Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

12 December 2024

SEC OGC Opinion No. 24-43
Re: Exempt Transactions under Subsection 10.2 of the Securities Regulation Code

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Attention: **Atty. Ramoncito Gerardo S. Gupit**
Atty. Marico Navarro-Laudencia
Atty. Patrick Joseph E. Teopengco

Re: **Request for Opinion**

Dear Sirs:

This refers to your Letter dated 20 June 2024[1] requesting the Commission's opinion on the mandatory compliance requirements, if any, under Republic Act No. 8799, otherwise known as the "Securities Regulation Code ('SRC')," and its Implementing Rules and Regulations ("2015 SRC Rules"), pertaining to stock options and shares of stocks issued by a publicly-listed non-resident foreign corporation in France.

As stated in your Letter, the relevant facts are as follows:

1. TotalEnergies Global Services Philippines, Inc. ("TGSPI") is part of the TotalEnergies Group of Companies (the "Group"), a French Corporation with headquarters based in France. As part of the Group's centennial celebration, employees of the different TotalEnergies companies around the world, including TGSPI employees (Filipinos), will be issued shares of stocks for free. These securities are to be issued by TotalEnergies SE ("TTE"), a publicly listed entity in France.

2. In another respect, the Group is expected to issue, from time to time, Stock Options as additional benefit to qualified TGSPI executives/employees. Similar to the particular transaction mentioned above, the securities will be issued by TTE.

3. It is your understanding that TTE, being a "creature of law" created under the laws of another country, has no legal existence in the Philippines for which laws and regulations concerning the Commission can apply. Consequently, the issuance of shares to Filipinos by a non-resident foreign corporation that is not doing any business in the Philippines is outside the Commission's territorial jurisdiction and scope.

[1] Received by this Office on 25 June 2024.

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Your queries are:

1. Whether the Stock Options of French Share issued by the Group, offered as additional benefits to top qualified executives/employees of TGSPI, are subject to any compliance or registration requirements mandated by the Commission?

2. Whether the shares issued by TTE, intended to be distributed to the employees of TGSPI for free, are subject to any compliance or registration requirements mandated by the Commission?

FIRST QUERY

As a general rule, Subsection 8.1 of the SRC mandates the registration of securities offered for sale or distribution within the Philippines, thus:

> Section 8. *Requirement of Registration of Securities.*– 8.1. *Securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission.* Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser.
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The Commission has consistently advanced the *general rule of registration of securities* as mandated under Subsection 8.1 of the SRC, thus:

> In sum, ***before PMWHC issues or sells its shares of stock, it should comply with the registration requirements of Section 8 of the SRC***, unless said sale or issuance thereof is an exempt transaction under Section 10 of the SRC except Sec. 10.1 (i) of the SRC which needs registration of the securities if such subscription entails expenses. Note however, that notice of exemption on SEC Form 10-1 is required in an offering or distribution of securities under Section 10.1 (k) and (1) of the SRC.[3]

Indeed, it is clear from Subsection 8.1 of the SRC that one of the elements considered in determining the obligation to register the securities is whether the same are sold or offered for sale within the Philippines. Applying the foregoing yardstick, corporations intending ***to offer for sale or distribution securities*** within the Philippines are bound by the registration requirements imposed by the SRC, subject to the exceptions provided under Section 9 and Subsection 10.1 thereof, regardless of the citizenship or residency of the issuer.

Nevertheless, Subsection 10.2 of the SRC provides that the Commission *may exempt* other transactions, if it finds that the requirements of registration under the SRC is not necessary in the public interest or for the protection of the investors such as by the reason of the ***small amount involved or the limited character of the public offering.***

The Commission previously opined that if the offering or distribution of securities does not fall in any of the exempt transactions provided in Subsection 10.1 of the SRC,[4] an issuer may instead request for

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[2] Italics supplied.

[3] SEC-OGC Opinion No. 10-33 dated 17 December 2010, addressed to Mr. Teodoro G. Rolluqui. Emphasis and italics supplied.

[4] Section 10. *Exempt Transactions.* – 10.1. The requirement of registration under Subsection 8.1 shall not apply to the sale of any security in any of the following transactions:

(a) At any judicial sale, or sale by an executor, administrator, guardian or receiver or trustee in insolvency or bankruptcy.

(b) By or for the account of a pledge holder, or mortgagee or any of a pledge lien holder selling of offering for sale or delivery in the ordinary course of business and not for the purpose of avoiding the provision of this Code, to liquidate a *bona fide* debt, a security pledged in good faith as security for such debt.

(c) An isolated transaction in which any security is sold, offered for sale, subscription or delivery by the owner therefore, or by his representative for the owner's account, such sale or offer for sale or offer for sale, subscription or delivery not being made in the course of repeated and successive transaction of a like character by such owner, or on his account by such representative and such owner or representative not being the underwriter of such security.

