Republic of the Philippines
Department of Finance
Securities and Exchange Commission

In the Matter of:
HYPER PROGRAM INTERNATIONAL DIRECT SALES AND TRADING CORPORATION and HPI DIRECT SALES AND TRADING CORPORATION

SEC CDO Case No. 06-15-020

HYPER PROGRAM INTERNATIONAL DIRECT SALES AND TRADING CORPORATION and HPI DIRECT SALES AND TRADING CORPORATION,
Respondents.
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RESOLUTION

This resolves the *Motion to Lift Cease and Desist Order*[1] ("Motion to Lift") filed on 16 November 2015 by HYPER PROGRAM INTERNATIONAL DIRECT SALES AND TRADING CORPORATION ("HYPER") and HPI DIRECT SALES AND TRADING CORPORATION ("HPI") (collectively "Respondents") praying that the Commission lift its *Cease and Desist Order* dated 5 November 2015 ("Assailed CDO"), the dispositive portion reads as follows:

> WHEREFORE, premises considered, HYPER PROGRAM INTERNATIONAL DIRECT SALES AND TRADING CORPORATION and HPI DIRECT SALES AND TRADING CORPORATION, their officers, directors, agents, representatives, assigns, and any and all persons claiming and acting for and in their behalf and under their authority are hereby ordered to IMMEDIATELY CEASE AND DESIST, UNDER PAIN OF CONTEMPT, further offering, soliciting, or otherwise offering or selling unregistered securities to the public, until they have complied with the requirements of the SRC and its AIRR.

The facts of the case are as follows:

HYPER is a corporation duly registered with the Commission on 2 February 2015, under SEC Registration No. CS201501619, with principal office located at 301 Cabrera Building, Timog Avenue, South Triangle, Quezon City. HPI is a corporation duly registered with the Commission on 9 May 2014, under SEC Registration No. CS201409056, with principal office likewise located at 301 Cabrera Building, Timog Avenue, South Triangle, Quezon City. The primary purposes of both HYPER and HPI, as shown in their Articles of Incorporation, is:

> To engage in, conduct and carry on the business of buying, selling, distributing, marketing, supplying at wholesale/retail basis in so far as my be permitted by the law all kinds of goods such as soap, body oil, health products, mobile phone prepaid cell phone cards, and other related products of any kind and description to enter into all kinds of contracts for the purchase, acquisition, sale at wholesale/retail basis and other disposition for its own account as principal or representative capacity as manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents, upon consignment of all kinds of goods such as soap, body oil, help products, prepaid cards and other related products of every kind and description whether natural or artificial and to provide services relative to trading of such goods.

The *Assailed CDO* was issued to restrain respondent corporations from offering and selling investment contracts through is product packages sold to investors.

On 9 November 2015, Respondents received a copy of the Commission's *Assailed CDO*.[2] Then, on 16 November 2015, they filed a *Motion to Lift* alleging among others, the following:

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[1] Dated 15 December 2015.
[2] Introductory statement of the *Motion to Lift*.

1. The Respondents are not selling securities or soliciting investments from the public;
2. The Respondents are plainly doing Direct Selling of its products and trading them;
3. The issuance of the *Assailed CDO* was violative of the rules of the Commission with regard to issuance of CDOs;
4. The definition of Securities as provided in the Securities Regulation Code (SRC)[3] does not cover the operation of Respondents; and
5. The Respondents' constitutional right to due process is severely violated.

At the hearing of Respondents' *Motion to Lift*, which was set on 27 November 2015, both parties were directed to submit their respective memoranda within fifteen (15) days from said hearing.

On 11 December 2015, the Commission's Enforcement and Investor Protection Department (EIPD) filed its *Memorandum*,[4] arguing, among others:

1. Respondents are engaged in the unauthorized offer and sale of securities, reiterating the arguments in its *Motion for the Issuance of a Cease and Desist Order*; and
2. The findings of the EIPD and its agents enjoy the presumption of regularity in the performance of their duties.

On 6 January 2016, Respondents filed their *Memorandum*,[5] arguing, among others:

1. The pieces of evidence presented by the EIPD to support its *Motion for the Issuance of a Cease and Desist Order* are all Hearsay and hence of no probative value; and
2. The respondents were not given due process in the issuance of the *Assailed CDO*.

With the submission of respondents' *Memorandum* and with no remaining issues to be clarified, the hearing on the *Motion to Lift* is terminated and submitted for resolution on 1 August 2016.

The issue to be resolved is summarized as follows: whether or not Respondents presented sufficient grounds to overturn the Commission's *Assailed CDO*. This main issue is divided into the following sub-issues:

1. Whether or not Respondents were deprived of Due Process in the issuance of the *Assailed CDO*; and
2. Whether or not the business activities of Respondents subject of the *Assailed CDO* are outside the coverage of the SRC.

