

CLARIFICATORY NOTE NO. 19-001

Subject: Coverage of Compulsory Notification in Land Acquisition

1. This Clarificatory Note is issued as a guide to the public on the coverage of compulsory notification under Republic Act No. 10667, otherwise known as the Philippine Competition Act (“PCA”) and its Implementing Rules and Regulations (“IRR”).¹
2. Rule 2 (a) of the IRR defines “Acquisition” as the purchase or transfer of securities or assets, through contract or other means, for the purpose of obtaining control by:
 - (1) One (1) entity of the whole or part of another;
 - (2) Two (2) or more entities over another; or
 - (3) One (1) or more entities over one (1) or more entities.
3. Rule 2 (f) of the IRR defines “Control” as the ability to substantially influence or direct the actions or decisions of an entity, whether by contract, agency or otherwise.
4. A land acquisition not for the purpose of obtaining control by one (1) or more entities through contract or other means is not subject to the compulsory notification requirement under the PCA and the IRR. A land acquisition is not for the purpose of obtaining control when the following requisites are present:
 - a. The acquiring entity will not obtain control over an acquired entity as a result of the acquisition; or
 - b. The acquiring entity will not obtain control over a part of an acquired entity as a result of the acquisition:
 - (i) The land to be acquired does not contain improvements that constitute an operating segment as defined under Section 6 that will result in a horizontal or vertical relationship between the Notifying Group² of the acquiring and acquired entities; and
 - (ii) The land to be acquired does not contain improvements that may be considered as an essential facility, as defined under Section 7.

Examples:

- 4.1. The examples below are hypothetical and intended only to illustrate the Note outlined above.
- 4.2. Rainier Manufacturing Corporation (“Rainier”) is engaged in the business of manufacturing organic fertilizers. Fleurdeliz Corporation (“Fleurdeliz”) is engaged in the business of buying and selling cars. Fleurdeliz intends to buy from Rainier 25 hectares of raw land located in Sta. Rosa, Laguna to convert into warehouses for the cars it buys. The land has an aggregate value of PhP 5 billion.

¹ The definitions herein shall be strictly construed solely for purposes of filing notifications with the PCC.

² As defined under Section 1.4 of the Rules on Merger Procedure.

The purchase of raw land by Fleurdeliz from Rainier is a pure land acquisition under Section 4(a) since Rainier will not obtain control over Fleurdeliz post-acquisition, and the land has no improvements.

- 4.3. Assume that Rainier's 25 hectares of land has an operational packaging plant for the fertilizer it sells. The purchase of the land by Fleurdeliz will now depend if the packaging plant constitutes an operating segment of Rainier that has a horizontal or vertical relationship with Fleurdeliz and its Notifying Group's lines of businesses or it may be considered as an essential facility.
 - a. Assume that within Fleurdeliz' Notifying Group, there is an entity that is engaged in the sale and distribution of fertilizers ("Sister Company"). Considering that the 25 hectares of land has an operational fertilizer packaging plant, the acquisition will not fall under Section 4(b) since Fleurdeliz will be acquiring control over Rainier's operating segment, which is in a vertical relationship with Fleurdeliz' Sister Company.
 - 4.4. Assume that Rainier's 25 hectares of land has a guardhouse constructed on it, and is surrounded by a fence. The purchase of the land by Fleurdeliz from Rainier is a land acquisition falling under Section 4(b) since the land has no improvements that constitute an operating segment or an essential facility.
5. In furtherance to Section 4(a) hereof, the acquiring entity is presumed to have acquired control over the seller (the acquired entity) if the seller is engaged in a real estate business and the acquiring entity or entities, including the entities within its Notifying Group, will be in a position to replace, or substantially replace, the acquired entity in the business or in part of the relevant business, or allow an acquirer to build up a market presence or develop market access within a reasonably short period of time.

Examples:

5.1. The examples below are hypothetical and intended only to illustrate the Note outlined above.

5.2. Angelica Real Estate Holdings, Inc. ("Angelica") is engaged in the buying and selling of land. Ruby Land, Inc. ("Ruby") is engaged in the business developing real estate for commercial and residential spaces.

Ruby intends to purchase from Angelica 10 hectares of raw land located in Victorias City with an aggregate value of PhP 4 billion. Angelica's entire inventory consists of 11 hectares of raw land, 10 of which is located in Victorias City. The remaining 1 hectare is where Angelica's corporate office is located.

Ruby's acquisition of the 10 hectares of land amounts to an acquisition of all or substantially all of the assets of Angelica, such that it would allow Ruby to be in a position to replace Angelica in the business of buying and selling of land. Consequently, the transaction between Ruby and Angelica is subject to compulsory notification.

5.3. Cedric Landholdings, Inc., a corporation engaged in development of real estate, intends to buy from Michael a parcel of land which he inherited from his mother. This parcel of land is the only land that Michael owns.

