



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

OFFICE OF THE GENERAL COUNSEL

28 February 2018

SEC-OGC Opinion No. 18-02
Re: Manner of Voting;
Nature and Amendment of
By-Laws

CESAR S. GALANG

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Mr. Galang:

This refers to your letter dated 26 December 2017 requesting the Commission's opinion regarding the compliance of officers and members of a SEC-registered professional organization with its Constitution and By-laws.

In your letter, you seek guidance on the following questions:

1. If the Constitution and Bylaws of a certain SEC-registered professional organization does not include "on-line" election and the Board of Directors would like to implement one, do they need to amend the Constitution and Bylaws first before implementing?
2. If the Officers implemented the "on-line" election without the final approval of SEC in the amendment of their Constitution, will it be legal? What is the correct procedure approved by law after voting for an amendment in the Constitution until its official?
3. If a referendum was conducted to amend the Constitution to include an on-line election in its provision, will the result be valid and legal if less than the majority voted? Will it be legal if the referendum will be done using on-line voting and only those with email address will be able to participate? Will it not

infringe on the right to vote of the other members who do not have email address?

4. Can a sitting Board of Directors vote for matters that are contrary or conflict with the provisions of their Constitution and implement it through an approved Resolution? Will this be valid or legal?
5. Supposed it is written in one of the provisions of the SEC-registered professional organization that the appointed COMELEC shall promulgate such rules and regulations governing all conduct of the elections subject to the approval of the Board. With the said provision, can the COMELEC promulgate election rules contrary or in-conflict with the Constitution?

As to your *first query*, Section 89 of the Corporation Code (the "Code") is pertinent, to wit:

Sec. 89. Right to vote. - The right of the members of any class or classes to vote may be limited, broadened or denied to the extent specified in the articles of incorporation or the by-laws. Unless so limited, broadened or denied, each member, regardless of class, shall be entitled to one vote.

Unless otherwise provided in the articles of incorporation or the by-laws, a member may vote by proxy in accordance with the provisions of this Code.

Voting by mail or other similar means by members of non-stock corporations may be authorized by the by-laws of non-stock corporations with the approval of, and under such conditions which may be prescribed by, the Securities and Exchange Commission.

Even if voting by mail or other similar means is allowed in non-stock corporations under Section 89 of the Corporation Code, the same must be specifically provided for in the association's by-laws before the same can be availed of.¹ Section 89 of the Code is explicit that voting by mail or other similar means must be clearly set forth in the by-laws, subject to SEC approval and such terms and conditions that may be imposed by the SEC before it can be exercised by the members. In the absence of a provision allowing mail voting or other similar means in the by-laws, all votes cast in such manner are violative of Section 89 of the Code."²

Therefore, an on-line election for the member of Board of Directors, which is covered by the phrase "other similar means" in Section 89, can only be resorted to if it is expressly set-forth in the by-laws of the corporation.

¹ SEC Opinion dated August 3, 1984 addressed to Philippine Institute of Civil Engineers, Inc.

² SEC Opinion No. 04-50, dated December 7, 2004 addressed to Dr. Carlos E. Infante.

As to your *second* and *third* queries, to reiterate, in the absence of a provision allowing mail voting or other similar means in the by-laws, all votes through such method are violative of Section 89 of the Code.

Any change in such manner of voting must be done through an amendment of the by-laws in accordance with Section 48 of the Code, to wit:

"Sec. 48. Amendment to by-laws. - The board of directors or trustees, by a majority vote thereof, and the owners of at least a majority of the members of a non-stock corporation, at a regular or special meeting duly called for the purpose, may amend or repeal any by-laws or adopt new by-laws. The owners of two-thirds (2/3) of the outstanding capital stock or two-thirds (2/3) of the members in a non-stock corporation may delegate to the board of directors or trustees the power to amend or repeal any by-laws or adopt new by-laws...xxx...

The amended or new by-laws shall only be effective upon the issuance by the Securities and Exchange Commission of a certification that the same are not inconsistent with this Code."