First Sub-Issue:
Due Process in the Issuance of the Assailed CDO

Under this sub-issue falls the following points raised by respondents: (1) the issuance of the *Assailed CDO* being violative of the Commission's rules in the issuance of CDOs; (2) the pieces of evidence presented by the EIPD in support of its motion for the issuance of the *Assailed CDO* being hearsay, and consequently of no probative value; and (3) Respondents were not given due process in the issuance of the *Assailed CDO*.

As to the first point, Respondents invoke a certain *SEC Circular No. 4, s. 2001*, particularly Part 3 Rule I, Article 2 on Motion for issuance of CDO, thus:

> [I]f the Director of CED, after proper investigation of verification of the information gathered by the ISD and/or the CID, *motu proprio*, or upon verified complaint by an aggrieved party, is satisfied that there is an ongoing violation of any of the laws, and unless restrained, will operate as a fraud on investors or is likely to cause grave or irreparable injury or prejudice to the public, the

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[3] Republic Act No. 8799 (2000).
[4] Dated 10 December 2015.
[5] Dated 6 January 2016.

> Director of CED shall file a motion for issuance of CDO before the Commission or designated Review Unit, *provided*, that in the absence of any initiatory pleading for the main case, the same shall serve as the initiatory pleading.[6]

According to Respondents, there is not a single verified complaint against the Respondents,[7] and that it is the EIPD and not the ISD and/or CID which made the report,[8] making the issuance of the *Assailed CDO* violative of the aforementioned SEC Circular.

The contention is untenable. Currently, the issuance of CDOs is governed by the 2006 Rules of Procedure of the Commission ("2006 Rules"), particularly Rule X thereof on Cease and Desist Order. Under the 2006 Rules, which are the rules in effect at the time the *Motion for the Issuance of a Cease and Desist Order* was filed, CDOs may be issued by the Commission upon verified complaint or after proper investigation or verification by the Compliance and Enforcement Department ("CED").[9] **As of the issuance of the *Assailed CDO*, it is the EIPD that performs the investigations or verifications for the purpose issuing CDOs**, the EIPD being the successor of the CED after the internal realignment of departmental functions of the Commission in 2013.

Thus, Respondents' assertion that the issuance of the *Assailed CDO* violates the Commission's rules is unmeritorious.

As to the second point, Respondents contend that there are no affidavits of the agents who conducted the field investigations, of the alleged employees of Respondent Corporations, and of the alleged customers, thus making the *Field Investigation Report*, which supports the EIPD's *Motion for the Issuance of a Cease and Desist Order*, Hearsay Evidence.[10]

Again, we find Respondents' argument flimsy.

Primarily, the *Field Investigation Report* is merely a part, and **not the sole piece**, of evidence presented to support the *Motion for the Issuance of a Cease and Desist Order.* To recall, separate sworn statements from Bryan V. Montilla, Vincent V. Ong, Rey Angelo Q. Marabella, and Kenny Choa Sy, stating commonly that (1) they joined Hyper Program International (HPI) Direct Sales and Trading Corporation located at 2nd Floor Anonas Complex, Anonas Street, Project 3, Quezon City and now located at 301 Cabrera Building 1, Timog Ave., Bgy. Sacred Heart, Quezon City, headed by Mr. Darlito Marquez dela Cruz as the acting Chairman/Owner, and (2) the scheme of Respondents as "buy the package in exchange for a product and code equivalent to the amount invested, the code shall be encoded in the system then after two weeks you will receive the pay-out."[11] Such sworn statements corroborate the information reported by the EIPD Investigators in the Field Investigation Report. This contradicts the claim of Respondents as to the lack of sworn statements that supports the issuance of the Assailed CDO.

Furthermore, Section 36, Rule 130 of the Rules of Court provides for the rule on hearsay, thus:

> Section 36. *Testimony generally confined to personal knowledge; hearsay excluded.* — A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these rules.

Thus, evidence is hearsay when its probative force depends on the competency and credibility of some persons other than the witness by whom it is sought to be produced.[12] In the case at bar, the contents of the *Field Investigation Report*, which Respondents contend to be hearsay, are actually based on what the EIPD Investigators personally perceived, i.e., seen and heard, during the field investigations. It is the EIPD Investigators themselves who witnessed the business presentations of Ms. Jenn Santos in which the barred

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[6] *Motion to Lift*, Paragraph 16.
[7] Ibid., Paragraph 16.2 and 16.3.
[8] Ibid., Paragraph 16.4.
[9] Rule X, Section 10-2 of the 2006 Rules
[10] *Memorandum for Respondents*, paragraphs 2, 2.1, 2.2, and 2.3.
[11] *Assailed CDO*, p. 5.
[12] *Dantis vs. Maghinang*, G.R. No. 191696, 10 April 2013.

business scheme of Respondent Corporations is presented, as well as the offer of the business scheme by persons acting for and on behalf of Respondent Corporations.[13] In short, **the information narrated in the *Field Investigation Report* is based on the personal knowledge of the EIPD Investigators**.