(d) The distribution by a corporation actively engaged in the business authorized by its articles of incorporation, of securities to its stockholders or other security holders as a stock dividend or other distribution out of surplus.

(e) The sale of capital stock of a corporation to its own stockholders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale of such capital stock.

an exemption from the Commission, pursuant to Subsection 10.2 of the SRC, by providing the required justifications that the requirements of registration under the SRC is not necessary in the public interest or for the protection of the investors. Thus:

> We also invite your attention to Section 10.1 Paragraph 3.A. of the Amended Implementing Rules and Regulations of the SRC which provides:
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> "3. Exempt Transactions Requiring Notice
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> A. Notice of exemption on SEC Form 10-1 shall be required in an offering or distribution of securities under Section 10.1 (k) and (l) of the Code."
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> Consequently, if the offering or distribution of your increased POCs falls within the conditions specified in Section 10.1 (e) or (i), a notice of exemption is not required. However, if the offering or distribution of such increased POCs falls in Section 10.1 (k), a notice of exemption from the registration requirements on SEC Form 10-1 must be filed with the Corporate Governance and Finance Department ("CGFD")[5] of the Commission.
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> In any case, whether or not a notice is required, you may opt to file with our CGFD an application for confirmation or declaration of exemption, also through SEC Form 10-1, pursuant to Section 10.3 of the SRC.
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> Unless confirmation of the availability of such exemption is applied for, any person claiming an exemption under Section 10 has the burden, if challenged, to establish that the exemption is available and the Commission may challenge such exemption at any time. This means that although an application for confirmation is optional, a party may avail of such confirmation to defeat future challenge from the Commission.
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> ***On a final note, if the offering or distribution of your increased POCs does not fall in any of the exempt transactions provided in Section 10.1 of the SRC, you may still request for an exemption from the Commission, pursuant to Section 10.2 of the SRC, by providing justifications that the requirements of registration under the SRC is not necessary in the public interest or for the protection of the investors such as by reason of the small amount involved or the limited character of the public offering.***[6]

For a public offering to be considered of limited character, the covered securities should be available *only* to the parties or persons named in the application for exemption *for a specified period*.[7] Thus, on the basis of said allowable exemption under Subsection 10.2, the Commission, on several occasions, had treated "stock option plans" granted by foreign corporations in favor of qualified employees of their

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(f) The issuance of bonds or notes secured by mortgage upon real estate or tangible personal property, when the entire mortgage together with all the bonds or notes secured thereby are sold to a single purchaser at a single sale.
(g) The issue and delivery of any security in exchange for any other security of the same issuer pursuant to a right of conversion entitling the holder of the security surrendered in exchange to make such conversion: Provided, That the security so surrendered has been registered under this Code or was, when sold, exempt from the provision of this Code, and that the security issued and delivered in exchange, if sold at the conversion price, would at the time of such conversion fall within the class of securities entitled to registration under this Code. Upon such conversion the par value of the security surrendered in such exchange shall be deemed the price at which the securities issued and delivered in such exchange are sold.
(h) Broker's transaction, executed upon customer's orders, on any registered Exchange or other trading market.
(i) Subscriptions for shares of the capitals stocks of a corporation prior to the incorporation thereof or in pursuance of an increase in its authorized capital stocks under the Corporation Code, when no expense is incurred, or no commission, compensation or remuneration is paid or given in connection with the sale or disposition of such securities, and only when the purpose for soliciting, giving or taking of such subscription is to comply with the requirements of such law as to the percentage of the capital stock of a corporation which should be subscribed before it can be registered and duly incorporated, or its authorized, capital increase.
(j) The exchange of securities by the issuer with the existing security holders exclusively, where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.
(k) The sale of securities by an issuer to fewer than twenty (20) persons in the Philippines during any twelve-month period.
(l) The sale of securities to any number of the following qualified buyers:

i. Bank;
ii. Registered investment house;
iii. Insurance company;
iv. Pension fund or retirement plan maintained by the Government of the Philippines or any political subdivision thereof or manage by a bank or other persons authorized by the Bangko Sentral to engage in trust functions;
v. Investment company or;
vi. Such other person as the Commission may rule by determine as qualified buyers, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial and business matters, or amount of assets under management.

[5] *Now* Markets and Securities Regulation Department.
[6] SEC-OGC Opinion No. 13-13 dated 05 December 2013, addressed to Mr. Jeric Hechanova. Emphasis and italics supplied. Citations omitted.
[7] Rule 10.2.2, 2015 SRC Rules.

