letter* dated 7 March 2012 regarding SMC's belated filing of SEC Form 23-A).

On the same day, SMC received another *Letter* dated 7 March 2012 from CFD informing the former that it belatedly filed its SEC Form 23-B relative to its change in beneficial ownership in Meralco. The Letter of CFD stated that SMC was One Hundred Sixty Five (165) days late in reporting its disposition of the shares in Meralco to SMPFC. The said Letter likewise stated that SMC was One Hundred Sixty Five (165) days late in reporting its indirect acquisition of the Fifty-Four Million One Sixty Eight Hundred Thousand Six Hundred Thirty Six (54,168,636) shares of Meralco. Lastly, the CFD stated that SMC must file the SEC Form 23-B within ten (10) days after the close of each calendar month pursuant to SRC Rule 23(1)(B). Thus, the CFD directed SMC to show cause, within five (5) days from receipt of such letter, why it should not be held liable for violation of SRC Rule 23(1)(B).[13]

In response, SMC filed on 19 March 2012 with the Commission a *Letter* stating that it did not timely file its SEC Form 23-A and SEC Form 23-B due to inadvertence. However, SMC claims that it made various disclosures to the Commission regarding its transactions of the shares of stock in Meralco albeit not through the SEC Form 23-A and SEC Form 23-B. Thus, SMC requested for the utmost consideration and indulgence of the Commission in not imposing any sanction on it.[14]

The CFD issued the *Assailed Order*[15] dated 20 March 2012 stating that the reasons cited by SMC, in its Letter filed with the Commission on 19 March 2012, is without merit since reporting persons are strictly required to comply with the requirements of the Securities and Regulation Code (SRC)[16] and its implementing rules and regulations (IRR), particularly SRC Rule 23 of the IRR. As a consequence, SMC was assessed a penalty of **Seven Hundred Sixty Nine Million Two Hundred Ninety Three Thousand Nine Hundred Sixty Eight Pesos and 1/100 (P769,293,968.10)**, in accordance with the **Consolidated Scales of Fines under SEC Memorandum Circular No. 6, Series of 2005** (SEC-MC No. 6-05), computed as follows:

SRC/IRR Provisions	Description	Second Offense on SEC Form 23-A	Second Offense on SEC Form 23-B	Total Amount

[13] *Id*, par. 19 and Annex "S" (*Letter* dated 7 March 2012 regarding SMC's belated filing of SEC Form 23-A).
[14] *Id*., par. 20, and Annex "T" (*Letter* dated 19 March 2012 of SMC).
[15] *Id*., Annex "A" (*Letter* dated 19 March 2012 of SMC).
[16] Republic Act No. 8799 (2000).

Section 23; SRC Rule 23	Late Filing of SEC Form 23-A/B	1% of the amount of each purchase or disposition, or Php 10,000.00 per transaction, whichever is higher plus Php 100.00 per day of delay	2% of the amount of each purchase or disposition, or Php 20,000.00 per transaction, whichever is higher plus Php 200.00 per day of delay	
		(i) August 5, 2011 direct acquisition of the Meralco shares from GSIS: BASIC: 300,963,189 common shares @ Php 90.00 per share Php 27,086,687,010.00 x 1% **Php 270,866,870.10** DAILY: PHP 100.00 x 191 days[17] **Php 19,100.00**	***(ii) August 24, 2011 direct disposition of Meralco shares to its subsidiary SMPFC:*** BASIC: 59,090,909 common shares @ Php 220.00 per share Php 12,999,999,980.00 x 2% **Php 259,999,999.60** DAILY: PHP 200.00 x 165 days[18] **Php 33,000.00** ***(iii) August 24, 2011 indirect acquisition of***	

[17] Due date 15 August 2011 and filed on 22 February 2012, which is 191 days late.
[18] Due date 10 September 2011 and filed on 22 February 2012, which is 165 days late.

			<u>***Meralco shares since 91.67% of SMPFC is owned by the SMC:***</u> BASIC: 54,168,636 common shares @ Php 220.00 per share Php 11,917,099,920.00 <u>x 2%</u> **Php 238,341,998.40** DAILY: PHP 200.00 <u>x 165 days[19]</u> **Php 33,000.00**	
		TOTAL: **Php 270,885,970.10**	TOTAL: **Php 498,407,998.00**	GRAND TOTAL: **Php 769,293,968.10**

Hence, this appeal.

In its *Memorandum on Appeal*, SMC argues that: (1) the CFD did not act in accordance with the limitations on the amount of imposable fines prescribed under Section 54.1(ii) of the SRC (i.e., not more than Php 1,000,000 plus an additional Php 2000.00 for each day of continuing violation), in assessing it the penalty or administrative fine; (ii) the CFD incorrectly applied SEC-MC No. 6-05 when it characterized the belated filing of the SEC Form 23-A and SEC Form 23-B as the "second offense" and "third offense" instead of just "first offense" considering that the imposition of the second and subsequent violations were not committed within

[19] Due date 10 September 2011 and filed on 22 February 2012, which is 165 days late.

a twelve (12) month period counted from the first offense as required under SEC Memorandum Circular No. 01-01 (SEC-MC No. 01-01) and SEC Memorandum Circular No. 02-03 (SEC-MC No. 02-03); (iii) the CFD erred in calculating twice the imposable penalty for the "third offense" of SRC Rule 23.1(B) since there should have just one imposable penalty for the belated reporting of just one transaction; (iv) the CFD is guilty of violation of SMC's right to substantive due process when it assessed the penalty or administrative fine of Php 769,293,968.10, which is grossly disproportionate to the offense committed (i.e. belated filings of the SEC Form 23-A and SEC Form 23-B); (v) it substantially complied with the spirit of SRC Rule 23 by disclosing to the PSE and Commission the transactions covering its purchase of the Meralco shares from GSIS and its transfer to SMPFC; and (vi) that justice and equity warrant the substantial mitigation or even outright elimination of the penalty or administrative fine.[20]

In response, the CFD in its *Reply Memorandum*[21] filed on 7 May 2012 claims that: (1) the Commission has the authority to impose sanctions for violations of the laws and rules under Section 5(f) of the SRC; (2) SEC-MC No. 01-01 and SEC-MC 02-03 were repealed by SEC-MC No. 6-05 and that there is no need to consider the counting of the twelve (12) month period for the offenses committed; (3) that there were two transactions entered into by SMC when it disposed its shares to SMPFC (i.e. direct disposition of the Meralco shares to SMPFC and indirect acquisition of the Meralco shares as a consequence); and (4) that it has no basis to recommend a reduction or outright elimination of the assessed penalty.

