

CLARIFICATORY NOTE No. 16-001
Subject: Definitive Agreements and Binding Preliminary Agreements
in Mergers and Acquisitions

1. This Clarificatory Note is issued as guide to the public in the interpretation of the Implementing Rules and Regulations of R.A.10667, particularly Rule 4 Section 2 (a) on the compulsory notification requirement prior to the execution of *definitive agreements* and Rule 4 Section 5 (c) on notification based on a *binding preliminary agreement* in mergers and acquisitions.

2. Rule 4 Section 2 (a) and Section 5 (c) are based on the Commission's appreciation of the customary stages or phases in the completion of mergers and acquisitions, to wit:

- 1st Phase: Execution of binding preliminary agreement
- 2nd Phase: Execution of definitive agreement or agreements
- 3rd Phase: Closing/Completion/Consummation

3. A binding preliminary agreement refers to such terms and conditions on which parties to a planned merger or acquisition have reached a consensus and on the basis of which the parties intend to complete the transaction in good faith. The agreement may be in any form, such as a memorandum of agreement, term sheet or letter of intent. At this stage, the complete and final terms and conditions of the merger or acquisition are yet to be agreed upon.

4. A definitive agreement sets out the complete and final terms and conditions of a merger or acquisition, including the rights and obligations between or among the transacting parties. Such agreement may be in the form of a share purchase agreement, asset purchase agreement, joint venture agreement or other similar agreement. The inclusion of conditions which must be fulfilled by a party or the parties to make the agreement effective against a party or the parties will not negate the definitive nature of the agreement.

5. A merger or acquisition is consummated where the parties have transferred, conveyed, assigned, encumbered any right, title, interest, property or asset pursuant to the executed definitive agreement or agreements, or more generally, acted in exercise of their rights and obligations as transacting parties under the definitive agreement or agreements. The exercise of such rights and obligations by the parties are to be factually determined by the Commission.

6. Notification may be submitted on the basis of:

- a. A binding preliminary agreement upon its execution;
- b. If there is no binding preliminary agreement or parties do not wish to notify at that stage, notification to the Commission must be made:
 - i. Prior to the execution of the definitive agreement or agreements relating to the merger or acquisition. The terms

and conditions of the most recent draft of the definitive agreement or agreements shall be the basis of the notification;

- ii. Prior to the execution of the definitive agreement or agreements involving the Philippine aspect of the merger or acquisition, where the merger or acquisition is a global transaction requiring notification in multiple jurisdictions, i.e. three (3) or more jurisdictions outside the Philippines. The terms and conditions of the global agreement or the most recent draft of the definitive agreement or agreements relating to the Philippine aspect of the transaction, or both, where appropriate, shall be the basis of the notification.

8. The foregoing Clarificatory Note is issued only for the purpose of giving clarity and guidance to all concerned and is relevant solely to the specific aforesaid provisions of the IRR. The Commission may modify or revise this Note as it deems necessary.

Pasig City, Philippines.

16 September 2016.