Republic of the Philippines
Department of Finance
Securities and Exchange Commission
OFFICE OF THE GENERAL COUNSEL

11 October 2019

SEC-OGC Opinion No. 19-51
Re: Classification of Corporations; Express powers; Right of first refusal; Procedure in transferring shares of stock; Qualifications of directors; and Probative Value of the stock and transfer book.

CARLOS F. EUSTAQUIO
277 Cabato Road, Tetuan
Zamboanga City

Dear Mr. Eustaquio:

This refers to your letter dated 18 August 2017, raising the following queries/concerns regarding Universidad de Zamboanga, Inc. (UDZ):

(1) Is UDZ a stock and profit corporation? If it is, does this mean that its stockholders may request for the declaration of dividends since it has exorbitant retained earnings over the years?
(2) Whether or not Nos. 2(f); 2(j) and 2(l) of UDZ's 2004 Amended Articles of Incorporation (AOI) serve its primary purpose?
(3) That for several years, it has been observed that there are adverse opinions coming from the external auditors.
(4) In the absence of the right of first refusal in UDZ's AOI and By-Laws, can a stockholder sell his/her share without offering to other stockholders?
(5) What is the procedure in transferring a common/voting stock and when is it legal?
(6) Can any heir of a deceased stockholder sit down as a member of the board of directors?
(7) Can the Securities and Exchange Commission do an independent audit of UDZ, especially on its stock and transfer book (STB)?
(8) Which is a more legal document between the General Information Sheet (GIS) and the STB? In case the corporate secretary is unable to produce STB, what could be the basis in identifying a true stockholder?
(9) Request for the latest GIS of UDZ.

As to your first query, UDZ is a stock but non-profit corporation as stated in paragraphs 7 and 9 of its Amended AOI, to wit:

> "7. That the capital stock of said corporation is SIX HUNDRED THOUSAND PESOS (P600,000.00), divided into ONE THOUSAND TWO HUNDRED (1,200) shares at the par value of FIVE HUNDRED PESOS.
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> 9. That, since said corporation is a NON-PROFIT CORPORATION, no stock shall be entitled to dividends during the lifetime of said corporation, the right of the holders thereof being limited to the repayment of the value of the said stocks upon the repurchase from their holders by said corporation in accordance with the Corporation Law and the By-Laws, or upon the expiration of its terms of existence or upon its dissolution in accordance with law, xxx."

In this connection, it is worthy to note that during the time of UDZ's registration/incorporation in 1954, Philippine laws allowed educational institutions to incorporate as stock but non-profit corporations as evinced by the passage of Republic Act No. (RA) 6055 on 4 August 1969, entitled "*An Act To Provide For The Conversion Of Educational Institutions From Stock Corporations To Non-Profit Foundations, Directing The Government Service Insurance System, The Social Security System And The Development Bank Of The Philippines To Assist In Such Conversion, And For Other Purposes*".

Section 1 of said law states that "**[a]ny educational institution organized as a stock corporation**, which for at least ten years has been conferring baccalaureate degrees and has maintained good standing as required by Section two, paragraph (b) of this Act, **may convert itself into a non-stock, non-profit education foundation**, under the following conditions: xxx"

In view of the foregoing and considering that UDZ's records fail to show any circumstance that it was converted to a non-stock and non-profit corporation under RA 6055, UDZ is considered a stock and non-profit corporation which may not declare dividends to its stockholders.

As to your second query, the Amended AOI of UDZ states that the corporation has the following powers:

> "To engage in any/all of the following activities and enterprises, the earnings therefore, if any, shall be devoted **to the furtherance of the main purposes above-mentioned**:
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> xxxxx
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> (f) To donate and/or give gifts for charity and/or to recognized charitable and/or educational institutions.
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> xxxxx

(j) To rent, erect, construct and lease, buy and sell buildings and other real and personal property necessary for the conduct of its business, subject to the limitation provided by law.

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(l) Subject to the limitations established by law, to acquire by purchase, exchange, assignment, gift, or otherwise, and to hold, own and use for investment or otherwise, and to sell, assign, transfer, exchange, mortgage, pledge, traffic and deal in and with, and otherwise to enjoy and dispose of, any bonds, debentures, promissory notes, shares of capital stock and/or other securities, and/or obligations, created, negotiated or issued by any corporation, association, or other entity, foreign or domestic, and while the owner thereof, to exercise all the rights, powers and privileges of ownership, including the right to receive, collect, and dispose of, any and all dividends, interest and income, derived therefrom, and the right to vote on any shares of the capital stock, and upon any bonds, debentures and/or other securities, having voting power so owned." (Emphasis ours)