Section 48 provides that the by-laws may be amended in two-ways. The first is by a majority vote of the board of directors or trustees and at least a majority of the outstanding capital stock or members of a non-stock corporation. The second is by delegating this power to the board of directors or trustees by the vote of 2/3 of the outstanding capital stock or of members in a non-stock corporation.³

It is a general rule that when the constitution or the by-laws of a corporation specifies the mode of amendment, this prescribed mode shall be followed in substance in order for the amendments to be valid and binding. If the charter or statute prescribes the manner in which the by-laws may be amended, an attempt to amend them in different manner will fail. However, although the constitution or the by-laws may provide for a different quorum, it must still be in accordance with the provisions of the Code which specifically provide for the minimum requirements of membership votes in case of amendments. These minimum requirements cannot be lowered to a mere vote of 2/5 or one-fourth (1/4) of the members. The by-laws may, however, provide for a greater number of votes but an unanimous vote is never required.⁴

In an Opinion⁵, the Commission held that:

"In amending the by-laws, Section 48 of the Corporation Code requires the actual presence of the stockholders/members casting their votes at a meeting duly called for the purpose. Accordingly, amendments to the by-laws cannot be legally done by a mere referendum without the necessity of a meeting. The rationale behind the law is to give all the stockholders/members the opportunity to participate during the deliberation of the amendment to be voted."

³ SEC-OGC Opinion No. 08-12 addressed to Ms. Susan P. Trinidad, dated 29 April 2008.

⁴ *Ibid.*

⁵ SEC Opinion dated October 13, 1997 addressed to Ms. Restituta A. Mendigorin.

Thus, while under Section 89 of the Code, members of a non-stock corporation may be allowed to vote by mail or other similar means, the same should be treated as a general provision applicable only in the absence of a specific provision in the Code on a particular subject matter.⁶ Such voting procedure is not allowed in the case of amendments to corporate by-laws as Section 48 of the Code explicitly requires the casting of votes at a meeting duly called for the purpose.⁷

As to your *fourth* and *fifth* queries, the Supreme Court has previously held in several cases, thus:

The general rule is that a corporation, through its board of directors, should act in the manner and within the formalities, if any, prescribed in its charter or by the general law.⁸

Essentially, by-laws are merely intended for the protection of the corporation, and prescribe regulation, not restrictions, and they are always subject to the charter of the corporation.⁹

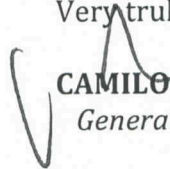
However, the by-laws of a corporation are its own private laws which substantially have the same effect as the laws of the corporation. They are in effect, written, into the charter. In this sense they become part of the fundamental law of the corporation with which the corporation and its directors and officers must comply.¹⁰

Thus, a corporation's Board of Directors and COMELEC, cannot vote for, or promulgate rules and regulations on matters that are contrary or in conflict with the provisions of the corporation's constitution and by-laws. The rules set in the by-laws are mandatory for every member of the corporation to respect. They are the fundamental law of the corporation with which the corporation and its officers and members must comply¹¹.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether similar or dissimilar circumstances.¹² 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.

Very truly yours,


CAMILO S. CORREA
General Counsel

⁶ SEC Opinion dated 4 August 1998 addressed to Ms. Ma. Pelita B. Dotado-Viliran.

⁷ SEC Opinion dated 5 November 1998 addressed to V.E. Del Rosario.

⁸ Jose Bernas, et al. vs Jovencio Cinco, et al., G.R. Nos. 163356-57, July 10, 2015

⁹ Rural Bank of Salinas v. Court of Appeals, 210 SCRS 510 (1992).

¹⁰ ROSITA PEÑA petitioner, vs. THE COURT OF APPEALS, et al., G.R. No. 91478, February 7, 1991

¹¹ See Note 2.

¹² SEC Memorandum Circular No.15, Series of 2003