



**Republic of the Philippines
Department of Finance
Securities and Exchange Commission**

OFFICE OF THE GENERAL COUNSEL

7 May 2021

SEC-OGC Opinion No. 21-05
RE: Increase of Authorized Capital
Stock; Registration of Shares of
Stock to be Issued Therefor

ANTONIO G. TINSAY
#88 Agana Circle, BF Parklane,
BF Homes Subd. Phase 3,
Paranaque City

Dear Mr. Tinsay:

This refers to your letter requesting an opinion on whether the additional shares of stock that may be issued as a consequence of the increase in authorized capital stock ("ACS") of the corporation which is subject to the stockholder's pre-emptive rights need to be registered.

As stated in your letter, the stockholders of an entity engaged in the operation of a hospital and medical center (the "corporation") have, during the annual stockholders' meeting, ratified a board resolution increasing the corporation's ACS from P100M to P250M, thereby increasing the number of shares from 50,000 to 125,000 at a par value of P2,000 per share. Further, you stated that the corporation is planning to include in the shares to be issued relative to the exercise of the stockholder's pre-emptive rights, certain medical benefits which effectively increased the par value of each share from P2,000 to P3,500.

As a stockholder of said corporation, you expressed your intent to exercise your pre-emptive right and to acquire a certain number of shares. However, you seek confirmation of the corporation's position that these shares need not be registered with the Commission considering that the same will be offered only to the existing stockholders and not to the investing public. It is your understanding that the corporation may not be exempted from registering these shares considering that the total number of existing investors/stockholders is in excess of the limit set by the Implementing Rules and Regulations ("IRR") of the Securities Regulation Code ("SRC") i.e. not more than nineteen (19) persons.

Hence, the instant request.

The SRC defines 'securities' as 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.¹ It includes shares of stock, bonds, debentures, notes, evidences of indebtedness, and asset-backed securities, among others.²

As a general rule, securities shall not be sold or offered for sale or distribution within the Philippines without a registration statement duly filed with and approved by the Commission.³ However, the SRC provides for certain exemptions accorded to selected classes of securities where the registration requirement is not made applicable.⁴ In addition, the IRR of the SRC provides for other exempt securities.⁵

Considering that the shares of stock to be issued by the corporation to stockholders exercising their pre-emptive right are not among the securities enumerated under Section 9 of the SRC and Rule 9.1 of the SRC-IRR, they are not exempt securities.

The foregoing notwithstanding, it should be noted that the corporation has, in the instant case, approved the increase of its authorized capital stock and its existing shareholders may exercise their pre-emptive rights in relation to such increase and/or the unissued shares of the corporation. In relation thereto, Sections 10 (e) and (i) of the SRC which covers sale of unissued shares and sale from the increase in the authorized capital stock, respectively, of a corporation provides for *exempt transactions* where the requirement for registration also does not apply, to wit:

¹ Section 3.1 of the SRC

² Section 3.1 (a), *ibid.*

³ Section 8, *ibid.*

⁴ Section 9, *ibid.*

⁵ Section 9.1.1. Any evidence of indebtedness issued by a financial institution that has been licensed by the BSP to engage in banking or quasi-banking shall be exempt from registration under Section 8.1 of the Code.

Section 9.1.2. The registration requirement shall not likewise apply to the following:

Section 9.1.2.1. Evidence of indebtedness issued to the BSP under its open market and/or discounting operations;

Section 9.1.2.2. Bills of exchange arising from a bona fide sale of goods and services that are distributed and/or traded by banks or investment houses duly licensed by the Commission and BSP through an organized market that is operated under the rules approved by the Commission.

Section 9.1.2.3. Any security issued or guaranteed by multilateral financial entities established through a treaty or any other binding agreement to which the Philippines is a party or subsequently becomes a member (hereinafter referred as Multilateral Financial Entities or MFE), e.g. international financial institutions, multilateral development banks, development finance institutions or any other similar entities; or by facilities or funds established, administered, and supported by MFEs; Provided, that the issuer shall file an offering circular/memorandum in a format prescribed by the Commission and containing among others: (1) information about the issuer and the security to be issued, (2) information about the MFE, and (3) information about the guarantee.

Section 9.1.2.4. The registration requirement shall not likewise apply to evidence of indebtedness, e.g. commercial papers, that meet the following conditions:

Section 9.1.2.4.1. Issued to not more than nineteen (19) non-institutional lenders;

Section 9.1.2.4.2. Payable to a specific person;

Section 9.1.2.4.3. Neither negotiable nor assignable and held on to maturity; and

Section 9.1.2.4.4. In an amount not exceeding One Hundred Fifty Million Pesos (PHP 150,000,000.00) or such higher amount as the Commission may prescribe.