Hence, the *Field Investigation Report*, and the other evidence attached to EIPD's *Motion for the Issuance of a Cease and Desist Order* are not hearsay and possess probative value in evidence, making the issuance of the Assailed CDO well-supported by evidence.

With respect to the third point, Respondents' argument that there was a violation of their right to due process is devoid of merit.

It is already settled that denial of due process cannot be successfully invoked by a party who was afforded the opportunity to be heard.[14] In administrative proceedings, procedural due process simply means the opportunity to explain one's side or the opportunity to seek a reconsideration of the action or ruling complained of. "To be heard" does not mean only verbal arguments in court; one may be heard also through pleadings. Where opportunity to be heard, either through oral arguments or pleadings, is accorded, there is no denial of procedural due process.[15] Moreover, Section 64.1 of the SRC is clear that a cease and desist order may be issued without the necessity of a prior hearing, with the respondent being granted an opportunity to file a formal request for the filing thereof.[16]

In the case at bar, the procedural due process requirement is satisfied with the Respondents' filing of the *Motion to Lift*.

Considering that the arguments submitted by Respondents in relation to the process by which the *Assailed CDO*'s issuance are untenable, there is no reason to believe that Respondents' right to due process were violated. The issuance of the *Assailed CDO* is compliant with the established rules.

Second Sub-Issue:
The business activities of Respondents subject of the Assailed CDO being outside the coverage of the SRC.

Based on the pleadings filed and evidence presented in this case, it has been established that Respondents' product packages are in fact investment contracts, considering that the transactions involving the said product packages satisfy the requisites of investment contracts, as enumerated by the Supreme Court in *Power Homes Unlimited vs. SEC*.[17] As discussed in the *Assailed CDO*, the requisites of investment contracts present in the business scheme of Respondents are as follows:

1. Investment of money

    In order to gain profits, investors should purchase at least a Bronze Package for a fee of P7,350.00 that will enable them to participate in Respondents' compensation plan. The fee is not merely for the products and incidentals, but more importantly, for qualification to join in Respondents' bonuses and incentives, where one can earn profits of 30% to 35% in a span of 40 to 45 days.

2. Common enterprise

    The common enterprise in Respondents' business scheme is the compensation plan, where investors pool their resources of at least P7,350.00 for the product packages to the Respondents. In turn, investors share in the profits realized from Respondents' Four (4) Ways to Earn.

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[13] *Letter dated 8 July 2015* from Atty. James K. Abugan, Counsel for Respondents, addressed to EIPD.
[14] *Vivo vs. PAGCOR*, G.R. No. 187854, 12 November 2013, citing *Gonzales vs. Civil Service Commission*, G.R. No. 156253, 15 June 2006.
[15] Ibid., citing *Casimiro vs. Tandog*, G.R. No. 146137, 8 June 2005.
[16] Section 64.3 of the SRC.
[17] G.R. No. 164182, 26 February 2008.

3. Expectation of profits

The expectation of profits is manifested thus: Investors who purchased HPI Packages will receive a Rewards Incentive through a points system, where points having an equivalent peso value depending on the purchased product packages are given to all those who purchased the packages, with the Rewards Incentive accumulated and released within a period not exceeding two (2) months. Further, when customers referred, i.e., recruited, by members become members and receive Rewards Incentives, the sponsoring member will receive a Qualifying Bonus

4. Primarily from the efforts of others

The efforts of others in the case at bar is the expertise and managerial efforts of the Directors and Officers of Respondent Corporations in implementing the compensation plan. The scheme was conceptualized, developed, maintained, and implemented by Respondents. The investors are merely required to pay at least P7,350.00 for a promise of profit after a certain period without any further effort or obligation.

Respondents, in praying for the lifting of the *Assailed CDO*, argued that they are not selling securities to the public,[18] but are plainly doing Direct Selling of its products and trading them.[19] According to Respondents, the HPI Reward System, which is Respondents' unique business model that enables Respondents to share their profits to loyal customers, is a system that lets customers receive rewards bonuses from HPI and Hyper because of the customers' loyalty and undying support for HPI products.[20] Likewise, the independent distributors receive other additional rewards bonus from HPI by endorsing the product to other customers, which generate additional sales.[21] Further, Respondents theorized that the imposition of a CDO against Respondent Corporations is tantamount to imposing a CDO on similar business establishments such as Amway, Forever Living Products, Avon, and other similar businesses.[22]

However, it should be noted that besides the averments mentioned in the preceding paragraph, Respondents did not elaborate further the characteristics or nature of their business scheme so as to establish that the scheme is Direct Selling or Trading activities and not investment taking, so as to remove it from purview of the SRC. Moreover, the evidence presented by Respondents, such as awards and recognitions from various organizations, the feature article on Mr. Dela Cruz in a certain magazine, and the business licenses and permits procured by Respondent Corporations, are not sufficient to prove that is involved in legitimate direct selling or trading.

