



Republic of the Philippines
Department of Finance
SECURITIES AND EXCHANGE COMMISSION
SEC Building, EDSA, Greenhills
Mandaluyong City Metro Manila
Philippines

March 24, 2006

SEC Opinion No. 06-22
RE: Foundations are not
allowed to issue securities
including pre-need plans.

Mr. Joel J. Jabal
Department of Agrarian Reform
Employees Association (DAREA)
Oriental Mindoro
DAR Provincial Office, Sto. Niño
Calapan City, Oriental Mindoro

Sir:

This refers to your letters of January 3 and February 27, 2006 requesting the opinion of the Commission on the following queries:

1. Whether or not the Retirement, Investment and Savings Equity Benefit Fund (RISE) Certificates issued by **DARE Foundation Inc.** *formerly DAREA Foundation, Inc.* ('DAREFI' for brevity) are in the nature of securities. If yes, were they registered with the Commission?
2. Whether or not DAREFI is in the position to honor its obligations as embodied in the "General Provisions" of the RISE.
3. Whether or not this RISE fund was in consonance with DAREFI's objectives as stated in its Articles of Incorporation.

4. Whether or not DAREFI's RISE, now renamed Employees Retirement Welfare Fund (ERWF), being in the nature of a pre-need plan, need not be registered with the SEC as averred by Ms. Violeta Bonilla [president of DAREFI].
5. Whether or not the DARE Foundation Inc. is licensed to operate the RISE Benefit Fund, now ERWF.
6. Whether or not the subscribers can recover the RISE premiums they paid.

The Securities Regulation Code (SRC)¹ defined securities as follows:

SECTION 3. Definition of Terms. —

3.1. "Securities" are shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character. It includes:

- (a) Shares of stock, bonds, debentures, notes, evidences of indebtedness, asset-backed securities;
- (b) investment contracts, certificates of interest or participation in a profit sharing agreement, certificates of deposit for a future subscription;
- (c) Fractional undivided interests in oil, gas or other mineral rights;
- (d) Derivatives like option and warrants;
- (e) Certificates of assignments, certificates of participation, trust certificates, voting trust certificates or similar instruments;
- (f) Proprietary or nonproprietary membership certificates in corporations; and
- (g) Other instruments as may in the future be determined by the Commission.

From the documents that were submitted to us together with the subject letters, it seems that DAREFI represents the RISE Benefit Fund

¹ R.A. 8799 which took effect August 8, 2000

Program as the retirement program contemplated in one of its primary purposes, to wit:

5. To develop, operate, maintain, manage and provide medical and health care benefits and **retirement program** to all qualified members/subscribers of the Foundation who are officials or employees of DAR and other employees of the public sector, whether in active duty or retired (As amended on March 23, 2004).[emphasis supplied]

Records further disclose that in implementing this RISE Benefit Fund Program, DAREFI requires the person/s availing of the program, to regularly pay DAREFI the required investment/equity amortized in either annual, semi-annual, quarterly or monthly payments. The written evidence of such investment is the **RISE Fund Certificate** issued by DAREFI. Upon completion of the required investment, the holder of the RISE Fund Certificate shall be entitled to the full maturity value stated in the certificate on the maturity date indicated.

The RISE Benefit Fund Program also provides for a schedule of pre-termination values in case a holder of a RISE Certificate wishes to pre-terminate his contract before completion of the required investment or before its maturity date.

It is evident from the above scheme that the RISE Certificates which emanate from the RISE Benefit Fund Program, resemble an investment contract -a pre-need plan [retirement/pension plan].

A pre-need plan is defined by the Securities Regulation Code as follows:

SEC. 3. Definition of Terms.-

xxx

xxx

xxx

xxx

3.9. "Pre-Need Plans" are contracts which provide for the performance of future services or the payment of future monetary considerations at the time of actual need, for which planholders pay in cash or installment at stated prices, with or without interest or insurance coverage and includes life, pension, education, interments and other plans which the Commission may from time to time approve.

Thus, in connection with your first query, the RISE Certificates fall squarely within the context of the term "securities" as defined under the Securities Regulation Code.

Pre-Need Plans and its issuers (Pre-Need companies) are primarily regulated by the Commission. Under the SRC, it is explicitly provided that:

CHAPTER IV

Regulation of Pre-Need Plans

SECTION 16. Pre-Need Plans. — No person shall sell or offer for sale to the public any pre-need plan except in accordance with rules and regulations which the Commission shall prescribe. Such rules shall regulate the sale of pre-need plans by, among other things, requiring the registration of pre-need plans, licensing persons involved in the sale of pre-need plans, requiring disclosures to prospective plan holders, prescribing advertising guidelines, providing for uniform accounting system, reports and record keeping with respect to such plans, imposing capital, bonding and other financial responsibility, and establishing trust funds for the payment of benefits under such plans. [emphasis supplied]

Further, under the rules² issued by the Commission relative to the regulation of Pre-Need plans, it is provided that:

Rule 2. Minimum Paid-up Capital of Pre-Need Plan Company

Any new corporation applying for registration to act as an issuer of Pre-Need Plans shall have a minimum paid-up capital of One Hundred Million Pesos (P100,000,000.00); provided, that existing Pre-Need Companies with paid up capital of less than One Hundred Million Pesos (P100,000,000.00) shall have until April 30 2002 to comply with this requirement. For this purpose, the moratorium on registration of new Pre-Need Companies shall be extended up to April 30 2002. Provided however, that the moratorium does not apply to companies that acquire the shares and/or the assets and liabilities of existing Pre-Need Companies and who meet the P 100.0 Million paid-up requirement.