Cedric's acquisition of the parcel of land that Michael owns is not subject to compulsory notification because Michael did not sell all or substantially all of his assets for a business. In this case, there is no acquired entity.

- 5.4. Yellow Land Holdings (“Yellow”) is engaged in the business of leasing out warehouses. Yellow owns 10 hectares of land in Calamba, Laguna where 10 of its warehouses stand. Red Real Estate Corporation (“Red”) proposes to buy the 10 hectares of land and the 10 warehouses. The land and the warehouses has an aggregate value of PhP 8 billion.

The purchase of land and the warehouses by Red from Yellow is not a pure land acquisition considering that it will result in control over an acquired entity after acquiring all of the seller’s assets.

- 5.5. Madison Real Estate, Inc. (“Madison”), a corporation engaged in landholdings and land development, proposes to acquire 5 parcels of land located in Quezon City with an aggregate value of PhP 7 billion from Wilson Land Holdings, Corp. (“Wilson”), a corporation engaged in landholdings.

Wilson holds 15 parcels of land in Quezon City. The land Wilson intends to sell forms 10% of its inventory. The lands for sale are located in Fairview and are currently covered with large cogon grass. Aside from a hut where guards may stay after making rounds of the property, nothing else stands on the property and no canals were built above or below the land.

Madison’s proposed acquisition of the 5 parcels of land is not subject to compulsory notification. Madison will not acquire control over Wilson as a result of the acquisition since the 5 parcels of land do not amount to all or substantially all of Wilson’s inventory. Further, the guard hut is not an improvement amounting to an operating segment of the seller or an essential facility of the seller.

6. In furtherance to Section 4(b)(i) hereof, an “operating segment” refers to a component of an entity that engages in business activities from which it earns or may earn revenues and incur expenses (including revenues relating to transactions with other components of the same entity) irrespective of whether it is organized as a separate legal entity or not.

Examples:

- 6.1. The examples below are hypothetical and intended only to illustrate the Note outlined above.

- 6.2. Anthony Hardware, Inc. (“Anthony”), a corporation engaged in buying and selling construction materials, intends to buy from Jackson Land, Inc. (“Jackson”), a corporation engaged in constructing commercial and residential spaces, a parcel of land with an aggregate value of PhP 3 billion. The land to be sold includes two commercial spaces, one is a showroom of a model residential space and the other is a showroom and store for residential tiles and fixtures.

The land Anthony intends to acquire contains an operating segment of Jackson since it has a store that earns revenues and showrooms that Anthony may incur revenues. Anthony’s acquisition of the parcel of land from Jackson may be subject to compulsory notification if it will result in a horizontal or vertical relationship between the Notifying Group of Anthony and Jackson.

- 6.3. Assume that the land Jackson will sell to Anthony has no other improvements except several fruit bearing trees and a portion of which is paved with concrete. Such improvements will not constitute as an operating segment of Jackson considering that it is not being used to engage in business activities.

7. In furtherance to Section 4(b)(ii) hereof, a facility is essential if it cannot be duplicated in a practicable manner by would-be competitors or it is indispensable to carrying on another person’s business because there is no actual or potential substitute in existence. Denying access to an essential facility results in harm to

competition through the foreclosure of existing or potential competitors from said facility.

Example:

7.1. The example below is hypothetical and intended only to illustrate the Note outlined above.

7.2. Catherine Soda, Inc. (“Catherine”) owns two parcels of land. One contains soda bottling factory and the other contains a wastewater treatment facility at the top of an inclined slope that provides water irrigation to rice fields below it. The rice fields are isolated and have no access to the river or other irrigation canals.

Mangrove Clear Water, Inc. (“Mangrove”), who also owns a portion of the rice fields, intends to purchase from Catherine one parcel of land including the wastewater treatment facility which stands over it. The aggregate value of the facility and the land is PhP 4 billion.

The land Mangrove seeks to acquire contains an essential facility since the wastewater treatment facility is the only way for the rice fields to be supplied with water. It is indispensable in carrying out the business of rice farming, and competitors of Mangrove cannot reasonably duplicate the facility. Mangrove’s acquisition of the land with the wastewater treatment facility is subject to compulsory notification.

8. For the avoidance of doubt, acquisition of assets is subject to the compulsory notification requirement pursuant to Section 4 and 17 of the PCA. Acquisitions of assets where land is only an incidental part of the transaction is not covered by this Clarificatory Note. Contribution of land in a joint venture by acquiring entities (i.e. joint venture partners) into the acquired entity (i.e. joint venture company) is likewise not covered under this Note.
9. The foregoing shall not prevent the Commission from commencing a *motu proprio* review of mergers and acquisitions pursuant to Section 12, 17 and 20 of the PCA.
10. This Clarificatory Note is issued only for the purpose of giving clarity and guidance to all concerned. The Commission may modify or revise this Note as it deems necessary.

Quezon City, Philippines.

8 January 2019