

The President's Corner

BY: JOEL RAYMOND R. AYSON
PRESIDENT, IBP MAKATI CITY CHAPTER
2009-2011

How time flies, we are almost midway into our term. Kudos to the officers and members of the Chapter who volunteered their valuable time and energies for the success of the Chapter's activities.

Last November, the Chapter sponsored a well-attended 36-unit MCLE course at A Venue Hotel. This was capped by our annual Christmas Party on December 4, with IBP Southern Luzon Governor Amador Tolentino and Philippine National Red Cross Governor Atty. Inky Reyes as special guests. Atty. Reyes, a member of the Makati City Chapter, accepted our donation to flood victims. The Chapter participated in the march condemning the massacre of innocent civilians in Maguindanao and the imposition of martial law in the province. The volume of legal aid consultations and cases accepted have also increased.

In January, the board of officers attended the House of Delegates Convention in Puerto Princesa, Palawan where proposed amendments to the IBP By-laws were presented. Two additional regions are proposed to be created which will affect the existing Northern Luzon, Southern Luzon and

Greater Manila Regions. New chapters will also be created. Under the proposal, Makati will be transferred to a new region – NCR South. The breakout sessions were characterized by highly spirited discussions and the exchange of opposing views from the delegates. The Chapter will be consulting the members before submitting its position on the proposal.

A more pressing concern is the question on the next Chief Justice with the retirement of Chief Justice Puno on May 17. The Chapter is opposed to any midnight appointment of the next Chief Justice. The Chapter's position was presented to Governor Tolentino and brought up during the House of Delegates Convention. The House of Delegates, with the proactive role of the Chapter, urged the IBP Board of Governors to take a position on the issue.

Preparations are now underway for the IBP Southern Luzon Regional Convention from April 15 to 17 to be hosted by the IBP Cavite Chapter. Details of the planned activities will be circulated in the next few weeks. Let us show our untiring support and the solidarity for the success of our regional convention.

Finally, let us all go out and vote on May 10. Our choice will chart our country's course in the next six years.



The Chapter conducted its MCLE seminars at A Venue Hotel.



Chapter officers attended the 19th House of Delegates Convention at the Legend Hotel, Puerto Princesa, Palawan.

The SSS Condonation Law

BY: ISIDRO B. BARRIOS III AND CZARINA G. QUINTANILLA

Last January 7, 2010, Republic Act No. 9903 or the “Social Security Condonation Law of 2009” was signed into law by President Gloria Macapagal Arroyo. This law authorizes the Social Security System (“SSS”) to grant a one-time condonation of penalties and interest payments of delinquent employers, and provides installment options for those who will opt to settle their outstanding unpaid principal contributions over a period of four (4) years.

Under this law, any employer who is delinquent or has not remitted all contributions due and payable to the SSS, including those with pending cases either before the Social Security Commission, the courts, or the Office of the Prosecutor, may remit in full or submit in writing a proposal to pay in installment such delinquent principal contributions, without incurring the prescribed penalty under Republic Act No. 8282 or the Social Security Act of 1997, within six (6) months from the effectivity of Republic Act No. 9903.

Should the delinquent employer opt to submit an installment proposal, the SSS shall give due course to approve and grant the same, subject to the implementing rules and regulations as the Social Security Commission shall prescribe. However, those who will opt to settle by installment shall remit, upon submission of the installment proposal, a down payment of not less than five percent (5%) of their total contribution delinquency, and the balance thereof must be remitted in equal monthly installments within a period not exceeding forty-eight (48) months but shall bear an interest of three percent (3%) per annum.

Upon approval and payment in full or in installments, pending cases against the employer, if any, shall be withdrawn without prejudice to the re-filing of the case in the event the employer fails to remit in full the required delinquent contributions or defaults in the payment of any installment under the approved proposal. In addition, the penalties are deemed reimposed from the time the contributions first become due until the delinquent account is paid in full. Finally, for reasons of equity, employers who settled arrears in contributions before the effectivity of this law shall likewise have their accrued penalties waived.

Philippine REIT, What Is This All About?

BY: ERIC R. RECALDE

The “Real Estate Investment Trust (REIT) Act of 2009” (otherwise known as the “REIT Law”) lapsed into law on December 17, 2009 and will take effect on February 9, 2010. Hence, this is the most recent piece of legislation that must be considered by foreign and local, including retail, investors in the Philippine securities market.

