Asia Pacific Guide to Lending and Taking Security - Philippines

When considering whether to lend

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# 1. Is it necessary or advisable for any lender, arranger, facility agent or security agent to be licensed, qualified or otherwise entitled to carry on business in this jurisdiction: (a) by reason only of its execution, delivery or performance of the finance documents; or (b) to enable it to enforce its rights under the finance documents?

**Execution, delivery and performance of the finance documents**

Based on Philippine Supreme Court decisions and Securities and Exchange Commission (SEC) opinions, arguably, a foreign lender, arranger, facility agent or security agent is not required to obtain a license from the SEC by reason solely of its execution, delivery or performance of finance documents, provided that the finance documents relate to a single or isolated transaction and there is no purpose or intention to do any other business within the country.

As a rule, a foreign corporation is required to obtain a license from the SEC if the activities that the foreign corporation intends to carry out will constitute the foreign corporation doing business in the Philippines. On the other hand, if the activities that the foreign corporation intends to undertake do not constitute doing business in the Philippines, the foreign corporation is not required to obtain a license from the SEC.

There is no exclusive list of activities that constitute doing business in the Philippines. However, the Foreign Investments Act and its implementing rules provide for a nonexclusive enumeration of specific activities that constitute doing business in the Philippines1.

The Philippine Supreme Court has ruled that a foreign corporation is not deemed to be doing business if its commercial dealing is limited to a single agreement or is isolated or is an occasional transaction and indicates no element of continuity of conduct in that respect. Further, the SEC has opined that a foreign corporation is not doing business by lending money to a Philippine resident, where the loan is merely incidental to, and not a substantial part of, its corporate business, or where the loan is made offshore. Hence, if the execution, delivery and performance of the finance documents relate to a single or isolated loan transaction, and there is no purpose or intention to do any other business within the country, it can be argued that the foregoing activities do not constitute doing business in the Philippines and, as such, obtaining a license from the SEC is not required.

The SEC license is also referred to as the primary license of a foreign corporation. In addition to the SEC license, a foreign corporation that will engage in lending activities in the Philippines generally and on a continuing basis is required to obtain a secondary license from other regulatory agencies. Depending on the scope of the lending activities, such a foreign corporation must obtain a secondary license to operate either as a bank, a financing company or a lending company.

**Enforcement of the finance documents**

Whether a license is required to enable a foreign corporation to enforce its rights under the finance documents depends on whether the foreign corporation is doing business in the Philippines.

It is not necessary for a lender, arranger, facility agent or security agent that is not "doing business in the Philippines" to be licensed for it to enforce its rights under the finance documents. Conversely, a lender, arranger, facility agent or security agent that is doing business in the Philippines without a license is barred from filing or intervening in any action, suit or proceeding in any court or administrative agency of the Philippines, unless it obtains the required license to transact business in the Philippines. However, it may be sued in relation to any valid cause of action recognized under Philippine law.

1 The implementing rules of the Foreign Investments Act provide that "doing business" will include soliciting orders, service contracts and opening offices, whether liaison offices or branches; appointing representatives or distributors, operating under full control of the foreign corporation, domiciled in the Philippines or that in any calendar year stay in the country for a period totaling 180 days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to and in progressive prosecution of commercial gain, or of the purpose and object of the business organization. The following acts will not be deemed "doing business" in the Philippines:

Mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business and/or the exercise of rights as such investor

Having a nominee director or officer to represent its interest in such corporation

Appointing a representative or distributor domiciled in the Philippines that transacts business in the representative's or distributor's own name and account

Publishing a general advertisement through any print or broadcast media

Maintaining a stock of goods in the Philippines solely for the purpose of having the same processed by another entity in the Philippines

Consignment by a foreign entity of equipment with a local company to be used in the processing of products for export

Collecting information in the Philippines

Performing services auxiliary to an existing isolated contract of sale that are not on a continuing basis, such as installing in the Philippines machinery it has manufactured or exported to the Philippines, servicing the same, training domestic workers to operate it and similar incidental services

# 2. Will any lender, arranger, facility agent or security agent be deemed to be resident, domiciled, carrying on business or subject to tax by reason only of the execution, delivery, performance or enforcement of the finance documents?

No. However, the income of any lender, arranger, facility agent or security agent is subject to tax if the income originated from sources within the Philippines. Interest income is deemed to originate from sources within the Philippines if the debtor is a resident of the Philippines or the loan is used in the Philippines.

# 3. Are there any regulatory reporting requirements that lenders must observe in connection with those transactions?

Generally, reporting requirements are imposed by the Bangko Sentral ng Pilipinas (BSP), the Philippine central bank, on BSP-supervised institutions (such as banks that are operating in the Philippines). Further, for foreign loans of residents, the reporting requirements under Philippine foreign exchange regulations are imposed on the resident borrower.

# 4. Is it necessary to establish a place of business in your jurisdiction in order to enforce any provision of the finance documents?

If a foreign corporation is deemed to be "doing business" in the Philippines, it is required to obtain a license from the SEC. To obtain the license, the SEC requires the foreign corporation to establish a principal place of business in the Philippines.

On the other hand, if a foreign corporation is not considered to be doing business, it is not necessary to obtain a license from the SEC and, for that purpose, establish a principal place of business.

# 5. Is a foreign bank/financial institution permitted to approach local entities for business?

If a foreign bank/financial institution that is not licensed in the Philippines goes to the Philippines and approaches or solicits local entities for business, such institution may be deemed to be doing business without the required licenses from the SEC and the BSP.

The possible consequences of a foreign bank being deemed to be "doing business" in the Philippines without authorization include the foreign bank being barred from maintaining or intervening in any legal or administrative action or proceedings and the imposition of a fine, imprisonment of the responsible directors and officers, or both, at the court's discretion.

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