On 21 May 2012, SMC filed a *Motion for Leave and for Time to File Comment on Appellee's Reply Memorandum* (Motion for Time to File Comment)[22] praying that the Commission grant it leave to file a Comment on Appellee's Reply Memorandum.

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[20] *Memorandum on Appeal*, pp. 16-18.
[21] *Reply Memorandum* dated 7 May 2012.
[22] *Motion to File Comment* dated 21 May 2012.

In response to the Motion for Time to File Comment, the CFD sought denial thereof claiming, among others, that such motion is a prohibited pleading under the 2006 Rules of Procedure of the Commission (Rules).[23]

A *Motion To Admit Attached Comment on Reply-Memorandum*[24] was likewise filed on 11 June 2012 by SMC attaching therein its Comment on the Reply Memorandum filed by and praying that the Commission admit its Comment to the Reply Memorandum.[25] In the Comment on the Reply Memorandum, SMC reiterates its arguments stated in its Memorandum on Appeal.

Considering that the *Motion for Leave and for Time to File Comment on Appellee's Reply Memorandum* and *Motion To Admit Attached Comment on Reply-Memorandum* are not prohibited pleadings under Section 3-6 of the Rules, the said motions are admitted.

The issues to be resolved are the following:

(i) whether the administrative fine is in excess of the limitations prescribed in Section 54.1(ii) of the SRC;

(ii) whether the belated filing of SEC Form 23-A and SEC Form 23-B should be characterized as a "first offense"

(iii) whether SMC should be assessed twice a penalty for belatedly reporting its sale of Meralco shares to its subsidiary, SMPFC; and

(iv) whether the fine imposed on SMC by CGFD is grossly disproportionate to the administrative offense;

(v) whether SMC complied with the spirit of SRC Rule 23; and

(vi) whether SMC acted in good faith.

FINE IS NOT IN EXCESS OF THE LIMITATIONS PROVIDED FOR UNDER THE SRC AND IS NOT GROSSLY DISPROPORTIONATE TO THE ADMINISTRATIVE OFFENSE COMMITTED

As to the *first issue*, SMC argues that the CFD did not act in accordance with the limitations on the amount of imposable fines prescribed under Section 54.1(ii) of the SRC (i.e., not more than Php 1,000,000.00

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[23] *Comment/Opposition on Motion for Leave and for Time to File Comment on Appellee's Reply Memorandum* dated 22 May 2012 of the CFD and filed on 24 May 2012.
[24] Dated 11 June 2012.
[25] *Comment to the Reply Memorandum* dated 11 June 2012.

plus an additional Php 2000.00 for each day of continuing violation), in assessing it the penalty or administrative fine. SMC claims that the statutory cap or limitation of Php 1,000,000.00 provided under Section 54.1 (ii) should be considered written in SEC-MC No. 6-05. Otherwise, the application of SEC-MC No. 6-05 would become illegal and will constitute an invalid exercise of legislative power if the CFD were to impose a penalty or administrative fine of Php 769,293,968.10 which would exceed the cap or limitation of Php 1,000,000.00 provided under Section 54.1 (ii).[26]

The Supreme Court, in the case entitled *"Gerochi, et al. v. Department of Energy, et al."*,[27] had the occasion to discuss the principle of non-delegation of powers. The principle of separation of powers ordains that each of the three branches of government has exclusive cognizance of and is supreme in matters falling within its own constitutionally allocated sphere. A logical corollary to the doctrine of separation of powers is the principle of non-delegation of powers, as expressed in the Latin maxim *potestas delegata non delegari potest* (what has been delegated cannot be delegated). This is based on the ethical principle that such delegated power constitutes not only a right but a duty to be performed by the delegate through the instrumentality of his own judgment and not through the intervening mind of another.

In the face of the increasing complexity of modern life, delegation of legislative power to various specialized administrative agencies is allowed as an exception to this principle. Given the volume and variety of interactions in today's society, it is doubtful if the legislature can promulgate laws that will deal adequately with and respond promptly to the minutiae of everyday life. Hence, the need to delegate to administrative bodies - the principal agencies tasked to execute laws in their specialized fields - the authority to promulgate rules and regulations to implement a given statute and effectuate its policies. All that is required for the valid exercise of this power of subordinate legislation is that the regulation be germane to the objects and purposes of the law and that the regulation be not in contradiction to, but in conformity with, the standards prescribed by the law. These requirements are denominated as the *completeness test* and the *sufficient standard test.*

Under the *first test,* the law must be complete in all its terms and conditions when it leaves the legislature such that when it reaches the delegate, the only thing he will have to do is to enforce it. The *second test* mandates adequate guidelines or limitations in the law to determine the

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[26] *Memorandum on Appeal*, par. 47.
[27] G.R. No. 159796, 17 July 2007.

boundaries of the delegate's authority and prevent the delegation from running riot.