Rule 3. Registration of Pre-Need Plans

No corporation shall issue, offer for sale, or sell Pre-Need Plans unless such plans shall have been registered under Rule 4. [emphasis supplied]

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It is clear from the foregoing that DAREFI, a non-stock, non-profit foundation cannot be registered as a Pre-Need company. Even granting

² New Rules on the Registration and Sale of Pre-Need Plans issued on August 16, 2001

that DAREFI had applied for a secondary license to issue Pre-Need Plans, in view of the above regulations, the same would have been denied by the Commission. Consequently, since DAREFI is not a licensed issuer, it follows that the RISE Certificates issued by DAREFI cannot, in any instance, be registered. Thus, its present issuance is illegal and is punishable under the SRC.³

In view of the above discussion, we have answered query nos. (2), (4) and (5).

The fact that DAREFI was organized as a foundation is evidence enough that it cannot function as a Pre-Need Company. Notwithstanding that one of its primary purposes under its articles of incorporation is to *develop, maintain, manage and provide medical and health care benefits and retirement program to all qualified members/ subscribers of the Foundation who are officials or employees of DAR and other employees of the public sector, whether in active duty or retired*⁴, in no case can such purpose be stretched to include the issuance of Pre-Need Plans by the said foundation as an incidental activity, much less a necessary activity for the accomplishment of such purpose.

To give it an all-encompassing interpretation would negate the very purpose of requiring a secondary license from the Commission before a corporation can issue pre-need plans. Moreover, it will surreptitiously open the gates to activities without the corresponding regulation from government agencies which require a license or permit for it.

The statement of the objects or purposes or powers in the charter results practically in defining the scope of the authorized corporate enterprise or undertaking. This statement both confers and also limits the actual authority of the corporate representatives. The customary objects or purpose clause is usually made so multifarious, with such absurd particularity of enumeration, that it has been well said that it aims "not to specify, not to disclose, but to bury beneath a mass of

³ SECTION 73. Penalties — Any person who violates any of the provisions of this Code, or the rules and regulations promulgated by the Commission under authority thereof, or any person who, in a registration statement filed under this Code, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall, upon conviction, suffer a fine of not less than Fifty thousand pesos (P50,000.00) nor more than Five million pesos (P5,000,000.00) or imprisonment of not less than seven (7) years nor more than twenty-one (21) years, or both in the discretion of the court. If the offender is a corporation, partnership or association or other juridical entity, the penalty may in the discretion of the court be imposed upon such juridical entity and upon the officer or officers of the corporation, partnership, association or entity responsible for the violation, and if such officer is an alien, he shall in addition to the penalties prescribed, be deported without further proceedings after service of sentence.

⁴ Paragraph 5, primary purposes of DARE Foundation Inc. as amended on March 23, 2004

words, the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms."⁵

Thus, we have answered query no. (3)

Finally, regarding the question of whether or not the subscribers can recover the RISE premiums they paid, since there is nullity proceeding from the illegality of the cause or object of the contract, the innocent subscribers can lawfully demand the return of the premiums they paid.⁶ This is without prejudice to their right in instituting the appropriate civil and/or criminal actions in enforcing their claims against the erring corporation.

We hope we have satisfactorily answered your queries.

Very truly yours,



VERNETTE G. UMALI-PACO
General Counsel

⁵ Ballantine on Corporations, 1946, p. 221 citing Cotman v. Brougham A.C. 514, 523 [1918]

⁶ The effects of illegal contracts of a corporation are governed by the following provisions of the Civil Code:

ARTICLE 1411. When the nullity proceeds from the illegality of the cause or object of the contract, and the act constitutes a criminal offense, both parties being in *pari delicto*, they shall have no action against each other, and both shall be prosecuted. Moreover, the provisions of the Penal Code relative to the disposal of effects or instruments of a crime shall be applicable to the things or the price of the contract.

This rule shall be applicable when only one of the parties is guilty; but the innocent one may claim what he has given, and shall not be bound to comply with his promise. (1305)

ARTICLE 1412. If the act in which the unlawful or forbidden cause consists does not constitute a criminal offense, the following rules shall be observed:

- (1) When the fault is on the part of both contracting parties, neither may recover what he has given by virtue of the contract, or demand the performance of the other's undertaking;
- (2) When only one of the contracting parties is at fault, he cannot recover what he has given by reason of the contract, or ask for the fulfillment of what has been promised him. The other, who is not at fault, may demand the return of what he has given without any obligation to comply his promise. (1306)