“Section 10. Exempt transactions. – 10.1. The requirement of registration under Subsection 8.1 shall not apply to the sale of any security in any of the following transactions:

x x x

- (e) **The sale of capital stock of a corporation to its own stockholders exclusively**, where no commission or other remuneration is paid or given directly or indirectly in connection with the sale of such capital stock.

xxx xxx xxx

- (i) **Subscriptions for shares of the capital stock of a corporation** prior to the incorporation thereof or **in pursuance of an increase in its authorized capital stock under the Corporation Code, when no expense is incurred, or no commission, compensation or remuneration is paid or given in connection with the sale or disposition of such securities**, and only when the purpose for soliciting, giving or taking of such subscriptions is to comply with the requirements of such law as to the percentage of the capital stock of a corporation which should be subscribed before it can be registered and duly incorporated, or its authorized capital increased.” (Emphasis supplied)

It bears emphasis that the exemptions provided under Section 10.1 (e) and (i) cannot be availed if a commission or fee is paid, directly or indirectly, in connection with the sale of such capital stock, or the corporation incurs an expense in the sale or disposition of such securities. In such case, the sale will have to be registered with the Commission.

It should be noted that the phrase “in connection with the sale of capital stock” qualifies the phrase “where no commission or other remuneration is paid or given”. As such, for the transaction to be exempt, it must be shown that (a) no amount in addition to the sale price of the capital stock is paid/given in relation to such sale as this is covered by the concept of “direct commission or remuneration”, or (b) no transaction or service is carried out or performed which will benefit another person/entity other than the stockholder purchasing the capital stock, as this is covered by the concept of “indirect commission or remuneration”. Thus, the sale of unissued capital stock of a corporation to its own stockholders exclusively under Section 10.1 (e) or the sale of capital stock of a corporation to its own stockholders pursuant to an increase in its authorized capital stock under Section 10.1 (i) will not be exempt if the same is carried out with the assistance of a financial advisor because expenses are deemed to have been incurred.

Applying the afore-quoted provisions, this Office opines that based on the information provided and in the absence of any showing that the corporation has incurred or will incur expenses in connection with its sale of the capital stocks pursuant to an increase in its authorized capital stock exclusively to its shareholders, such sale is an exempt transaction that does not require to be registered with the Commission.

However, it should be emphasized that while the exemptions provided under the SRC and its IRR may immediately be availed of by the corporation (or any person) as the same proceeds from a statutory grant, the corporation (or any person) claiming such exemption has the burden of proof of showing that it is entitled to the exemption should the Commission challenge the same.⁶

⁶ Section 10.1.8., IRR of the SRC.

A corporation may thus secure a confirmation of exemption under Section 10.1.5.1 of the IRR of the SRC by filing SEC Form 10.1 with the Commission for added protection.

It must be noted, however, that while there is an available exemption for the Issuer, the same shall not be granted or allowed if the same is resorted to as a part of a scheme to evade compliance with the registration requirements, to wit:

“10.1.10. Exemption Not Available for Scheme To Evade Compliance


A request for confirmation of exemption under Section 10 of the Code shall not be available to any Issuer or other persons to any transaction or chain of transactions that, although it may appear to be in compliance with the Code and these Rules, is a part of a plan or scheme to evade compliance with the registration requirements of the Code. In such cases, registration shall be mandatory.”⁷

As a final note, the Commission understands that through the increase in ACS, the corporation intends to issue shares with medical benefits which can be enjoyed by stockholders who are purchasing the same in the exercise of their pre-emptive rights thereby effectively creating two (2) distinct types of shares: (1) the previously issued shares without medical benefits; and (2) additional shares with medical benefits.

In this regard, it is strongly suggested that the corporation amends and clearly defines in its Articles of Incorporation the features of this new set of shares to be issued from the increase in ACS to substantially differentiate and/or distinguish them from the previously issued shares.

It shall be understood, however, that the above-stated opinion is rendered solely on the basis of the facts and circumstances disclosed to the Commission, and should be considered relevant only to the particular issue raised therein. This opinion shall not be considered and 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 further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void

Please be guided accordingly.


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⁷ Section 10.1.10, IRR of the SRC. (Emphasis supplied)