



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

8 April 2014

SEC Opinion No. 14-03

Re: minimum public ownership
of REIT; trustee of a pre-need
trust fund

Loyola Plans Consolidated, Inc.
Loyola Plans Bldg.
849 A. Arnaiz Avenue
Makati City
1200 Philippines

Attention: **Ms. Jesusa P. Concepcion**
Mr. Christopher P. Concepcion

Dear Ms. and Mr. Concepcion,

This refers to your *Letter* dated 28 February 2013 requesting confirmation that, for the purposes of determining the minimum public ownership of a real estate investment trust (REIT), each of the planholders of a pre-need trust fund investing in the REIT would be regarded as shareholders thereof.

In your Letter, you stated that Loyola Plans Consolidated, Inc. (LPCI) is engaged in the business of marketing and selling pension, education, memorial and life plans. LPCI will establish a REIT in connection with its objective to provide better investment outlets for its pre-need trust funds. In setting up the REIT, LPCI will transfer real properties in exchange for REIT shares. Two (2) pre-need trust funds will invest on behalf of its planholders by purchasing the shares owned by LPCI during the REIT's initial public offering.

You believe that the planholders of the pre-need trust funds should be regarded as the shareholders of the REIT for purposes of determining the minimum public ownership of a REIT. You argue that the pre-need trusts funds are established for the benefit of the planholders and that the planholders should be considered as the real owners of all the properties and investments transacted through the pre-need trust funds.

In order to establish a REIT, it must comply with the minimum public ownership requirements. A REIT shall be a public company and to be considered as such, a REIT shall: (a) maintain its status as a listed company; and (b) upon and after listing, have at least one thousand (1000) Public shareholders each owning at least fifty (50) shares. and

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who, in the aggregate, own at least forty percent (40%) of the outstanding capital stock of the REIT at the initial year; provided that the minimum ownership shall be increased to sixty seven percent (67%) within three (3) years from its listing.¹

Under the Pre-Need Code,² a trust fund refers to a fund set up from the planholders' payments to pay for the cost of benefits and services, termination values payable to planholders and other costs necessary to ensure the delivery of benefits or services to planholders as provided for in the contracts.³ A portion of the installment payment for the pre-need plan collected shall be deposited by the pre-need company in the trust fund.⁴ The management and administration of the trust fund will then be entrusted by the pre-need company to any reputable bank's trust department, trust company or any entity authorized to perform trust functions in the Philippines who will act as the trustee.⁵ Lastly, to ensure the liquidity of the trust fund to guarantee the delivery of the benefits provided for under the plan contract and likewise to obtain sufficient capital growth to meet the growing actuarial reserve liabilities, the said trust funds may invest in fixed income securities, equities and real estate which shall be subject to certain limitations.⁶

In establishing a trust fund, a relationship called a trust is created where a person who sets up a trust is called a trustor, the one in whom confidence is reposed as regards the property for the benefit of another person is known as the trustee, and the person for whose benefit the trust has been created is called the beneficiary.⁷

Here, the pre-need company is the trustor, the trust department of a bank, a trust company or entity, an investment house or financial institution authorized to perform trust functions in the Philippines is the trustee⁸ which is entrusted to manage and administer the trust fund,⁹ and the planholder or the person designated by the planholder who will be the recipient of the benefits of the pre-need plan is the beneficiary of the pre-need trust funds.¹⁰

We opine that the planholders or beneficiaries of the trust funds are not considered as shareholders of the REIT for the purpose of determining the minimum public ownership of the REIT.

¹ SEC Memorandum Circular No. 2, Series of 2011, amending Sec. 5.1 (a), Rule 4 of the Implementing Rules and Regulations of Republic Act No. 9856 or the REIT Act of 2009.

² Republic Act No. 9829 (2009).

³ Section 4(j), Pre-Need Code.

⁴ Section 30, *Id.*

⁵ Section 38, *Id.*

⁶ Section 34, *Id.*

⁷ Article 1440 of the Civil Code.

⁸ Section 4(bb), Implementing Rules and Regulations of the Pre-Need Code.

⁹ Section 40, *Id.*

¹⁰ Section 4c, *Id.*



It must be noted that neither the Pre-Need Code nor the REIT Act does not expressly provide that the planholders of a pre-need plan, in whose favor a trust fund is set up, may be considered as individual stockholders in an investee company (i.e., REIT) in order to satisfy the public ownership requirement under the REIT Act.

In a trust arrangement, the trustee holds the legal title over the trust property which requires him to perform certain duties and exercise powers over it for the benefit of the beneficiary¹¹, while the beneficiary or the *cestui que trust*, is the person who has an equitable interest in the property and enjoys the benefit of the administration of the trust by the trustee.¹² The law regards the trustees for all purposes as stockholders of the corporation. They vote the stock and exercise all rights belonging to the stockholders. If they happen to own a majority of the stock, they control the corporation.¹³ In other words, a holder or stockholder includes a person holding stocks in trust¹⁴ and trustees holding corporate stock are regarded for all legal purposes as stockholders.¹⁵

Here, the planholders have an interest in the trust fund as a whole, as distinguished from an interest in a particular equity, in this case, the REIT shares. In short, the planholders have a mere inchoate interest or right to the REIT shares. The planholders' interests in the REIT shares merely lie in the overall performance of the REIT. If the REIT performs well, the planholders will gain indirectly since the trust fund will be more liquid, ensuring that the said planholders will receive its benefits under the plan contract when it matures. On the other hand, if the REIT does not perform well, the planholders will likewise be affected since the performance of the said REIT may affect the liquidity of the trust fund.

That being the case, the planholders cannot be considered as beneficial owners under the SRC Rule 3(A).¹⁶ They do not have the power to vote or to direct the voting, or to dispose of or to direct the disposition, of such security. As a matter of fact, which you aptly pointed out, the trustee shall exercise due diligence for the protection of the planholders guided by sound investment principles and shall have the exclusive management and control over the funds and the right at any time to sell, convert, invest, change, transfer or otherwise change or dispose of the assets comprising the funds.¹⁷

¹¹ See Hector S. de Leon and Hector M. de Leon, Jr. "Comments and Cases on Partnership, Agency and Trust", 5th Edition (1999), pp. 652-655.

¹² *Ibid.*

¹³ Bay State Distributing Corp. v. Doran, 33 F2d 782.

¹⁴ 11 Fletcher Cyc Corp (Perm Ed), section 5085 [1976] p. 30, citing Bay State Distributing Corp. v. Doran, 33 F2d 782.

¹⁵ *Id.*, p. 33, citing Bay State Distributing Corp. v. Doran.

¹⁶ Beneficial owner or beneficial ownership means any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power, which includes the power to vote, or to direct the voting of such security; and/or investment returns or power, which includes the power to dispose of, or to direct the disposition of such security.

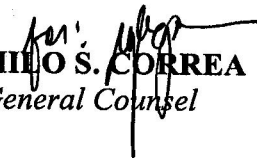
¹⁷ P. 4 of your Letter dated 28 February 2013.



Moreover, it appears that the planholders do not attend stockholders' meetings or elect the directors of the REIT.

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

By Authority of the Commission *En Banc*:


CAMILLO S. CORREA
General Counsel

¹⁸ Par. 7, SEC Memorandum Circular No. 15, Series of 2003.