While REITs were first introduced in the United States during the 1960s, the REITs eventually took off only in the 1990s. Presently, there are about more than 20 countries that have REIT-type structures. In Asia alone, Hong Kong, Japan, Malaysia, Singapore, South Korea, Taiwan and Thailand have REITs. The Philippines, with the REIT Law, is expected to catch up with its Asian neighbor countries by providing a legislative framework that encourages the establishment of REITs and make the Philippines globally competitive.

So what is a REIT and what is the REIT Law all about?

A REIT is a special purpose company that is envisaged to own income-generating real estate assets. Although designated as a “trust,” it does not have the same technical meaning as “trust” under existing laws and regulations. It has been designated as such only for the purpose of adopting the internationally accepted description of the company in accordance with global best practices. Under the REIT Law, it must be established as a stock corporation. Congress adopted the corporate-type (rather than a trust-type) of REIT since existing laws and regulations on trust are not well defined in the Philippines.

The REIT Law is designed to promote, among others, the development of the capital market and democratize wealth by broadening the participation of Filipinos in the ownership of real estate in the Philippines. Thus, the shares of the REIT are required to be listed in a stock exchange so the public can invest therein and, indirectly, own income-generating real estate assets. In order to achieve these objectives, the REIT Law provides certain incentives, which together with the incentives provided under existing laws, encourage the establishment of REITs in the Philippines. It also provides safety measures designed to protect the interest of the investing public.

Main players under the REIT Law

There are several main players under the REIT Law, namely: the REIT itself, its sponsor, the fund manager, the property manager and the public.

REIT

The REIT, as mentioned earlier, must be a stock corporation with a minimum paid-up capital of P300,000,000.00. It must be a public company, i.e., it must maintain its status as a listed company and have at least 1,000 public shareholders (each owning at least 50 shares) who in the aggregate own at least 1/3 of the outstanding capital stock of the REIT.

Sponsor

The sponsor of the REIT (Sponsor) is the one that establishes or incorporates the REIT. It either contributes cash or property to the REIT. It is expected that the big real property owners are the ones that will be the Sponsors, who will contribute their existing income-generating real estate assets to the REIT. Through the REIT, the Sponsor will be able to improve its financial ratios by removing from its balance sheet such income-generating real estate assets (which normally comprise a huge portion of the Sponsor’s asset base) and replacing it with publicly listed shares. Since the REIT Law only requires 1/3 minimum ownership of the REIT by the public, the Sponsor (if it retains 2/3 ownership) remains in control of the REIT.

Fund Manager/Property Manager

There has been a debate on the propriety of an “externally” over “internally” managed REIT (and *vice versa*) for the protection of the investing public. There is no uniform global practice on this issue. The REIT Law adopts an “externally” managed REIT. Thus, the REIT’s fund manager (Fund Manager), which is responsible for the allocation of the REIT’s deposited property to allowable

investment outlets and selection of income generating real estate, and the REIT's property manager (Property Manager), which is responsible for managing the REIT's real estate assets, must be functionally independent from the REIT and the Sponsor. The REIT Law provides their minimum qualifications to ensure such independence.

Public

The public, which is the ultimate beneficiary of the REIT Law, may either be the seller of real estate assets to the REIT or an investor which acquires the REIT's listed shares. As mentioned earlier, the REIT Law provides ample measures to protect the interest of the investing public.

Tax consequences of a REIT transaction

In order to encourage the Sponsor to establish and for the public to invest in a REIT, the REIT Law eliminates and/or minimizes certain "friction" costs. In conjunction with existing laws, the following are the tax and cost consequences of a REIT transaction:

Transfer of real estate assets to a REIT

As mentioned earlier, the Sponsor is the primary potential transferor of real estate assets to a REIT. Such real estate assets will generally be used as the Sponsor's contribution to satisfy the REIT's minimum paid-up capital requirement. Existing law provides that such transfer will not be subject to income tax, documentary stamp tax and value-added tax (although the exemption from the latter is debatable) provided the Sponsor gains (or further gains) control of at least 51% equity ownership of the REIT. However, there remains a documentary stamp tax on the issuance of the shares by the REIT in exchange for the aforementioned real estate assets. The local transfer tax imposed by the appropriate local government unit is also payable. Moreover, the registration and annotation fees imposed by the Register of Deeds remain payable but the REIT Law reduces the amounts payable to 50%.

