Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

19 November 2024

SEC-OGC Opinion No. 24-36
Re: Additional Paid-In Capital; Foreign Equity Ownership Requirement for Corporations engaged in Land or Real Estate Business

SENIORPROPERTIES CORPORATION
Unit 602 West Insula
135 West Avenue, Quezon City

Attention: **Atty. Maria Elisa Dr. Mendoza**
Director

Dear Atty. Mendoza:

This refers to your letter[1] requesting the Commission's opinion regarding subscription, at a premium, of preferred shares of a partly nationalized corporation.

Your letter states that Seniorproperties Corporation ("SPC") is a real estate development corporation primarily engaged in real estate acquisition and leasing, having an authorized capital of Twenty Million Pesos (Php 20 million) with five thousand (5,000) common shares at One Thousand Pesos (Php 1,000.00) par value and one hundred fifty (150) preferred shares at One Hundred Thousand Pesos (Php 100,000.00) par value. The 5,000 common shares have been fully subscribed with Two Million Five Hundred Thousand Pesos (Php 2.5 million) paid-up while the preferred shares remain unsubscribed.

You mentioned that SPC has the opportunity to purchase a real estate which is way beyond its paid-up capital. Since only preferred shares remain unissued, SPC intends to raise funds for the acquisition of the property by allowing an investor to subscribe to eighty (80) preferred shares but instead of subscribing at par, the investor will subscribe and pay for the preferred shares at a premium. The proceeds of the subscription, including the premium, will be used exclusively to acquire the real estate and register it in SPC's name.

Relative to the foregoing, you are requesting the opinion of the Commission on the following:

1. Is the premium considered additional paid-in capital (APIC)?
2. Is there a limitation on the amount of premium for each preferred share?

[1] Dated 3 March 2018

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3. Can the premium paid be used by SPC to acquire a land which SPC will own and develop?
4. If the investing entity subscribed to 80 preferred shares with Php 100,000.00 par value or a total of Eight Million Pesos (Php 8 million) out of the authorized capital of Php 20 million, is the investing entity's equity still considered only 40% even if there is Php 80 million premium paid for the preferred shares?
5. If such premium is considered as APIC, will the APIC be considered equity for purposes of determining the nationality of a corporation?
6. If the investing entity under question no. 4 that will purchase at a premium the 80 preferred shares with Php 100,000 par value is a foreign entity, will there be a violation of the foreign equity limitation under the Constitution?

ADDITIONAL PAID-IN CAPITAL

Paid-in capital is defined under ***Section 2 of SEC Memorandum Circular (MC) No. 16, Series of 2023***[2] as follows:

> "xxx **Paid-in Capital –** the sum of the amount paid for shares of stock issued, including the **additional paid-in capital (APIC) or premium** paid over the par value of shares."

APIC is "any contribution of stockholders *over* the par value of shares. Incidentally, a share premium is also defined as the amount received by a firm over the par value of its share."[3]

Thus, ***paid-up capital*** differs from ***paid-in capital*** such that the former refers to shares actually subscribed and paid while the latter is the sum of the amount paid for shares of stocks issued, plus the APIC, or the excess or premium paid over the par value of such shares.

Hence, to answer your first query, the premium paid or the amount received over the par value of its shares is APIC.

The Supreme Court, in ***Salido vs. Aramaywan Metals Development Corp.***[4], citing ***NTC vs. CA and PLDT***, confirms that the capital subscribed 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."

From the foregoing, a corporation may 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]

Thus, to answer your second query, generally, there is no limitation on the amount of premium for the preferred shares.

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[2] SEC Memorandum Circular No. 16, Series of 2023, Revised Guidelines on the Determination of Retained Earnings Available for Dividend Declaration, 19 September 2023.
[3] SEC Opinion No. 14-13 dated 11 June 2014 addressed to Isla Lipana & Co.
[4] G.R. No. 233857, 18 March 2021.
[5] SEC-OGC Opinion No. 22 dated 27 September 2022 addressed to Fleet Marine Cable Solutions, Inc.

With regard to your third query, the Commission previously opined that:

> Applying the above corporate principle on the present case, the subscribers of the proposed corporation may, in their own personal capacity and acting in good faith, borrow money for payment of their subscriptions. The loan agreement between the borrowers and the creditor Bank is a private contract between them of which the proposed corporation is not a party. What the SEC requires for purposes of registration is that the statutory paid up capital requirement must be actually paid. As to where the amount used for payment comes from, the SEC normally does not inquire into it. The moment the borrowed money is contributed as payment to subscriptions and upon incorporation, the ownership thereof is transferred to the new corporation. Accordingly, upon the issuance by the SEC of the certificate of registration, the corporation, being now the owner of the funds, can already withdraw and disburse the same for the operation of its business; xxx [6]

Based on the foregoing, from the moment the corporation receives the premium paid, ownership thereof is transferred to the corporation, and the corporation, being now the owner of the funds, can disburse the same for the operation of its business, such as for acquisition of land, subject to the discussion below.

CORPORATE STRUCTURE

Section 173 of the ***Revised Corporation Code (RCC)***[7] defines outstanding capital stock (OCS) as encompassing all shares issued, whether voting or non-voting, except treasury shares, to wit:

> Section 173. Outstanding Capital Stock Defined. - The term "outstanding capital stock", as used in this Code, shall mean the **total shares of stock issued** under binding subscription contracts to subscribers or stockholders, whether fully or partially paid, except treasury shares.

To answer your fourth query, if the investing entity subscribed to 80 preferred shares at Php 100,000.00 par value, the total OCS is 5,080 shares.[8] Hence, the investing entity's equity is 1.57%[9] of the OCS of SPC.