Here, the SRC is complete in itself since the authority of the Commission to impose fines and penalties is found in Section 5.1 thereof which provides the following:

> "x x x [T]he Commission shall have, among others, the following powers and functions:
>
> x x x
>
> (d) Regulate, investigate or supervise the activities of persons to ensure compliance; x x x
>
> (f) Impose sanctions for the violation of laws and rules, regulations and orders, and issued pursuant thereto;
>
> (g) Prepare, approve, amend or repeal rules, regulations and orders, and issue opinions and provide guidance on and supervise compliance with such rules, regulation and orders; x x x
>
> (n) Exercise such other powers as may be provided by law as well as those which may be implied from, or which are necessary or incidental to the carrying out of, the express powers granted the Commission to achieve the objectives and purposes of these laws.;"

Additionally, the power of the Commission to impose fines and penalties is likewise found in Section 54.1 of the SRC which provides the following:

> "**Section 54.** *Administrative Sanctions.* – 54.1. **<u>If, after due notice and hearing, the Commission finds that: (a) There is a violation of this Code, its Rules, or its orders</u>**; x x x **<u>it shall,</u>** in its discretion, and subject only to the limitations hereinafter prescribed, **<u>impose ANY or ALL of the following sanctions</u>** as may be appropriate in light of the facts and circumstances:
>
> (i) Suspension, or revocation of any registration for the offering of securities;
>
> (ii) A fine of no less than Ten thousand pesos (P10,000.00) nor more than One million pesos (P1,000,000.00) plus not more than Two thousand pesos (P2,000.00) for each day of continuing violation;

(iii) In the case of a violation of Sections 19.2, 20, 24, 26 and 27, disqualification from being an officer, member of the Board of Directors, or person performing similar functions, of an issuer required to file reports under Section 17 of this Code or any other act, rule or regulation administered by the Commission;

(iv) In the case of a violation of Section 34, a fine of no more than three (3) times the profit gained or loss avoided as result of the purchase, sale or communication proscribed by such Section, and

(v) *Other penalties* within the power of the Commission to impose." (Emphasis ours)

Lastly, Section 72.1 of the SRC provides:

"x x x **To effect the provisions and purposes of this Code, the Commission may issue, amend, and rescind such rules and regulations and orders necessary or appropriate** x x x"

Thus, the law is complete and passes the first test for valid delegation of legislative power.

As to the *second test*, the Supreme Court in *Maceda v. Macaraig*[28] stated that the required "standard" need not be expressed. In *Edu vs. Ericta*[29] and in *De la Llana vs. Alba*[30] the Court held: "The standard may be either express or implied. If the former, the non-delegated objection is easily met. The standard though does not have to be spelled out specifically. **It could be *implied* from the policy and purpose of the act considered as a whole**."

In *People vs. Rosenthal*[31] the broad standard of "public interest" was deemed sufficient. In *Calalang vs. Williams*,[32] it was "public welfare" and in *Cervantes vs. Auditor General*,[33] it was the purpose of promotion of "simplicity, economy and efficiency." And, implied from the purpose of the law as a whole, "national security" was considered sufficient standard and so was "protection of fish fry or fish eggs.[34]

[28] G.R. No. 88291, 31 May 1991.
[29] 35 SCRA 481 (1970).
[30] 112 SCRA 294 (1982).
[31] 68 Phil. 328 (1939).
[32] 70 Phil. 726 (1940).
[33] 91 Phil 359 (1952).
[34] See Note 29.

Here, the declaration of the state policy provided in Section 2 of the SRC, which states, among others, "**to ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market**", meets the requirements for valid delegation, as they provide the limitations on the Commission's power to formulate administrative regulations. These are sufficient standards.

Clearly, the limitation in the Commission's authority to impose administrative penalties and fines is found in the declaration of the state policy provided in the SRC as stated in the case of *Maceda,* citing *Edu* and *De La Llana*. This is contrary to SMC's argument that the limitation to impose penalties and fines is found in Section 54.1(ii) of the SRC (i.e., a fine of no more than more than One million pesos [P1,000,000.00]).

In fact, the Commission is authorized to impose penalties over One million pesos (P1,000,000.00) as found in Section 54.1 (v) of the SRC (i.e., other penalties within the power of the Commission to impose).[35] The Supreme Court, in the case of *Soriano v. Laguardia,*[36] explained that the "investiture of supervisory, regulatory, and disciplinary power would surely be a meaningless grant if it did not carry with it the power to penalize the supervised or the regulated as may be proportionate to the offense committed, charged, and proved."

The petitioner in said *Soriano* case argued that the Movie and Television Review and Classification Board (MTRCB) erred in promulgating the Implementing Rules and Regulations of Presidential Decree No. 1986, prescribing a schedule of penalties for violation of the provisions of the decree, since the decree itself does not expressly prescribe the imposition of, or authorize the MTRCB to impose, penalties against violators.

The Court held that MTRCB is authorized to promulgate the schedule of penalties since Section 3(k) of the decree mandates the MTRCB "to exercise such powers and functions as may be necessary or incidental to the attainment of the purpose and objectives of [the law]." The Court further stated that when a general grant of power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is also conferred. Moreover, when the statute

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[35] It must be pointed out that, in the case of *Celebrity Sports Plaza, Inc. v. Barin*, G.R. No. 205616, 10 December 2014, the Supreme Court affirmed the order of the Commission imposing a penalty over One million pesos (P1,000,000.00) on the company pursuant to SEC-MC No. 06-05.

[36] G.R. No. 164785, G.R. No. 165636, 29 April 2009.

does not specify the particular method to be followed or used by a government agency in the exercise of the power vested in it by law, said agency has the authority to adopt any reasonable method to carry out its function.

Thus, the same reasoning applies to the Commission in imposing penalties to ensure full and fair disclosure about securities, and to minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market, pursuant to the declaration of the state policy under Section 2 of the SRC. Moreover, these powers provide sufficient bases for the Commission to adopt SEC-MC No. 6-05 that prescribes penalties beyond the limits provided under Section 54.1 (ii) of the SRC.