The public may also transfer real estate assets to the REIT. However, the REIT Law provides no tax incentives on such transfer, except for the aforementioned reduction of the registration and annotation fees and the 50% reduction of the documentary stamp tax due on such transfer. Thus, the income tax (which may either be a 6% capital gains tax or the regular income tax subject to the applicable creditable withholding tax, as the case may be), the documentary stamp tax (at a 50% reduced amount), the value-added tax (if applicable), the local transfer tax and the registration and annotation fees (at a 50% reduced amount) shall still be payable.

Sale and purchase of REIT shares

The REIT Law exempts the REIT or the Sponsor (when it offers primary shares or sells secondary shares, respectively, to the public during the initial public offering) from paying an IPO tax. Any gain derived by the Sponsor from the sale of secondary shares to the public during the initial public offering shall no longer be subject to income tax (including capital gains tax).

Based on existing laws, the subsequent transfer of the REIT shares through the local stock exchange is subject to a stock transaction tax but not to documentary stamp tax.

Taxable Income of REIT

The REIT is required to invest at least 75% of its deposited property in income generating real estate. The rest of its deposited property may be placed in other investment outlets, such as equity, debt and/or government securities. Thus, its income from investments may generally be classified as subject to a final withholding tax, a regular corporate income tax and a capital gains tax.

The REIT's income that is subject to a final withholding tax pertains to its passive income from Philippine sources for which the National Internal Revenue Code (Tax Code) imposes a special tax rate. Such income includes interest from bank deposits, yield or other monetary benefit from deposit substitutes. As the tax withheld by its income payor is already final, the REIT is no longer required to include such income in its taxable net income.

On the other hand, the REIT's other passive income, income from the rental or sale of income generating real estate assets, are part of the REIT's taxable income. Such income remains subject to the 30% regular corporate income tax. As an incentive to the Sponsor, the REIT Law makes the REIT a "pass-through" entity by allowing declared dividends (which must be at least 90% of its distributable income) as deductible from its taxable income. Thus, if the REIT declares as dividends all its distributable income for a year, its taxable income will be zero and, therefore, the REIT will not pay the 30% regular corporate income tax.

Inasmuch as the REIT will have a very minimal taxable income (assuming the REIT only declares 90% of its distributable income) against which the tax withheld by its income payor will be credited, the REIT Law reduces to 1% the withholding tax on income payments to a REIT (instead of, for example, 5% in case of a lease, or 6% or 1 to 5% in case of a sale of real estate assets).

The REIT, if it acquires and later on sells shares of stock in a domestic corporation outside of the stock exchange, remains subject to the 5% to 10% capital gains tax on its net gain from such sale transaction.

VAT on REIT transactions

A REIT, with regard to the sale or rental of its real estate assets, is subject to the 12% VAT. Nevertheless, it can always pass on the VAT to its buyer or lessee. It is not considered as a dealer in securities and shall not be subject to VAT when it sells, exchanges or transfers securities forming part of its real estate-related assets.

REIT as a withholding agent

While it enjoys some tax exemptions, a REIT is not spared from withholding tax on its income payments to third parties, such as the Fund Manager, Property Manager and its stockholders.

Dividends paid by REITS

Cash or property dividends paid by a REIT to its stockholders (i.e., Sponsor, the investing public) are subject to a 10% final withholding tax, unless the stockholder is: (a) a non-resident alien individual or a non-resident foreign corporation who is entitled to a lower withholding tax rate pursuant to a tax treaty; (b) a domestic

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CONDEMNATION OF A MIDNIGHT APPOINTMENT OF THE CHIEF JUSTICE

(Reproduction of the letter of the IBP Makati Board of Officers and Directors dated January 22, 2010 addressed to IBP Southern Luzon Governor Amador Z. Tolentino)

An appointment of the next Chief Justice by President Gloria Macapagal Arroyo (PGMA) during the Constitutional ban against midnight appointments should be condemned. It is clearly contrary to Section 15, Article VII of the Constitution, which states:

“Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.”