It bears articulating that if *prima facie* evidence had been established by a movant party against any respondent or defendant, it becomes incumbent upon the respondent or defendant to adduce evidence to meet and nullify, if not overthrow, the prima facie case against them.[23] Furthermore, findings of government agents done in the regular course of their duties enjoy the presumption of regularity, and such findings may only be disputed through clear and convincing evidence that proves the contrary.[24]

In the case at bar, evidence presented by Respondents in its *Motion to Lift* are not persuasive, for the same do not establish at all that the business undertaking of Respondents is not and/or do not involve investment taking. In contrast, the EIPD has explained the nature of the business scheme which makes it an investment taking activity, and has sufficiently supported the explanation with evidence. **It has become incumbent with the Respondents to present a full explanation of its claims in the *Motion to Lift* that will contradict the EIPD's findings and present evidence therefor, which Respondents failed to do.** Thus, the Commission finds no reason to nullify the findings of the EIPD, that is, Respondents' engaging in investment taking activities.

Lastly, Respondents' argument that imposing the CDO against them is tantamount to imposing a CDO on similar business establishments is without merit. To reiterate, **the activities ordered by the**

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[18] *Motion to Lift*, paragraph 12.
[19] Ibid., paragraph13.
[20] Ibid., paragraph 5.
[21] Ibid.,, paragraph 5.
[22] Ibid., paragraph 17.2.
[23] *Bautista vs. People*, G.R. No. L-45137, 23 September 1985.
[24] *People vs. Pagkalinawan*, G.R. No. 184805, 3 March 2010.

Commission to be stopped and discontinued are limited to the investment taking activities until Respondents have complied with the requirements of the SRC and its AIRR, and, as discussed earlier, Respondents failed to establish that its business scheme is outside the purview of securities regulation.

The issuance of the Assailed CDO is within the Commission's power to restrict activities in violation of the SRC, as well as its duty to protect investors and the investing public from acts that would operate as fraud upon investors or are likely to cause grave or irreparable injury or prejudice to the investing public, and to penalize fraudulent acts, course of business, transactions or practices in connection with the sale or purchase of securities.

Conclusion

Based on the foregoing discussions, the contentions forwarded by Respondents in order to overturn the *Assailed CDO*, to wit, violation of Respondents' right to due process in the issuance of the *Assailed CDO* and the activities of Respondents being outside the coverage of the SRC, are devoid of merit. Otherwise stated, Respondents failed to present sufficient grounds to overturn the Commission's *Assailed CDO*. Thus, the *Assailed CDO* is sustained by this Commission and the same should be made permanent.

WHEREFORE, premises considered, the *Motion to Lift Cease and Desist Order dated 15 December 2015*, filed by HYPER PROGRAM INTERNATIONAL DIRECT SALES AND TRADING CORPORATION and HPI DIRECT SALES AND TRADING CORPORATION is hereby **DENIED** for lack of merit. The CEASE AND DESIST ORDER dated 5 November 2015 issued against the subject corporations, its officers, directors, agents, representatives, conduits, assigns, and any and all persons claiming and acting for and in behalf and under its authority, is hereby **MADE PERMANENT**.

The Enforcement and Investor Protection Department is hereby **DIRECTED** to: (a) serve this *Resolution* to the President, General Manager, Corporate Secretary, Treasurer or In-House Counsel of by HYPER PROGRAM INTERNATIONAL DIRECT SALES AND TRADING CORPORATION and HPI DIRECT SALES AND TRADING CORPORATION, (b) post copies of the *Resolution* at the entrance of the main office and/or branches, if any, of by HYPER PROGRAM INTERNATIONAL DIRECT SALES AND TRADING CORPORATION and HPI DIRECT SALES AND TRADING CORPORATION.

Let a copy of this *Resolution* be also posted in the Commission's website; and published in a national newspaper of general circulation and furnished to all operating departments and offices of the Commission for their information and appropriate action.

EIPD, in coordination with other concerned departments, is **FURTHER DIRECTED** to submit a formal compliance report, by way of a pleading, to the Commission *En Banc* within TEN (10) days from receipt of this *Resolution*.

SO ORDERED.

Pasay City, Philippines; 2 August 2016.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner