Securities and Exchange Commission
PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

SEC OGC Opinion No. 23-11
Re: Sale of unissued shares at a premium; Pre-emptive Rights

19 May 2023

TOMAS CLAUDIO COLLEGES, INC.
Taghangin, Morong, Rizal

Attn: MR. EMILIANO A. FRANCISCO
Chairman, Board of Directors

MR. RODOLFO S. SAN FELIPE
President

Sirs:

This pertains to your letter dated 29 June 2020, requesting for opinion from the Commission regarding Tomas Claudio Colleges, Inc. ("TCC").

You disclosed the following:

1. TCC is "at present in need of fresh additional funds for the improvement of its services and quality of its educational products;"
2. TCC has recently increased its authorized capital and as a result, it has 609,181 unsubscribed and unissued shares which it is contemplating to sell;
3. TCC's stock's par value is at ₱50.00 per share and its market value is estimated at ₱250.00 to ₱300.00 per share;
4. As TCC intends to "raise fresh cash," it is contemplating to "sell a portion or whole of its unissued shares at over the par value price of ₱200.00 per share exclusively to its currently listed stockholders, in accordance with their pre-emptive rights." As a result of the sale, the excess funds that will accrue at over the par value will be treated and recorded in TCC's books of accounts as "Additional Paid-In Capital;" and
5. As of October 2019, TCC's stockholders stood at 1,908 and in October 2020, TCC shall hold its annual stockholders' meeting as required by its By-laws.

Your queries are:

1. Whether TCC is allowed to sell a portion or whole of its unissued shares at over par value price of ₱200.00 per share exclusively to its currently listed stockholders in accordance with their pre-emptive rights?
2. What can be done with the remaining unsubscribed stocks in case not all pre-emptive rights are exercised by the stockholders?
3. Whether TCC is allowed to hold its annual stockholders' meeting in October 2020 and be exempted from the prohibition of mass gathering as provided by the government's Covid-19 health protocols. If in the negative, what is TCC's remedy *in lieu* of the face-to-face meeting?

FIRST QUERY

Section 38 of the Revised Corporation Code ("RCC") provides that, "[a]ll stockholders of a stock corporation shall enjoy preemptive right to subscribe *to all issues or disposition of shares of any class, in proportion to their respective shareholdings, unless such right is denied by the articles of incorporation or an amendment thereto."*[1] Since Section 38 of the RCC[2] uses the phrase "all issues or disposition of shares of any class," pre-emptive right extends not only to issuance of new shares resulting from an increase in capital stock, but also to issuance of previously unsubscribed shares which form part of the existing authorized capital stock, as well as to disposition of treasury shares. *Ubi lex non distinguish nee nos distinguere debemos.* Where the law does not distinguish, courts should not distinguish.[3]

Meanwhile, the Supreme Court in *Salido vs. Aramaywan Metals Development Corp.*[4] discussed that the capital subscribed, which is the total amount of the capital that shareholders have agreed to take and pay for, can be *more* than the par value of the shares, to *wit:*

> "Briefly, capital refers to the value of the property or assets of a corporation. The capital subscribed is the total amount of the capital that persons (subscribers or shareholders) have agreed to take and pay for, which need not necessarily be, and *can be more than, the par value of the shares.* In fine, it is the amount that the corporation receives, inclusive of the premiums if any, in consideration of the original issuance of the shares." (Emphasis supplied)

Similarly, the Commission held that it is legal for a company to issue shares at a premium or over the par value of the shares as stated in its Articles of Incorporation (AOI), and for the subscribers of a corporation to pay more than the par value of the shares they subscribed as there is no law, rule or regulation that prohibits the same.[5]

The contribution of stockholders over the par value of shares is called additional paid-in capital (APIC) or "share premium" which is also defined as the amount received by a firm over the par value of its share. Share premium is also called paid-in surplus.[6]

Based on the foregoing, we answer your query in the affirmative.