There is no vagueness in the provision. Beginning two months before the next presidential elections, or beginning 11 March 2010, and up to the end of her term, that is 30 June 2010, PGMA cannot make appointments in government except temporary appointments ONLY to executive positions where the continued vacancies therein will prejudice public service or endanger public safety.

It is surprising, therefore, that there are certain individuals and groups that proffer an interpretation of the provision to be permissive for PGMA to appoint during the period of 11 March until 30 June 2010 the Chief Justice when the position becomes vacant upon the retirement of Chief Justice Reynato S. Puno on 17 May 2010. Not only is such an interpretation wanting of legal basis from a reading of the provision but even runs contrary to Supreme Court precedents on the matter.

In Administrative Matter No. 98-5-01 SC entitled, *In Re Appointments Dated March 30, 1998 of Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta As Judges Of The Regional Trial Court Of Branch 62, Bago City And Of Branch 24, Cabanatuan City, Respectively*, the Supreme Court rendered on 09 November 1998 an *En Banc* Decision penned by then Chief Justice Andres Narvasa declaring void the appointments signed by then President Fidel V. Ramos (PFVR) of Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta as Judges of the Regional Trial Court of Branch 62, Bago City and of Branch 24, Cabanatuan City, respectively for having been appointed during the period of the Constitutional ban on midnight appointments. The Court could not have been clearer; the Constitutional ban applies to judicial appointments.

Significantly, the Court as a consequence of the deliberations in the administrative case, likewise took the position that the Judicial and Bar Council shall not act on the vacancy in the Supreme Court left by the retirement of Justice Ricardo Francisco because a submission of a list of nominees to PFVR would be contrary to the Constitutional ban on midnight appointees.

Still it is argued that the Constitution requires for the President to fill in a vacancy in the Supreme Court within ninety (90) days from its occurrence (Section 4(1), Article VIII of the Constitution); thus, PGMA can appoint the Chief Justice from 18 May up to 30

June 2010. The 90-day period does not work as an exception to the ban on midnight appointments. No less than Fr. Joaquin Bernas, one of the framers of the Constitution, has said this. Moreover, the vacancy for Chief Justice occurs on May 18 at a time when a new President would have been elected. In the precedent case of *Aytona vs. Castillo*, 4 SCRA 1 (1962), where, ironically, PGMA's father, President Diosdado Macapagal, as the newly elected President was a victim of midnight appointments done by the outgoing President, Carlos Garcia, during the transition period of his presidency, the Supreme Court held that the latter becomes a caretaker for the newly elected incoming President and thus, appointments that would “beat the deadline” are void. Notably, in filling the vacancy of the Chief Justice, the new President who assumes office on 01 July 2010 would still have a remaining period of forty-seven (47) days to appoint a new Chief Justice.

Neither is it a valid argument that a permanent Chief Justice is of paramount importance during an election year so much so that an appointment to the vacancy during the ban is an exception as it serves the national interest. Such an argument clearly fails to realize that the Supreme Court continues to operate even during the absence of the Chief Justice. The Judiciary Act of 1948 provides that in case of a vacancy in the office of Chief Justice, the duties and powers of the office shall devolve upon the most senior Associate Justice until another Chief Justice is appointed (Section 12 of Republic Act No. 296). The Supreme Court has long applied this succession rule. Some of the longest periods where the most senior Associate Justice became an Acting Chief Justice in the absence of the Chief Justice are a little more than four months (06 June to 31 October 1973), in the case of Associate Justice Querube Makalintal filling in vice Chief Justice Roberto Concepcion, and a little less than three months (19 April to 02 July 1979) involving Associate Justice Enrique Fernando taking over Chief Justice Fred Ruiz Castro. In the event of the retirement of Chief Justice Reynato Puno, an Acting Chief Justice will be exercising the office for a total of only forty-three (43) days.