Further, the Commission has the authority to impose a penalty beyond Section 54.1(ii) of the SRC since the language of Section 54.1 thereof, taken as a whole, indicates that Congress conferred sufficient authority to the Commission to impose "*other penalties*" beyond the specific limits indicated under item (ii) of the provision. The same provision, in fact, confers on the Commission the authority to "*impose ANY or All of the following sanctions*" enumerated under Section 54.1. In other words, the administrative penalties under Section 54.1 are cumulative, not alternative, in character.[37]

This grant of discretion to the Commission to impose "other penalties" recognizes the fact that the securities regulation is a dynamic field, and the amount of fine imposed must be regularly updated to the appropriate magnitude so that persons regulated would not consider the assessment of fine as simply the costs of doing business, and thus ignore compliance.

Next, as to the *fourth issue,* SMC argues that the penalty imposed pursuant to SEC MC 06-05 is grossly disproportionate to the violation committed and is violation of its right to substantive due process. It must be pointed out that in the Supreme Court case, entitled "*Commissioner of Customs v. Delgado Shipping Agency, et al.*", the Court stated that respondent Delgado Shipping Agency was imposed a fine pursuant to Section 2523 of the Tariff and Customs Code. Section 2523 of the Tariff and Customs Code provides, to wit:

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[37] In the case Court of Appeals case entitled "*Filinvest Development Corporation v. Securities and Exchange Commission*", CA-G.R. Sp No. 118825, 26 January 2015, the Commission argued that Section 54.1 confers on the Commission the authority to "*impose ANY or All of the following sanctions*" enumerated thereunder. The Court of Appeals dismissed the petition filed by Filinvest Development Corporation.

> "SEC. 2523. Discrepancy Between Actual and Declared Weight of Manifested Article. - If the gross weight of any article or package described in the manifest exceeds by more than twenty (20) percentum the gross weight as declared in the manifest or bill of lading thereof, and the Collector shall be of the opinion that such discrepancy was due to the carelessness or incompetency of the master or pilot in command, owner or employee of the vessel or aircraft, **a FINE of not more than *fifteen (15) percentum of the value* of the package or article in respect to which the deficiency exists, may be imposed upon the importing vessel or aircraft.**" (Emphasis Ours)

As can be gleaned above, a fine of not more than *fifteen percent (15%) of the value* of the package or article may be imposed on the importing vessel or aircraft for failure to declare the correct weight of its cargo. Moreover, the provision, much like in SEC MC 06-05, did not provide any limitation or cap as to the monetary penalty to be imposed on the violator except not more than fifteen percent (15%) of the value of the package or article.

The Supreme Court stated:

> "The evident purpose of the codal provision requiring vessels to declare the correct weight of their cargo is to curb smuggling due to under declarations. Hence, imposing the maximum fine on vessels which grossly fail to comply with the obligation to declare the correct weight of their cargo truly promotes the spirit and purpose of the law, since imposing *a minimum fine* would only embolden would-be smugglers and foster gross negligence on the part of the master of the vessel in checking the true weight of the cargo."

In which case, following the doctrine enunciated in *Commissioner of Customs*, the Commission has the power to impose the above-mentioned penalty on SMC pursuant to SEC MC 06-05. The evident purpose of the Commission in imposing administrative fines on companies is in furtherance of the state policy in ensuring full and fair disclosure about securities and minimizing if not totally eliminating insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market. In order to ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading, the Commission, pursuant to its powers, promulgated SEC-MC No. 6-05 imposing penalties based on the amount of the transaction involved (e.g., 1% of the amount of each purchase, etc.). It is necessary to base the penalty on the amount of the transaction involved because persons regulated could easily shoulder the penalty as a business expense, and they will not be encouraged to comply since the gains they would potentially receive from violating the rule far outweigh the penalty imposed for the violation.

If the penalty were restricted to the limits prescribed under Section 54 (ii) of the SRC, that is, Php 1,000,000.00 plus not more than Php 2,000.00 for each day of continuing violation, as argued by SMC, the penalty loses its deterrent effect. In a securities transaction involving hundreds of millions of pesos, the potential financial gains from non disclosure of information and insider trading will be far greater than the penalty of over Php 1,000,000.00. The potential reward for non compliance will far outweigh the penalty for violation. If this situation were sustained, then clearly, the objective of the SRC to ensure full and fair disclosure about securities and eliminate insider trading will be utterly defeated.

Lastly, SMC is precluded based on estoppel from disputing the validity of SEC MC 06-05 since it paid the assessed penalty of Php 2,544,474.60 on 20 January 2011. The doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon. The doctrine of estoppel springs from equitable principles and the equities in the case. It is designed to aid the law in the administration of justice where without its aid injustice might result.[38]

In which case, SMC is forbidden under the principal of estoppel from arguing that the CFD did not act in accordance with the limitations on the amount of the fine prescribed under Section 54.1 (ii) of the SRC (i.e., not more than Php 1,000,000.00 plus an additional Php 2000.00 for each day of continuing violation). SMC did not object to the assessed penalty of Php 2,544,474.60 for its second violation of SRC Rule 23 when it had an opportunity to do so. In fact, SMC made such payment without any objection. It is only after SMC received the instant Assailed Order when it raised this issue for the first time. Clearly, public policy and fair dealing dictate that SMC cannot raise the limitation under Section 54.1 (ii) of the SRC after it has already paid more than the said limitation.

[38] Megan Sugar Corporation, G.R. No. 170352, 1 June 2011.

THE BELATED FILING OF SEC FORM 23-A AND 23-B IS NOT SMC'S FIRST OFFENSE

As to the *second issue,* SMC argues that the belated filing of SEC Form 23-A and SEC Form 23-B on 22 February 2012 should constitute a "first offense". The reason, SMC argues, is that they were committed outside the twelve (12) month period which will consider the offenses committed as "first offense" pursuant to SEC MC No. 01-01 and SEC MC No. 02-03. Moreover, SEC MC No. 01-01 and SEC MC No. 02-03 are not repealed by SEC MC No. 06-05.

