Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

28 March 2019

SEC-OGC Opinion No. 19-14
RE: CREATION OF APIC USING VALUE OF AN AIRCRAFT; NON-SCHEDULED DOMESTIC AIR TRANSPORT AS NATIONALIZED BUSINESS ACTIVITY

Reyes Diano Tumanda & Co. CPAs
2/F Xerografix World Plus Building
Lot Space 3, Manila Ave. cor. Canal Rd.
CBD, Subic Bay Freeport Zone

Attention: **Peter R. Tumanda, Managing Partner**

Gentlemen:

This refers to your letter dated 19 November 2018, requesting an opinion on (1) **whether or not the value of an aircraft may be used to create additional paid-in capital (APIC)**, and (2) **whether or not "non-scheduled domestic air transport" is a nationalized activity (*i.e.* public utility)**.

If domestic air transport is a nationalized activity, you further inquire as to (a) whether or not a foreign ***shareholder*** may infuse the APIC, and (b) whether or not APIC infused by a foreign ***shareholder*** should be included in the computation of foreign ownership.

1. Creation of APIC using the value of an aircraft

The creation of APIC is a matter within the business judgment of the corporation.[1] It does not require the prior approval of the Commission.

However, since the consideration here is property, in the form of an aircraft, it is subject to the Commission's confirmation of valuation, as mandated by **Section 61 of the Revised Corporation Code**,[2] viz.

---

[1] SEC Opinions 18-03 (dated 19 March 2018) and 10-34 (dated 22 December 2010), citing **SEC Resolution No. 94, Series of 2006** which grants corporations the "**option**," but not the obligation, to apply for creation of APIC with the Commission.

[2] Reenactment of Section 62 of the 1980 Corporation Code (B.P. 68)

> Section 61. Consideration for Stocks. xxx
>
> xxx xxx xxx
>
> Where the consideration is other than actual cash, or consists of intangible property such as patents or copyrights, the valuation thereof shall initially be determined by the stockholders or the board of directors, **subject to the approval of the Commission.** (Emphasis supplied)
>
> xxx xxx xxx

The corporation has to prepare its valuation of the aircraft with the aid of an appraiser,[3] and then file an application for confirmation. The Commission has to confirm the valuation of consideration other than cash, including aircraft, to prevent watering of stock.[4]

We recommend filing an **Application for Confirmation of Valuation of aircraft for the creation of APIC** with the Financial Analysis and Audit Division (FAAD) of the Commission's Company Registration and Monitoring Department (CRMD). The application should be accompanied by a favorable endorsement of **airworthiness** from the Civil Aeronautics Board.

The **SEC Guidelines Covering the Use of Properties that Require Ownership Registration as Paid-Up Capital dated 15 November 1994 (as amended by Memorandum Circular No. 14, Series of 2013)** also require proof of transfer of ownership within ninety (90) days from approval of the application,[5] viz.

> In the interest of investors and creditors in stock corporations, the following guidelines are hereby adopted by the Commission, in connection with land, and other properties requiring ownership registration, such as motor vehicles, sea vessels, **aircraft**, firearms, and shares of stock, which are used as paid-up capital of stock corporations xxx[6]

Absent such **confirmation of valuation** and **proof of transfer**, the value of an aircraft cannot be used to create APIC.

---

[3] See Item II-2 of SEC Memorandum Circular No. 2, Series of 2014 (Guidelines on Asset Valuations), viz. "For corporations that are not public companies xxx [if] the subject valuation is other than real property, the appraiser or valuer issuing the report shall show proof, upon request by the Commission, of [its] technical expertise on conducting such valuation."

[4] Lucila M. Decasa, Handbook on Private Corporations (2009) at 382.

[5] See new Paragraph 1.b ("property other than land") under SEC Memorandum Circular No. 14, Series of 2013.

[6] SEC Guidelines Covering the Use of Properties that Require Ownership Registration as Paid-Up Capital dated 15 November 1994.

2. Non-scheduled Domestic Air Transport as a Nationalized Business Activity (*i.e.* Public Utility)

To determine if the use of the aircraft falls within the nationality restrictions on public utilities, the Commission shall consider whether or not the air transport services are being offered to the general public. If so, the air transport services would constitute a public utility where 60% equity is reserved to Filipinos.

Since you have a pending application with the Civil Aeronautics Board (CAB) as "Non-scheduled Domestic Air Transport," for which the CAB will grant you a Certificate of Public Convenience and Necessity (CPCN), you are representing that you will offer the air transport services to the general public. Likewise, the CAB itself considers this kind of business activity as a public utility, because a CPCN is only required of and issued to public utilities.

Thus, the air transport here constitutes a public utility, of which 60% equity is reserved to Filipinos, pursuant to the 11th Regular Foreign Investment Negative List[7] which provides that **up to 40% foreign ownership** is allowed for a corporation engaged in the "operation of public utilities."[8]

For purposes of computing the required percentage of ownership reserved to Filipinos, we must refer to the provisions of **SEC Memorandum Circular No. 8, Series of 2013**, which applies to "nationalized" (100%) and "party-nationalized activities" (*e.g.* 60:40 Equity in Public Utilities).

The primary consideration is **full beneficial ownership of shares**, which is determined on the basis of (1) the total number of outstanding shares entitled to vote, and (2) the total number of all outstanding shares. As applied to the 60:40 Ratio, this means 60% of outstanding voting shares must be Filipino-owned, and 60% of all outstanding shares must also be Filipino-owned.

However, since APIC is considered "a premium paid over and above the price of shares," wherein the amount paid for the shares (as recorded on the balance sheet) is increased but **there is no further issuance of shares**, the creation of APIC will not affect Filipino ownership. The ratio of Filipino-to-foreign ownership would be same *before* and *after* the creation of APIC.

It is also of no consequence that the APIC was infused by a foreign ***shareholder***. The infusion/contribution of the aircraft's value will not cause a new issuance of shares, *i.e.* **the shareholders will be the same**.

Essentially, the value of the aircraft will increase the assets (*i.e.* property, plant, and equipment) of the corporation, while the creation of APIC will increase owners' equity (net worth).

---

[7] Executive Order No. 65 dated 29 October 2018

[8] List A, Number 18 ("Operation of Public Utilities")

However, there will be no corresponding increase in foreign ownership, since **no *additional* shares will be issued to the foreign *shareholder***.

We further caution that the Commission considers not only share ownership but also **other contracts and arrangements which grant control to foreigners**.[9] Based on the facts, however, no control is being granted to the foreign ***shareholder*** in consideration of the aircraft. If, on the other hand, a foreigner who is not already a shareholder seeks to gain control of the corporation through a donation, there might be a violation of foreign ownership laws *even without actually owning any shares.*

It shall be understood, however, that this opinion is based solely on the facts and circumstances disclosed and relevant solely to the particular issues 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.**[10] 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.

By authority of the En Banc:

CAMILO S. CORREA
General Counsel

---

[9] Rule 3.1.8.2 of the 2015 Implementing Rules of the Securities Regulation Code
[10] Number 7 of SEC Memorandum Circular No. 15, Series of 2003