Section 35 of RA 11232, otherwise known as the Revised Corporation Code of the Philippines (RCC) (previously Section 36 of Batas Pambansa Bilang (BP) 68 or the Corporation Code), provides for the corporate powers and capacities of a corporation, to wit:

"**SEC. 35.** *Corporate Powers and Capacity. – Every corporation incorporated under this Code has the power and capacity:*

Xxxxx

(g)To purchase, receive, take or grant, hold, convey, sell, lease, pledge, mortgage, and otherwise deal with such real and personal property, including securities and bonds of other corporations, as the transaction of the lawful business of the corporation may reasonably and necessarily require, subject to the limitations prescribed by law and the Constitution;

Xxxxx

(i)To make reasonable donations, including those for the public welfare or for hospital, charitable, cultural, scientific, civic, or similar purposes: Provided, That no foreign corporation shall give donations in aid of any political party or candidate or for purposes of partisan political activity;

Xxxxx

(k)To exercise such other powers as may be essential or necessary to carry out its purpose or purposes as stated in the articles of incorporation."

The Commission has already opined that "a corporation has only such powers as are expressly granted in its charter or in the statutes under which it is created or such powers as are necessary for the purpose of carrying out its express power. A corporation has both express and implied or incidental powers. Express powers are those which are

enumerated in Section 36 of BP 68 (now Section 35 of the RCC) and those which are sanctioned by the State in the corporation's articles of incorporation. Implied or incidental powers, on the other hand, are the corporation's powers attributes and properties incident to its existence, which may be essential or necessary to carry out its purpose or purposes as stated in its articles of incorporation."[1]

"Whether or not such power is included in what the corporation could do and perform under its articles of incorporation, it is nevertheless, deemed to be within the scope of its corporate powers by express declaration of Section 36 (now Section 35 of the RCC) of the Code."[2]

By virtue of the above-stated provision and doctrine, considering that Nos. 2(f); 2(j) and 2(l) of UDZ's AOI are essentially mere restatements of Section 35 of the RCC, the same are deemed automatically granted by law upon incorporation.

As to your third query, please be advised that as a matter of policy and pursuant to SEC Memorandum Circular No. 15, Series of 2003 (MC 15-2003), the Commission shall refrain from rendering an opinion on queries involving justiciable issues that are litigated or may be eventually litigated in the future, or that could only be clarified and determined in a proper proceeding, such as those presented in your third query. These are matters which involve the substantive and contractual rights of private parties who would, in all probability, contest the same in court if the opinion turns out to be adverse to their interest.[3]

Considering that said query involves multiple adverse opinions of external auditors which would necessarily require its review and interpretation and is justiciable in nature, this Commission cannot answer the same. However, we advise you to refer said concern to the Office of the General Accountant of this Commission for its proper action, considering that the matter involved therein is within its expertise.

As to your fourth query, "[t]he right of first refusal is a right that arises only by virtue of contractual stipulations, in which case the right is construed strictly against the right of persons to dispose of or deal with their property. It may also be provided for in specified statutory provisions, such as that provided for in Section 98 of the Code on close corporations. Unlike pre-emptive right which pertains to stockholders by common law and does require any statutory enabling provision, **the right of first refusal, if not provided for by law or by the articles of incorporation, does not exist at all.**"[4]

Thus, we advise you to check the corporation's AOI or By-Laws to determine whether a right of first refusal is granted to its stockholders. In case the AOI or By-Laws

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[1] SEC-OGC Opinion No. 19-22 dated 14 June 2019 and addressed to Juan Miguel Macapagal Arroyo.
[2] Lopez, R. The Corporation Code of the Philippines, Bol.2, 512 (1994), citing SEC Opinions dated September 6, 1982, Marble Corporation of the Philippines and January 25, 1991, Philippine Library Materials Project Foundation, Inc.
[3] SEC Memorandum Circular 2003-15, No.5.2
[4] Villanueva, Philippine Corporate Law 2001 Edition, p. 460.

are silent, a stockholder may freely sell his shareholdings to others without offering it to the corporation or to its stockholders.

With regard to your fifth query, Section 62 of the RCC (previously Section 63 of the Corporation Code) states that "[s]hares of stock so issued are personal property and may be transferred by delivery of the certificate or certificates indorsed by the owner, his attorney-in-fact, or any other person legally authorized to make the transfer. **No transfer, however, shall be valid, except as between the parties, until the transfer is recorded in the books of the corporation,** showing the names of the parties to the transaction, the date of the transfer, the number of the certificate or certificates, and the number of shares transferred."