SMC's argument is misplaced. An *implied repeal* transpires when a substantial conflict exists between the new and the prior laws. There are two instances of implied repeal. One takes place when the provisions in the two acts on the same subject matter are irreconcilably contradictory, in which case, the later act, to the extent of the conflict, constitutes an implied repeal of the earlier one. **The other occurs when the <u>later act covers the whole subject of the earlier one</u> and <u>is clearly intended as a substitute</u>; thus, it will operate to repeal the earlier law.**[39]

In this case, SEC MC No. 01-01 provides that the scale of fines shall be imposed for the late filing of reports, such as the Statement of Beneficial Ownership for every person who is the beneficial owner of ten percent (10%) or more of any class of any security of a company. The circular provides penalties for the first, second and third offenses. However, the circular provides that the "second and third offenses shall refer to subsequent violations within a 12 month period from the first offense."

On the other hand, SEC MC No. 02-03 provides for the scale of fines for the late or incomplete filing of Statement of Beneficial Ownership (SEC Form 23-A or B) pursuant to Section 23 of the SRC. The circular provides that every person who is directly or indirectly the beneficial owner of ten percent (10%) of any class of any security shall, within ten (10) days after he becomes such a beneficial owner, file such statement with the Commission. The circular provides penalties for the first, second and third offenses as well as a penalty for the fourth offense. However, the circular does not mention any "12 month period" as claimed by SMC.

Next, SEC MC No. 06-05, also provides for the scale of fines for the late or incomplete filing of Statement of Beneficial Ownership (SEC Form

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[39] Bank of Commerce v. Planters Development Bank, et al., G.R. Nos. 154470-71and G.R. Nos. 154589-90, 24 September 2012.

23-A or B). The filing of the Statement of Beneficial Ownership is pursuant to Section 23 of the SRC and SRC Rule 23 of the IRR. Moreover, the circular likewise provides penalties for the first, second, third and fourth offenses. However, the circular does not mention any "12 month period".

It would appear that there is an implied repeal of SEC MC No. 01-01 by the issuance of SEC MC No. 02-03 as to imposition of penalties for the late filing of the Statement of Beneficial Ownership for every person who is the beneficial owner of ten percent (10%) or more of any class of any security of a company. The subject matter of both circulars is the scale of fines for the late filing of such Statement of Beneficial Ownership. Moreover, both impose a fine for the first, second and third offenses for late filing. Clearly, there was intent on the part of the Commission to substitute SEC MC No. 01-01 when it was impliedly repealed by SEC MC No. 02-03 since the later covers the late filing of the Statement of Beneficial Ownership. As a consequence, the "twelve month period" mentioned in SEC MC 02-03 is deleted.

Next, SEC MC No. 02-03 has been impliedly repealed by SEC MC No. 06-05. The subject matter of both circulars is likewise the scale of fines for the late filing of Statement of Beneficial Ownership, as required by Section 23 of the SRC, by every person who is the beneficial owner of ten percent (10%) or more of any class of any security of a company. Moreover, both circulars impose fines for the first, second, third and fourth offenses for late filing of the Statement of Beneficial Ownership. Again, there was an intent on the part of the Commission to substitute the scale of fines for the belated filing of the Statement of Beneficial Ownership when it impliedly repealed SEC MC No. 02-03 by the issuance of SEC MC No. 06-05. SEC MC No. 06-05 also does not mention any "twelve month period".

Hence, considering that SEC MC No. 01-01 was impliedly repealed by SEC MC No. 02-03, which was likewise implied by SEC MC No. 06-05, the "twelve month period" as provided for under SEC MC No. 01-01 does not apply and the penalties imposed for the second and third offenses for the late filing of the SEC Form 23-A and SEC Form 23-B shall be assessed against SMC.

ONE TRANSACTION, TWO OUTCOMES

As to the *third issue*, as to whether there were two (2) transactions entered into by SMC when it sold a portion of its shares to SMFPC, SMC claims that there is only one (1) transaction covering the sale of a portion of Meralco shares to SMFPC, and that the changes occurred simultaneously. Again, SMC's argument is misplaced.

Indeed, there was only one transaction, contrary to CFD's findings. However, it does not detract from the fact that it resulted in two outcomes – a change in BOTH THE DIRECT and INDIRECT ownership of SMC over the said Meralco shares.

Section 23.1 of the SRC provides:

> "23.1. **Every person who is DIRECTLY or INDIRECTLY the beneficial owner of more than ten per centum (10%) of any class of any equity security** which satisfies the requirements of subsection 17.2, or who is a director or an officer of the issuer of such security, **shall file**, at the time either such requirement is first satisfied or ***after ten days*** **after he becomes such a beneficial owner**, director, or officer, **a STATEMENT with the Commission** and, if such security is listed for trading on an exchange, also with the exchange of the amount of all the equity security of such issuer of which he is the beneficial owner, and ***within ten days*** **after the close of each calendar month thereafter, if there has been a change in such ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.**"

SRC Rule 23.1 of the IRR provides:

> "**1. Every person who is DIRECTLY or INDIRECTLY the beneficial owner of ten percent (10%) or more of any class of any security of a company** which satisfies the requirements of subsection 17.2 of the Code, or who is a director or an officer of the issuer of such security, **shall file:**
>
> A. within ten (10) days after the effective date of the registration statement for that security, or **within ten (10) days after he becomes such beneficial owner**, director or officer, subsequent to the effective date of the registration statement, whichever is earlier, **file a statement with the Commission**, and with an Exchange if the security is listed on that Exchange, **on Form 23-A indicating the amount of all securities of such issuer of which he is the beneficial owner.**
>
> B. **within ten (10) days after the close of each calendar month thereafter, if there has been any change in such**

ownership during the month, file a statement with the Commission, and with an Exchange if the security is listed on that Exchange, **on Form 23-B indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during the calendar month.**" (Emphasis ours)

Section 23 of the SRC, in relation to SRC Rule 23, requires that every person, who is *directly* or *indirectly* the beneficial owner of ten percent (10%) or more of any security, to file SEC Form 23-B with the Commission after there has been any change in such ownership.