SECOND QUERY

The Commission had also previously opined that if the shares corresponding to one stockholder are not subscribed or purchased by him, it is not necessary that said shares should again be offered on a pro-rata basis to the stockholders who took advantage of their right of pre-emption. This is because for as long as they exercise their pre-emptive rights, their relative and proportionate voting strength in the corporation will not be affected adversely. *Thus, the shares may be offered to non-stockholders of record on a first come first serve basis without violating the pre-emptive rights of the stockholders.* However, the Commission considers it a sound corporate practice to offer always the remaining shares to interested stockholders of record whenever practical and feasible before offering them to third parties.[7]

THIRD QUERY

Please be advised that as a matter of policy, the Commission refrains from or does not render an opinion on questions which involve interpretation of administrative rules and issuances of other government agencies considering that it is the promulgating agencies which are competent to undertake such construction by reason of their knowledge of the specific intent and extent of application of the subject issuances.[8]

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[1] Italics supplied.
[2] Then Section 39 of the Corporation Code.
[3] SEC-OGC OPINION NO. 11-41 dated 05 October 2011, addressed to Joselito V. Banaag, citing J. Campos Jr. and M.C. Lopez-Campos, The Corporation Code: Comments, Notes and Selected Cases 54 (Vol. II 1990) and *United BF Homeowners Association v. The Barangay Chairman and Sangguniang Barangay of BF Homes Paranaque,* G.R. No. 140092, 08 September 2006.
[4] G.R. No. 233857, 18 March 2021 citing *National Telecommunications Commission v. Court of Appeals*, G.R. No. 127937, 28 July 1999.
[5] SEC-OGC OPINION NO. 22-12 dated 27 September 2022, addressed to Fleet Marine Cable Solutions, Inc., c/o Mayo Law Office.
[6] SEC-OGC Opinion No. 13-14 dated 11 June 2014, addressed to Isla Lipana & Co.
[7] SEC-OGC OPINION dated 22 June 1995, addressed to Mr. Edward S. De Los Reyes, citing SEC-OGC Opinion dated 24 September 1974, addressed to Atty. Salvador P. De Guzman, Jr. Emphasis supplied.
[8] SEC Memorandum Circular No. 15, Series of 2003, No. 5.6.

Based on the facts that you have provided, your proposed query necessarily involves the interpretation of relevant Covid-19 policies, protocols, rules and regulations which are issued and/or approved by the Department of Health, Department of the Interior and Local Government, its attached agency/ies, and the respective Local Government Units concerned, among others.

However, ***for purposes of information only***, the following may be imparted.

Section 49 of the RCC provides:

> Section 49. Regular and Special Meetings of Stockholders or Members.— Regular meetings of stockholders or members shall be held annually on a date fixed in the bylaws, or if not so fixed, on any date after April 15 of every year as determined by the board of directors or trustees:
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> x x x x x x x x x
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> The right to vote of stockholders or members may be exercised in person, through a proxy, or when so authorized in the bylaws, through remote communication or in absentia. *The Commission shall issue the rules and regulations governing participation and voting through remote communication or in absentia, taking into account the company's scale, number of shareholders or members, structure, and other factors consistent with the protection and promotion of shareholders' or members' meetings."* (Emphasis supplied)

Pursuant to Section 49 of the RCC, the Commission issued on 12 March 2020 Memorandum Circular No. 6, Series of 2020 ("MC No. 6") or the "Guidelines on the Attendance and Participation of Directors, Trustees, Stockholders, Members, and Other Persons of Corporations in Regular and Special Meetings through Teleconferencing, Video Conferencing and Other Remote or Electronic Means of Communication." Section 10 of MC No. 6 provides:

> Section 10. *Participation in Stockholders' or Members' Meetings through Remote Communication.* — When so provided in the bylaws or by majority of the board of directors, stockholders or members who cannot physically attend at *stockholders' or members' meetings may participate in such meetings through remote communications or other alternative modes of communication.*
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> If a stockholder or member intends to participate in a meeting through remote communication, he/she shall notify in advance the Presiding Officer and the Corporate Secretary of his/her intention. The Corporate Secretary shall note such fact in the Minutes of the meeting. (Emphasis supplied)

For more information on the rules on participation in stockholders' or members' meetings through remote communication, you may access a copy of MC No. 6 through the Commission's website.[9]

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.[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.

Very truly yours,

Romuald C Padilla
General Counsel

[9] https://www.sec.gov.ph/sec-issuances/memorandum-circulars/#gsc.tab=0
[10] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.