This Commission has already opined that "[m]ere endorsement of the certificate of stock shall be sufficient to legally effect the transfer of title to a share of stock, even without executing a deed of assignment of the shares, **provided the same is coupled with delivery and recorded in the stock and transfer book of the corporation**. An unrecorded transfer, though valid between the parties, cannot be effective as against the corporation.[5] The right of a stockholder accrues only upon entry of his name in the books of the corporation."[6]

However, the use of the word "may" means that the transfer may be effected in a manner different from that provided for in the law. In the case of *Gonzalo Chua Guan vs Samahang Magsasaka, Inc. (G.R. No. L-42091, 2 November 1935)*, which covers Section 35 of Act 1459[7] and has been carried over in Section 63 of BP 68 and now Section 62 of RA 11232, the Supreme Court (Court) held that:

> "xxx It is to be noted, however, that section 35 of the Corporation Law (Act No. 1459) enacts that shares of stock "may be transferred by delivery of the certificate endorsed by the owner or his attorney in fact or other person legally authorized to make the transfer." **The use of the verb "may" does not exclude the possibility that a transfer may be made in a different manner, thus leaving the creditor in an insecure position even though he has the certificate in his possession**. xxx" (Emphasis supplied)

The Court reiterate this in the case of *Alfonso S. Tan vs Securities and Exchange Commission (G.R. No. 95696, 3 March 1992)* that:

> Xxxxx
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> Contrary to the understanding of the petitioner with respect to the use of the word "may", in the case of *Shauf v. Court of Appeals*, (191 SCRA 713, 27 November 1990), this Court held, that "Remedial law statues are to be construed liberally." **The term 'may' as used in adjective rules, is only permissive and not mandatory.** xxx

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[5] SEC-OGC Opinion No. 07-06, dated 19 April 2007 and addressed to Augusto G. Panlilio.
[6] De Casa, Handbook on Private Corporations, p. 506.
[7] Otherwise known as *"the Corporation Law"*, the precursor of the Corporation Code.

> Years before the above rulings concerning the interpretation of the word "may", this Court held in *Chua v. Samahang Magsasaka*, that "**the word "may" indicates that the transfer may be effected in a manner different from that provided for in the law.**" (Emphasis supplied)

In view of the foregoing, "[w]hile it is usual to effect the transfer of shares by indorsement on the certificate, a conveyance may be made by an assignment or sale in a separate instrument in lieu of the indorsement of the certificate, unless the by-laws expressly provide that the transfer shall be made exclusively in the manner authorized by the statute."[8]

With respect to your sixth query, Section 22 of the RCC (previously Section 23 of the Corporation Code) provides for the qualification of a director, that he must own at least one (1) share of stock of the corporation under his/her name.

As such, "[t]he only mandatory qualification prescribed for a director under the Corporation Code is that he should appear in the corporate books (i.e. stock and transfer book or STB) as a stockholder or member of the corporation. However, additional qualifications may be imposed in the by-laws. In the absence of a provision in the by-laws, a corporation cannot require additional qualifications for directors other than the mandatory requirement under Section 23 xxx of the Corporation Code."[9]

Thus, any person, including any heir of a deceased stockholder, may become a member of the Board of Directors of corporation provided that he/she owns at least one (1) share of stock of the corporation under his/her name, which must be duly registered in the STB of the corporation, and provided he/she has all the other qualifications and none of the disqualifications as may be provided by the AOI or the By-Laws.

As to your seventh query, please be advised that the only function of the Commission with respect to STBs is the registration of the same. As for its contents, the same pertains to ownerships of shares of stocks, which is intra-corporate in nature and within the jurisdiction of the ordinary courts pursuant to the provisions of RA 8799, otherwise known as the *"Securities Regulation Code"*. Thus, this Commission may not conduct an audit over STBs and its contents.

As to your eighth query, the Commission opined that "the STB is the quintessential record of all stockholders and their corresponding stockholdings in the corporation. Only in the event that the said STB is lost or destroyed should the corporation resort to gathering extrinsic evidence or *parol* evidence of stock ownership following the general rules on the presentation of secondary evidence."[10]

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[8] Hector de Leon, the Corporation Code of the Philippines, Annotated, pp. 564-565 (2010).
[9] De Casa, Handbook on Private Corporations, p. 214-215.
[10] SEC-OGC Opinion No. 15-03, dated 3 July 2015 and addressed to Mr. Zandro O. Babol.

Thus, the STB is considered the best evidence to prove the status of a person as a stockholder of corporation. However, the same is not conclusive in nature to prove one's stockholdings. Should the STB be lost or destroyed, other pieces of evidence such as but not limited to the latest GIS of the corporation or the certificate of stock may be presented to substantiate one's claim as a stockholder of a corporation.

As to your last query, please be advised that any request for the GIS of a corporation should be directed to the Company Registration and Monitoring Department of this Commission (CRMD) for its appropriate action since the latter serves as the repository of such document.

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and 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.[11] If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

ROMUALD C. PADILLA
Officer-in-Charge

[11] SEC Memorandum Circular 2003-15, No.7