In which case, when SMC disposed the Meralco shares to its subsidiary, SMPFC, there was a change in beneficial ownership of the former in the following manner: (i) SMC, as the direct beneficial owner, disposed the 59,090,909 Meralco shares to its subsidiary; and (ii) SMC, as the indirect beneficial owner, acquired 54,168,636 Meralco shares since it is the owner of 91.67% of SMPFC. Thus, there were two (2) changes in the beneficial ownership, *directly* or *indirectly*, of SMC as a result of the disposition of shares by SMC.

As a consequence, SMC is mandated under Section 23.1 of the SRC and SRC Rule 23 of the IRR to file two (2) separate SEC Forms 23-B since there were two (2) changes in its beneficial ownership.

NO SUBSTANTIAL COMPLIANCE WITH SRC RULE 23

As to the *fifth issue*, SMC argues that it substantially complied with the spirit of SRC Rule 23 by disclosing to the PSE and Commission, through the SEC Form 17-C, the transactions covering its purchase of the Meralco shares from GSIS and its transfer to SMPFC. Such argument is misplaced.

Maximum efficiency in the capital markets is achieved when people are able to make rational investment decisions. And, people make decisions based on what they know. Thus, it is crucial that all investors, whether large institutions or private individuals, should have access to basic facts about an investment prior to buying it, and so long as they hold it. The steady flow of timely, comprehensive, and accurate information allows investors to make sound decisions that facilitate efficient capital formation that is important to a nation's economy.

Thus, as stated above, it is the policy of the State to ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market.

To achieve this policy, SRC Rule 23 requires insiders, particularly directors, officers and principal stockholders of the issuer to file: (1) SEC Form 23-A (Initial Statement of Beneficial Ownership of Securities) within ten (10) days from the approval of the Registration Statement; and (2) SEC Form 23-B (Statement of Changes in Beneficial Ownership of Securities) within ten (10) days after the close of each calendar month if there is a change in beneficial ownership.

SRC Rule 23 merely demonstrates the state's policy of insuring full and fair disclosure of securities in order to protect the investors. Such rule on disclosure is designed to assist in an informed investment decision, those contemplating the purchase, holding or disposition of securities, thereby providing for the integrity of fair and orderly trading of securities.[40] Moreover, the rationale for requiring the filing of the SEC Form 23-A and SEC Form 23-B within the respective prescribed periods is to prevent any possibility of insider trading.[41]

It must be pointed out that insider trading undermines investor confidence in the fairness and integrity of securities markets. Substantial beneficial owners of the securities, directors and officers of the issuer, by reason of their relationship to the issuer, have access to insider information that could be used in making short-swing profits. In order to maintain fairness and stability in the securities market, such insider information must be disclosed as soon as practicable to the investing public. Time is of the essence since as long as material information remains undisclosed to the public, persons who are privy to the information remain in an advantageous position, and there is always potential for insider trading.

Moreover, SEC Form 23-A and SEC Form 23-B are meant to monitor a creeping acquisition of principal stockholders and to ensure that the same are in conformity with the requirements of the Code. For instance, Section 19 of the SRC requires a tender offer for an acquisition of shares, even though, the same may have been done in small increments over a

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[40] *See* Union Bank of the Philippines v. Securities and Exchange Commission, G.R. No. 138949 (2001), where the Supreme Court cited the objectives of the Full Material Disclosure Policy of the Revised Security Act (now Securities Regulation Code) *See also*. V. Gerard Comizio, *Keeping Corporate Information Secret: Confidential Treatment under the Security Act of 1933 and the Securities Exchange Act of 1934, 18 New Eng. L. Rev. 787 (1982-1983).*

[41] Securities and Exchange Commission (2001). History of the Securities and Regulation Code, (page 38), Mandaluyong City, Philippines.

specified period. The moment a single stockholder holds 10% of any class of equity, the Commission is on notice for possible creeping acquisition activity, in violation of tender offer requirements.

Further, Subsection 23.1 of the SRC must not be considered in isolation, but should be read with the other provisions of the SRC, especially Subsections 23.2[42] and 23.3 thereof.[43] Subsection 23.2 is intended to prevent any possibility of insider trading by curtailing short-term speculation by members of an inside group who might use their inside information for selfish purposes. On the other hand, Subsection 23.3 prohibits two (2) speculative transactions (i.e., short sales[44] and sales against the box[45]) since the sellers have access to inside information, and hence, there is a potential for speculative abuse.[46]

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[42] Subsections 23.2 provides the following: "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director or officer by reason of his relationship to the issuer, any profit realized by him from any purchase or sale, or any sale or purchase, of any equity security of such issuer within any period of less than (6) months unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention of holding the security purchased or of not repurchasing the security sold for a period exceeding six (6) months. Suit to recover such profit may be instituted before the Regional Trial Court by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty (60) days after request or shall fail diligently to prosecute the same thereafter, but not such shall be brought more than two years after the date such profit was realized. This Subsection shall not be construed to cover any transaction were such beneficial owner was not such both time of the owner or the sale, or the sale of purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

[43] Subsections 23.3 provides the following: "It shall be unlawful for any such beneficial owner, director or officer, directly or indirectly, to sell any equity security of such issuer if the person selling the principal: (a) Does not own the security sold: or (b) If owning the security, does not deliver not deliver it against such sale within 20 days thereafter, or does not within five days after such sale deposit in the mails or the unusual channels of transportation; but no person shall be deemed to have violated this subsection if he proves not withstanding the exercise of good faith he was unable to make such delivery in such time, or that to do so would cause undue inconvenience or expense."

[44] *Short sales* occurs where the insider does not own the security but may borrow it from a lender, when he believes the price of stock will fall.

