Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

November 27, 2013

SEC-OGC Opinion No. 13-12
Re: Application of Control Test to Manning Companies

Atty. Saben Loyola/Atty. Joseph Rebano
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Makati Avenue corner Sen. Gil Puyat Avenue
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Dear Atty. Loyola and Atty. Rebano,

This refers to your letter dated 22 February 2012 requesting for "Opinion on the Application of the Control Test to Manning Companies."

In your letter, you stated that your client, Anscor Swire Ship Management Corporation ("Company") was incorporated under Philippine laws on 13 July 1993 and is engaged in the business of recruitment of Filipino seafarers for deployment on board the vessel of its foreign principals. You further stated that the Company has an authorized capital stock of Four Million Philippine Pesos (Php4,000,000), divided into forty thousand common shares with a par value of One Hundred Pesos (Php100.00) per share wherein 20,000 shares of which have been issued and fully paid. You have also presented the shareholdings in the Company as follows:

Name	Nationality	Type	Number of Shares Subscribed	Amount Subscribed	% Ownership
Serrata Investments Inc. ["Serrata"] (60% Filipino-40% Foreign)	Filipino	Common	14,994	1, 499,400	74.970
Eduardo P. Pertierra	Filipino	Common	2	200	0.010
Angel A. Penalosa	Filipino	Common	2	200	0.010
Edmund G. Menez	Filipino	Common	2	200	0.010
Swire Pacific Ship Management Corporation	British	Common	4,998	499,800	24.990
Colin John Payne	British	Common	2	200	0.010
TOTAL			20,000	2,000,000	100%

Considering that 74.97% of the Company is owned by Serrata, which according to your letter is a company whose Filipino equity is only 60%, you seek the Commission's definitive stance on whether the "Control Test" or the "Grandfather Rule" should be applied for purposes of determining the Company's compliance with the 75% Filipino equity requirement for manning agencies.

The Commission, in a plethora of opinions, utilized the Control Test or the Grandfather Rule in determining the eligibility of a corporation, which has foreign equity participation in its ownership structure, to engage in nationalized or partly nationalized activities, *viz:*

> Shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality, but if the percentage of Filipino ownership in the corporation or partnership is less than 60% only the number of shares corresponding to such percentage shall be counted as of Philippine nationality. **Thus, if 100,000 shares are registered in the name of a corporation or partnership at least 60% of the capital stock or capital respectively, of which belong to Filipino citizens, all of the said shares shall be recorded as owned by Filipino citizens.**[1] But if less than 60%, or, say, only 50% of the capital stock or capital of the corporation or partnership, respectively belongs to Filipino citizens, only 50,000 shares shall be counted as owned by Filipinos and the other 50,000 shares shall be recorded as belonging to aliens
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> Under the above-quoted SEC Rules, there are two cases in determining the nationality of the Investee Corporation. The first case is the 'liberal rule,' later coined by the SEC as the Control Test in its 30 May 1990 Opinion, and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which states, '(s)hares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality.' Under the liberal Control Test, there is no need to further trace the ownership of the 60% (or more) Filipino Stockholdings of the Investing Corporation since a corporation which is at least 60% Filipino-owned is considered as Filipino.
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> The second case is the Strict Rule or the Grandfather Rule Proper and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which

[1] Emphasis ours.

states, "but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality." Under the Strict Rule or Grandfather Rule Proper, the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., "grandfathered") to determine the total percentage of Filipino ownership.

Moreover, the ultimate Filipino ownership of the shares must first be traced to the level of the Investing Corporation and added to the shares directly owned in the Investee Corporation. xxx

xxx xxx xxx

In other words, based on the said SEC Rule and DOJ Opinion, the Grandfather Rule or the second part of the SEC Rule applies only when the 60-40 Filipino-foreign equity is in doubt. xxx **Stated differently, where the 60-40% Filipino-foreign equity ownership is not in doubt, the Grandfather rule will not apply.**"[2]

In relation to this, a "Philippine national" is defined by the Foreign Investment Act as follows:

"Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by the citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent [60%] of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent [60%] of the fund will accrue to the benefit of the Philippine nationals; Provided, that where a corporation its non-Filipino stockholders own stocks in a Securities and Exchange Commission [SEC] registered enterprise, at least sixty percent [60%] of the capital stock outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent [60%] of the members of the Board of Directors of each of both corporation must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national. The control test shall be applied for this purpose."[3]

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[2] SEC-OGC Opinion No. 12-02 dated 02 February 2012 addressed to Ms. Carlota Christina G. Laiño-Santiago, citing SEC Opinion No. 11-44 dated 27 October 2011 addressed to Atty. Wilfredo M. Penaflor

[3] Section 1(b) of the Implementing Rules and Regulations of the Foreign Investment Act of 1991.

Consequently since Serrata is 60% owned by Filipinos, its shareholdings of 74.97% in the Company is considered owned by Filipinos for purposes of computing the required seventy-five percent[4] Filipino equity for manning agencies. If the 74.97% shareholdings of Serrata in the Company is added to the .030% shareholdings of the Filipino individuals, then the Company is 75% Filipino-owned in compliance with the law.

Nevertheless, it shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon courts, whether of similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Very truly yours,

CAMILO S. CORREA
General Counsel

[4] Article 27, Labor Code of the Philippines; Section 2 Rule IV, Omnibus Rules Implementing the Labor Code; Ninth Foreign Negative List.