CORPORATE NATIONALITY

Section 7, Article XII of the 1987 Constitution reads:

> "Section 7. Save in cases of hereditary succession, **no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of public domain**." (Emphasis ours)

Corollary thereto, Section 22 and 23 of Chapter V of the Public Land Act[10] prescribes:

> "Section 22. Any citizen of lawful age of the Philippines, and any such citizen not of lawful age who is a head of a family, and **any corporation or association of which at least sixty per centum of the capital stock or of any interest in said capital stock belongs wholly to citizens of the Philippines, and which is organized and constituted under the laws of Philippines**, and corporate bodies organized in the Philippines authorized under their charters to do so; may purchase any tract of public agricultural land disposable under this Act, not to exceed one hundred and forty-four hectares in the case of an individual and one thousand and twenty-four hectares in that of a corporation or association, by proceeding as prescribed in this chapter; xxx

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[6] SEC Opinion dated 8 October 1993 addressed to Mr. Edwin V. Patricio.
[7] Republic Act (RA) No. 11232, Revised Corporation Code, 20 February 2019
[8] Total OCS = 5,000 common shares + 80 preferred shares = 5,080 shares
[9] Investing Entity's Equity = 80 preferred shares/ 5,080 shares = 1.574803%
[10] Commonwealth Act No. 141, 7 November 1936.

> Section 23. **No** person, **corporation**, association or partnership **other than those mentioned in the last preceding section may acquire or own agricultural public land or land of any other denomination or classification,** which is at the time or was originally, really or presumptively, of the public domain, or any permanent improvement thereon, or any real right on such land and improvement ..."

Hence, corporations should have at least sixty percent (60%) Filipino ownership of their capital stock in order to be qualified to acquire or hold private lands or lands of public domain.

In the landmark case of ***Gamboa vs. Teves, et.al***[11], the Supreme Court ruled that the "term 'capital' in Section 11, Article XII of the 1987 Constitution refers only to shares of stock entitled to vote in the election of directors, and not to the total outstanding capital stock (common and non-voting preferred shares)." The Supreme Court further held that in order"[f]or stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. Full beneficial ownership of the stocks, coupled with appropriate voting rights is essential. In effect, the Foreign Investment Act (FIA) clarifies, reiterates and confirms the interpretation that the term "capital" in Section 11, Article XII of the 1987 Constitution refers to shares with voting rights, as well as with full beneficial ownership. This is precisely because the right to vote in the election of directors, coupled with full beneficial ownership of stocks, translates to effective control of a corporation."[12]

Pursuant to this, the Commission issued ***SEC MC No. 8 Series of 2013 (SEC MC No. 8)***, which provides for the *two-tiered test* in determining compliance with the Filipino-Foreign ownership requirement, to wit:

> "Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. **For purpose of determining compliance therewith, the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors**."
> [Emphasis and underscoring supplied]

In the case of ***Jose M. Roy III vs. Chairperson Teresita Herbosa, et.al***[13], the Supreme Court affirmed that the SEC MC No. 8 adheres to the decision in ***Gamboa vs. Teves, et.al.***, and stated as follows:

> "Section 2 of SEC-MC No. 8 clearly incorporates the Voting Control Test or the controlling interest requirement. In fact, Section 2 goes beyond requiring a 60-40 ratio in favor of Filipino nationals in the voting stocks; it moreover requires the 60-40 percentage ownership in the total number of outstanding shares of stock, whether voting or not. The SEC formulated SEC-MC No. 8 to adhere to the Court's unambiguous pronouncement that "[f]ull beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights is required." Clearly, SEC-MC No. 8 cannot be said to have been issued with grave abuse of discretion."

The primary consideration is **full 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.[14]

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**

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[11] Heirs of Wilson P. Gamboa vs. Finance Secretary Margarito B. Teves, et.al.; G.R. No. 176479; 9 October 2012
[12] *Ibid.*
[13] Jose M. Roy III vs. Chairperson Teresita Herbosa, et.al, G.R. No. 207245
[14] SEC-OGC Opinion No. 19-14 dated 28 March 2019 addressed to Reyes Diano Tumanda & Co. CPAs

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.[15]

Hence, to answer your fifth query, it is the voting shares (as first tier) and the OCS (as second tier) which shall be considered in determining the 60% Filipino ownership requirement.

As to your sixth query, assuming that (1) all common shares (5,000 shares) are owned by Filipinos, (2) the 80 preferred shares subscribed by the foreign entity are non-voting shares[16], and (3) there is no doubt as to Filipino ownership resulting from the existence of layers of corporate stockholders of subject corporation, we determine the nationality of SPC as follows:

First Tier – Total Number of Voting Shares

As to the first tier, if only the common shares are voting shares, then, following the assumptions above, 100% of the voting shares are owned by Filipinos.

Second Tier – Total Number of OCS

As to the second tier, the OCS is 5,080 shares.[17] Hence, 98.43%[18] of all outstanding shares are owned by Filipinos.

Based on the foregoing discussion, the subscription by the foreign entity of 80 preferred shares will not result in the violation of the foreign equity limitation under the Constitution.

It shall be understood that the foregoing opinion is rendered solely on the basis of the facts, circumstances and documents disclosed/submitted, and should be considered 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. 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,

ROMUALD C. PADILLA
General Counsel

[15] *Supra*, note. 14.
[16] *Supra, note 7.* Section 6.
[17] *Supra*, note 8.
[18] Filipino equity = 5,000 common shares / 5,080 shares = 98.4251%