Securities and Exchange Commission
PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

SEC OGC Opinion No. 23-16

Re: Eligibility of a Foreign Investor to be Elected as Chairman of the Board in a Partly Nationalized Corporation

24 November 2023

Mendiola Baul & Valenzuela Law Office
Suite 1105, 11th Floor Prestige Tower,
F. Ortigas Jr. Road, Ortigas Center,
Pasig City, Metro Manila

Attn: Atty. Magher S. Baul

Dear Ma'am:

This refers to your letter dated 18 October 2023 requesting for the Commission's opinion on 1.) whether Cordial Shipping, Inc. ("Cordial" or the "Company") can allow a foreign investor to be elected as its Chairman of the Board; and 2.) the extent of participation allowed for a foreign investor sitting as a member of the Board, particularly in the exercise of and for the protection of his/ her interest in the Company.

As mentioned in your letter, Cordial's primary purpose, per its submitted Articles of Incorporation (AOI), is to provide complete marine services, as principal or agent, to shipowners and other ship operators and managers, and to any person or entity engaged in international marine and maritime business such as but not limited to full and partial crewing of ocean-going vessels acting as managers of ships or their crew.[1] Hence, you stated that Cordial is a private recruitment or manning agency for local or overseas employment.

Relative thereto, you recognize that Cordial, as a private recruitment and manning agency, shall comply with the foreign equity restrictions under the Constitution, Commonwealth Act No. 108 (the "Anti-Dummy Law") and the 12th Foreign Investment Negative List (12th FINL). Hence, you disclosed that the Company observes the 25% foreign equity restriction in its shareholdings and the limitation of participation of foreign investors in the Board of Directors.

Given the above circumstances, you would like to be apprised whether a foreign investor of Cordial can be appointed/elected as its Chairman whose participation is limited only to presiding in Board meetings. In addition, you would like to know the extent of participation of a foreign investor as a sitting member of the Board, particularly in the exercise of and the protection of his/ her interest in the Company.

Based on the facts you provided, we agree that Cordial, as a recruitment and manning agency, falls under Item No. 12 List A of the 12th FINL[2], and hence, a partially nationalized corporation. Accordingly, the Company cannot hire any foreigner who will intervene in its management, operation, administration or

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[1] Cordial Shipping Inc.'s Articles of Incorporation.
[2] Up to twenty-five (25%) of foreign equity
xxx
12.) Private recruitment, whether for local or overseas employment (Art. 27 of PD No. 442)

control. As provided under Section 2-A of the Anti-Dummy Law[3], foreign nationals are not allowed *"to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein"* in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege. The ban prohibits foreigners from being elected or appointed to management positions as president, vice-president, treasurer, secretary, etc.[4]

Consequently, a wholly or a partially nationalized corporation cannot hire any foreigner to intervene in its management, operation, administration or control, whether as an officer, employee or laborer therein with or without remuneration except as technical personnel whose employment may be specifically authorized by the Secretary of Justice, because to do otherwise is a violation of Section 2-A of the Anti-Dummy Law.[5]

However, it is noteworthy that while generally, "foreigners" are disqualified to be elected/appointed as "corporate officers" in wholly or partially nationalized business activities, nevertheless, they are allowed representation in the "Board of Directors" or "governing body" of said entities in proportion to their shareholdings. The reason for the exception is that the Board of Directors/governing body performs specific duties as a "body." Unlike corporate officers, each member of the Board of Directors/governing body has no individual power or authority to perform management function. The powers delegated to the Board of Directors/governing body can only be exercised by it acting as a body when a quorum is present. Hence, there can be no intervention in the management, operation, administration and control of the corporation by the members thereof in their individual capacity.[6]

In the case of Cordial, the foreign investor who is likewise a member of the Board of Directors is to be appointed as the *Chairman* of the Board but his/ her powers as such will only be limited to presiding in board meetings. Thus, there is a need to determine whether such a *Chairman* falls under the restriction under Section 2-A of the Anti-Dummy Law.

In SEC Opinion dated 15 May 1985, the Commission discussed that "the concept of board chairman and his functions as an executive vary so widely in different companies as to be indefinable. There is no settled practice."[7] The typical pattern of executive duties is that the president or the chairman of the board is designated, usually by the by-laws but sometimes in board resolutions, as the general manager or chief executive officer of the corporation. If the chairman of the board is so designated, the president is frequently designated the chief administrative or chief operating officer [or] may simply clearly be the officer who succeeds to the chairman's executive duties in his absence or disability. In such a given situation, an alien cannot qualify as chairman of the board of directors. However, where the president is the chief executive officer, typically, the duties of the Chairman of the board relate to presiding at meetings

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[3] "SEC. 2-A. 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 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.*

[4] SEC OGC Opinion No. 19-14 dated 15 July 2014 citing SEC Opinion dated 11 September 2002, addressed to Atty. Perseveranda A. Abrenica.

[5] SEC-OGC Opinion No. 19-10 dated 13 March 2019.

[6] *Ibid.*

[7] SEC Opinion dated 15 May 1985 addressed to Atty. Francisco F. Angeles citing 2 Fletcher, Cyc. Corps., sec. 506 at 541; Ballantine on Corporations, Rev. ed., sec. 52 at 142.

of the board and of committees of which he is a member and carrying out such other duties as the board shall assign.[8] The duty of the Chairman of the board as presiding officer is not an executive one.[9] **Thus, where the function of the chairman of the board as provided for in the by-laws consists merely of presiding at the meetings of the board or of committees of which he is a member, a non-Philippine national may qualify as the chairman of the board.**[10]

This was further reiterated in SEC Opinion No. 07-07, where the Commission opined that if the association is engaged in partly nationalized activities, foreign nationals may sit in the board in proportion to their allowable membership therein. **In the same vein, an alien national may assume the post of the Chairman of the Board whose act shall be limited to that of a presiding officer during board meetings.**[11]

Considering the foregoing, given that the function of the Chairman of the Board of Cordial shall be limited to only presiding in Board meetings, then a foreigner can be appointed as such.

As to your *second* query , it must be noted that while the management of the business of a corporation is generally vested in the Board, as it is the central power that authorizes the executive officers to enter into contracts and to embark on a business[12], an act or decision of a sole board member cannot validate or carry-out an act without the consent and approval of the majority of the board or not until a quorum is attained, as the case may be. Hence, a board member whether foreign or not, is allowed to exercise the corporate powers *(Sections 36-43 of the RCC)* granted under the RCC through his membership in the Board. However, it must be reiterated, and as earlier discussed, that the powers delegated to the Board of Directors/governing body can only be exercised by it acting as a body when a quorum is present. Thus, a single board member cannot intervene in the management, operation, administration and control of the corporation in his/her individual capacity.[13]

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.[14] 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

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[8] *Supra,* Note 7 citing Ballantine & Sterling, California Corporation Laws, Vol. 1, 1982 edition, Sec. 89.03 at chap. 5-42
[9] *Ibid* citing 2 Fletcher, Cyc. Corps., sec. 506 at 542.
[10] SEC Opinion dated 25 March 1992 citing SEC Opinion dated 15 May 1985.
[11] SEC Opinion dated 8 August 2007 addressed to Atty. Pastor M. Reyes, Jr.
[12] Aquino, Commentaries and Jurisprudence on the Revised Corporation Code 2020 Edition, p. 281.
[13] *Supra,* page 2, par. 3.
[14] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.