[45] *Sales against the box* is occurs when the seller anticipates the decline in the stock he owns and he will sell it to the buyer at the present market price but, delivers it later, when hopefully the market price will have fallen below the sales price, thus creating a paper profit for the seller.

[46] Economic Governance Technical Assistance. Draft Commentary on the Securities Regulation Code, pp. 104-105.

It is clear from the foregoing that SEC Form 23-B is an important reporting requirement by which the Commission and any interested party can ascertain critical information such as the identities of the persons who are directly or indirectly the beneficial owner of ten percent (10%) or more of any class of any security of the issuer, the volume of their investment therein, the changes in their ownership, and the history and relevant dates of their transactions. It is a tool by which the Commission and the public can monitor the trading activities of the said beneficial owner who are insiders of the issuer company, with the end view of: (1) preventing the prohibitions cited above; (2) detecting any violation thereof; (3) better enforcement of any civil (such as the civil action under Subsection 23.2), criminal, and/or administrative action arising therefrom; and (4) determining whether there is any possible creeping acquisition activity in violation of tender offer requirements.

In which case, the requirements for timely disclosure are absolute, and do not admit of any exemptions, otherwise, the rationale for the requirements would obviously be defeated, or easily circumvented.

Indeed, in other jurisdictions such as the United States, courts have always recognized the absolute nature of statutes and regulations requiring reports and disclosures from insiders such as major stockholders and top management personnel designed to prevent insider trading.[47] The disclosure requirements are absolute because they are precisely designed to make it difficult for insiders to realize the type of unfair advantage the statutes and regulations seek to prevent, and allow monitoring of insiders' trading activities to ensure compliance with trading restrictions.[48] American courts have confirmed that reportorial/disclosure requirements for insiders are absolute and not dependent upon showing of actual unfair use.[49] Further, courts have ruled that the omission of the required disclosure itself is a badge of fraud and deceit.[50]

In fact, American courts have held that actual intent is not necessary – it is unimportant that there was no actual attempt to defraud investors, and it is nevertheless a violation for as long as material information has been withheld in the face of insider trading.[51] And, motive for

[47] 69 Am. Jur. 2d Securities Regulation Federal §527.
[48] *Id.*
[49] 69 Am. Jur. 2d Securities Regulation Federal §528.
[50] *Id.*
[51] *SEC v. Texas Gulf Sulphur Co.* (CA2 NY) 401 F2d 833, 2ALR Fed 190, cert den 394 US 976, 22 L ed 2d 756, 89 S. Ct. 1454.

non-disclosure or false disclosure is irrelevant in light of the possibility of its direct impact on the market.[52]

Next, as to SEC Form 17-C, Section 17.1 of the SRC provides that every issuer satisfying the requirements in Section 17.2[53] hereof shall file with the Commission *current reports* on significant developments of the issuer as the Commission may prescribe as necessary to keep current information on the operation of the business and financial condition of the issuer.

This provision is implemented by SRC Rule 17.1(A)(iii) of the IRR which provides:

> "A. Every issuer shall file with the Commission: x x x
>
> iii. a *current report* on SEC Form 17-C, as necessary, **to make a full, fair and accurate disclosure to the public of every material fact or event that occurs, which would <u>reasonably be expected to affect the investors' decisions in relation to those securities</u>**."

Under Section 17.1 of the SRC and SRC Rule 17.1 (A)(iii) of the IRR, the issuer's obligation to continually disclose significant events may be construed to be part of its responsibility to keep information submitted to the Commission in current and accurate form. This requirement is essential to protect investors who participate in the securities market through the secondary market, to ensure that their investment decisions are informed by current and accurate information.[54] In short, the filing of SEC Form 17-C by the issuer of securities is not to inform the Commis-

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[52] *Heit v.* Weitzen (CA2 NY) 402 F2d 909, 3ALR Fed 803, cert den 395 US 903, 25 L ed 2d 217, 89 S. Ct. 1740.

[53] Section 17.2 of the SRC provides that the reportorial requirements of Subsection 17.1 shall apply to the following: (a) An issuer which has sold a class of its securities pursuant to a registration under section 12 hereof:*Provided however*, That the obligation of such issuer to file reports shall be suspended for any fiscal year after the year such registration became effective if such issuer, as of the first day of any such fiscal year, has less than one hundred (100) holder of such class securities or such other number as the Commission shall prescribe and it notifies the Commission of such; (b) An issuer with a class of securities listed for trading on an Exchange; and (c) An issuer with assets of at least Fifty million pesos (50,000,000.00) or such other amount as the Commission shall prescribe, and having two hundred (200) or more holder each holding at least one hundred (100) share of a class of its equity securities: *Provided, however*, That the obligation of such issuer to file report shall be terminate ninety (90) days after notification to the Commission by the issuer that the number of its holders holding at least one hundred (100) share reduced to less than one hundred (100).

[54] Economic Governance Technical Assistance. Draft Commentary on the Securities Regulation Code, p. 80.

sion of the former's significant developments but rather to guide the investing public in making rationale decisions in relation to those securities.

In sum, the filing of SEC Form 23-A and SEC Form 23-B are intended to prevent insider trading, creeping acquisition of securities, and to allow the public and the Commission to monitor critical information such the identities of persons who are beneficial owners of securities, volume of beneficial owners' investments therein, changes in ownership and the history of their transactions. On the other hand, the filing of SEC Form 17-C is intended to obligate the issuer of securities to disclose events that would reasonably be expected to affect the investors' decisions in relation to those securities. Moreover, the filing of SEC Form 17-C is not intended to inform the Commission of those events but rather to guide the investing public. Further, SEC Form 23-A and SEC Form 23-B must be filed by the beneficial owner of securities and, on the other hand, SEC Form 17-C must be filed by the issuer of securities. In fact, the disclosure in the wrong form is tantamount to non-disclosure since the investors will be looking for specific information from specific forms.