Philippine subsidiaries/affiliates, as an exempt transaction.[8]

Thus, we answer your first query in the *affirmative, in that while there is no registration requirement under Sections 8 and 12 of the SRC, there has to be compliance with the* ***requirements and conditions*** *for stock options as will be discussed hereunder.*

If the stock option is limited to qualified executives or employees of TGSPI who are in a position to know the present affairs of TTE, the issuer corporation and part of the Group, and the risk of investing therein, such that the registration of the shares to be offered is not necessary in the public interest and for the protection of the investors, the proposed transaction *may be* exempted from the registration requirement under the SRC. In line with this, the Commission previously ruled that:[9]

> Accordingly, if the stock option plan referred to in your letter is limited only to 58 qualified employees of the subsidiary of the parent corporation who are in a position to know the present affairs of the issuer corporation and the risk of investing therein such that the registration of the shares to be offered is not necessary in the public interest and for the protection of the investors, the proposed transaction may be exempted from the registration requirement under the Revised Securities Act subject to the following *requirements* which should be *filed prior to its implementation:*
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> 1. Filing of a request for exemption from the registration requirements stating the reason why it should be exempted from registration under the Revised Securities Act;
> 2. Payment of exemption fee amounting to one tenth of one per centum of the maximum aggregate price or issued value of the securities as required under section 6 (c) of the Revised Securities Act.[10]

Hence, the following shall be filed in support of the application for exemption under Subsection 10.2 of the SRC:

1. **Letter-request** containing the required information, as well as the requisite documentary requirements thereto.[11] For the complete list of the documentary requirements, kindly visit the Commission's website to secure the checklist of requirements for SEC Form 10.2 application, which may be accessed through this link: https://www.sec.gov.ph/wp-content/uploads/2023/12/2023UpdatedForm10.2andChecklist.docx.

   If you have questions on the operational details and documentary requirements on the application for exemption, you may contact the Commission's Markets and Securities Regulation Department at msrdsubmission@sec.gov.ph.

2. **Payment of exemption fee** equivalent to one-tenth (1/10) of one percent (1%) of the maximum value aggregate price or issued value of the securities.[12]

Further, it ought to be underscored that the grant of exemption under Subsection 10.2 of the SRC is ***subject to the following conditions:***

1. Any subsequent offer or sale thereof is subject to the registration requirement of the SRC unless such offer or sale qualifies as an exempt transaction;[13]

2. The covered securities should be available only to the parties or persons named in the application for exemption for a specified period;[14]

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[8] SEC Opinion dated 04 December 1998, addressed to Ms. Tomasa H. Lipana.
[9] SEC Opinion dated 20 March 2000, addressed to Ms. Helen G. Tiu.
[10] Italics in the original. Now Subsection 10.3 of the SRC.
[11] *See* Rule 10.2.3, 2015 SRC Rules.
[12] Any person applying for an exemption under this Section shall file with the Commission a notice identifying the exemption relied upon on such form and at such time as the Commission by rule may prescribe and with such notice shall pay to the Commission a fee equivalent to one-tenth (1/10) of one percent (1%) of the maximum aggregate price or issued value of the securities. (Subsection 10.3 of the SRC) *See* also Rule 10.2.5, 2015 SRC Rules.
[13] *See* Rule 10.2.6, 2015 SRC Rules.
[14] *Supra* Note 7.

3. Issuers, as well as the participating subsidiary, affiliate, branch office or any other entity-optionee, granted exemption shall submit to the Commission, on or before the 10th of January of each year following the date of the grant until full issuance, a report containing the necessary details of the grant, such as but not limited to, the names of actual optionees and the number of shares subscribed by them, or such other reports and for such period as the Commission may from time to time require;[15] and

4. Independent directors are allowed to participate in Employees' Stock Option Plan, provided that their shareholdings in the company do not exceed two percent (2%) of the outstanding shares of the corporation.[16]

SECOND QUERY

We answer your second query in the *negative.*

To reiterate, Subsection 8.1 of the SRC provides:

> Section 8. *Requirement of Registration of Securities.*– 8.1. *Securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission.* Prior to such sale, information on the securities, in such form and with such substance as the Commission may prescribe, shall be made available to each prospective purchaser.
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> xxx xxx xxx[17]

In cases for violation of the abovementioned provision, the following essential elements must be established:

a) The subject matter must be securities;
b) The securities must either be sold or offered for sale or distribution; and
c) The sale or offer to sell/distribute securities must be within the Philippines.

As represented, there is **no monetary investment of consideration** for the issuance of the shares to the employees. This negates the element of sale or distribution of securities to the public as the shares shall be issued for free in the form of centennial celebration bonus.

It shall be understood that the foregoing opinion is rendered based solely on the facts, circumstances and documents disclosed/submitted and relevant solely to the particular issue raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[18] If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,

Romuald C Padilla
General Counsel

[15] Rule 10.2.4, 2015 SRC Rules.
[16] SEC Memorandum Circular No. 5, Series of 2012, with the subject "Participation of Independent Directors in Employees' Stock Option Plan."
[17] Italics supplied.
[18] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.