In which case, SEC Form 17-C filed by SMC, in relation to its acquisition of the Meralco shares from GSIS, states the following:

> "x x x The Company has fully paid the purchase price of these shares to GSIS and have been crossed in the Philippine Stock Exchange on August 5, 2011."[55]

In SEC Form 23-A, in relation to such acquisition of the Meralco shares, SMC states the following:

- 27% ownership of securities of issuer Meralco;
- Owned 300,963,189 shares of issuer Meralco; and
- Form of Ownership in shares of issuer Meralco: "Direct".[56]

On the other hand, SEC Form 17-C filed by SMC, in relation to its disposition of the Meralco shares to SMPFC, states the following:

> "Further to the Company's disclosure on 12 August 2011, please be advised that the **Company [SMC] and San Miguel Pure Foods Company, Inc. (SMPFC) have executed a**

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[55] *Memorandum on Appeal*, Annex "M" (SEC Form 17-C dated 11 August 2011).
[56] *Id.*, Annex "P" (SEC Form 23-A).

share purchase agreement covering the sale by the Company to SMPFC of fifty nine million ninety thousand nine hundred nine (59,090,909) shares of stock of Manila Electric Company at Two Hundred Twenty Pesos (P220.00) per share."[57]

In SEC Form 23-B, in relation to such disposition of the Meralco shares, SMC states the following:

- Acquired 300,963,189 Meralco shares at Php 90.00 per share on 5 August 2011;
- Disposed 59,090,909 Meralco shares at Php 220.00 per share on 24 August 2011;
- Acquired 54,168,636 Meralco shares at Php 220.00 per share on 24 August 2011;
- It directly owns 241,872,280 Meralco shares, or 21.46% direct ownership of Meralco;
- It indirectly owns 54,168,636 Meralco shares, or 4.80% indirect ownership of Meralco;
- Its total beneficial ownership is 296,040,916 Meralco shares, or 26.26% total beneficial ownership of Meralco; and
- Nature of indirect beneficial ownership: SMPFC is 91.67% owned by SMC.[58]

Clearly, SEC Form 17-C, in relation to its acquisition of the Meralco shares from GSIS, filed by SMC only states that it paid the purchase price of the said shares to GSIS. SEC Form 17-C did not mention the number of Meralco shares it initially acquired, percentage of ownership of Meralco and form of ownership as required under SEC Form 23-A.

On the other hand, SEC Form 17-C filed by SMC, in relation to its disposition of the Meralco shares to SMPFC, only states the number of shares it sold to SMPFC and the price per share. SEC Form 17-C did not mention the history of the transactions of the Meraclco shares, number and percentage of Meralco shares owned by SMC and the nature of its indirect beneficial ownership. Clearly, SMC did not substantially comply with the spirit of SRC Rule 23 when it filed SEC Forms 17-C in relation to the above-mentioned transactions. SMC's disclosure of its transactions in SEC Form 17-C is tantamount to non-disclosure since the investors of Meralco will be seeking specific information from specific forms.

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[57] *Id.*, Annex "O" (SEC Form 17-C dated 16 August 2011).
[58] *Id.*, Annex "Q" (SEC Form 23-A).

Lastly, SMC argues that its late compliance of SRC Rule 23 is due to inadvertence. However, such excuse has no merit. **Excuses such as inadvertence are self-serving and unverifiable.** If such excuses are allowed, then the whole system of reportorial requirements designed to ensure transparency and fairness in the securities market would be undermined.

GOOD FAITH IS IMMATERIAL

As to the *last issue,* SMC argues that the penalty be mitigated or eliminated since it acted in good faith and without wanton disregard of Subsection 23.1 of the SRC and the IRR. However, whether or not SMC is acted in good faith is immaterial since it had the duty to report under the law to report any change in ownership.

Good faith or bad faith hardly comes into the picture in the enforcement of simple regulatory rules mandating submission of reportorial requirements. To allow legal notions to intrude at every level in the implementation of these rules would defeat their very purpose, as every penalty could be subject to question and every violation based on a clear-cut rule would be qualified by the presence or absence of good faith or bad faith, or the question of motive or intent.[59]

Besides, SMC's claim of good faith is belied by the fact that this is already its second violation of the same Rule, which it does not dispute. SMC was meted the penalty of Reprimand for its first violation of the same Rule on 11 May 2009. SMC was already warned that it must take measures to fully comply with the SRC and its IRR, otherwise, appropriate penalties shall be imposed based on the SEC MC No. 06-05 for a repetition of the same violation.

WHEREFORE, premises considered, the instant appeal is hereby **DENIED** for lack of merit. Appellant San Miguel Corporation is ordered to settle the penalty of Seven Hundred Sixty Nine Million Two Hundred Ninety Three Thousand Nine Hundred Sixty Eight Pesos and 1/10 (P769,293,968.10), in accordance with the Consolidated Scales of Fines (SEC Memorandum Circular No. 6, Series of 2005), to be paid in cash or by Manager's or Cashier's check to this Commission within fifteen (15) days from receipt of this Decision.

SO ORDERED.

Pasay City, 3 November 2017.

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[59] Lim v. CFD, SEC *En Banc* Case No. 02-10-196, 16 September 2010.

Dispositive portion as follows:

"**WHEREFORE,** premises considered, the instant appeal is hereby **DENIED** for lack of merit. Appellant San Miguel Corporation is ordered to settle the penalty of Seven Hundred Sixty Nine Million Two Hundred Ninety Three Thousand Nine Hundred Sixty Eight Pesos and 1/10 (P769,293,968.10), in accordance with the Consolidated Scales of Fines (SEC Memorandum Circular No. 6, Series of 2005), to be paid in cash or by Manager's or Cashier's check to this Commission within fifteen (15) days from receipt of this Decision.

SO ORDERED."

Pasay City, 21 November 2017.

TERESITA J. HERBOSA
Chairperson

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO*
Commissioner

EMILIO B. AQUINO
Commissioner

*Inhibited