The mad rush for PGMA to appoint the Chief Justice even during the Constitutional ban on midnight appointments smacks of political motivations that do not serve the best interest of the country and the Filipino people. For how can an act that would blatantly violate the Constitution be considered as beneficial to the national interest? Unless this latest attempt of PGMA to exercise a power that is contrary to the Constitution is prevented, we are liable to lose our democratic principles that are supposed to be applied and protected by the Supreme Court. As members of the bar we should stand fast against this brazen attempt at a midnight appointment to the highest position in the Judiciary. Let us make it known that the Integrated Bar of the Philippines will not tolerate this culpable act. Let us keep watch on the Judicial and Bar Council and remind the members that they should perform their Constitutional duty and be true to their oath of office by resisting being made a tool in the appointment of the Chief Justice during the Constitutional ban. Let us call on the Judicial and Bar Council not to submit a list of nominees to PGMA that would only lead to the violation of the Constitution on midnight appointments. Let us be vigilant and fight for a truly independent Judiciary that will be a vanguard of our rights and uphold at all times the Rule of Law.

IBP PPLM and IBP Makati Sponsor Forum on the Unconstitutionality of a Midnight Chief Justice

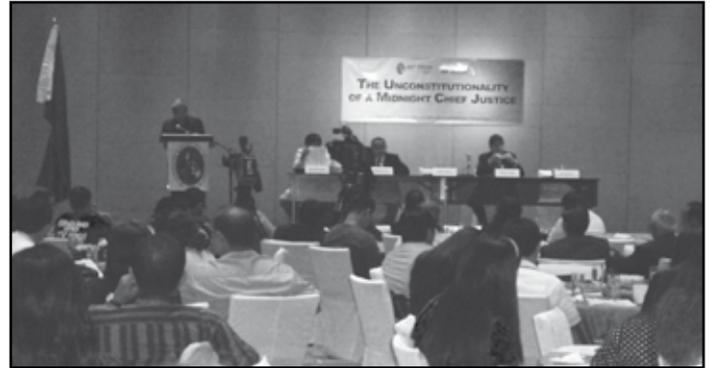
BY: JANICE RAMIREZ

The Integrated Bar of the Philippines Pasay-Parañaque, Las Piñas, and Muntinlupa (PPLM), and Makati City chapters organized a forum entitled “The Unconstitutionality of a Midnight Chief Justice,” led by Atty. Peter Irving Corvera, President of IBP PPLM, and Atty. Grace P. Quevedo-Panagsagan, Vice-President of IBP Makati. The jam-packed forum was held last February 2, 2010 at the Marriot Hotel Ballroom in Pasay City in response to the public outcry and the growing clamor for information on whether the appointment of a Chief Justice during the midnight appointments ban was unconstitutional.

Dean Marvic M.V.F. Leonen of the University of the Philippines College of Law and Fr. Joaquin G. Bernas, Dean Emeritus of the Ateneo de Manila Law School, discussed the finer points of law and jurisprudence on the subject. Senator Francis N. Pangilinan, AKBAYAN Party-list Representative Walden F. Bello and former Senator Franklin M. Drilon were intervenors, while Atty. Amador Tolentino, Jr., IBP Governor for Southern Luzon, and Ms. Carla Alcala, Vice President for NCR of the Association of Law Students in the Philippines, gave their responses.

Dean Leonen pointed out that the general rule that the president “shall not make appointments,” embodied under Section 15, Article VII of the Constitution applies to all; except when the appointment is temporary, refers to an executive position, and when continued, shall prejudice public service or endanger public safety. He stressed that the position of Chief Justice is neither temporary nor part of the executive department. Moreover, the absence of a Chief Justice does not jeopardize the operations of the Supreme Court.

Dean Leonen added that the wording of the Constitution is clear, and the Supreme Court en banc had unanimously settled the issue in 1998. In the *In Re: Valenzuela and Vallarta* rulings, it held that “the Court’s view is that during the period stated in Section 15, Article VII of the Constitution [t]wo months immediately before the next presidential elections and up to the end of his term - the President is neither required to make appointments to the courts nor allowed to do so; and that Sections 4(1) and 9 of Article VIII



The IBP Makati co-sponsored a well-attended forum on the Unconstitutionality of a Midnight Chief Justice.

simply mean that the President is required to fill vacancies in the courts within the time frames provided therein unless prohibited by Section 15 of Article VII.”

Former Senator Franklin Drilon also emphasized that in the *Valenzuela and Vallarta* case, the Judicial and Bar Council (JBC) had already previously interpreted that the 90-day rule is suspended during the period of the constitutional ban on midnight appointments.

Fr. Bernas, a former Constitutional Commission member, expressed the view that the JBC may submit a shortlist because the council is an executive body, not a judicial body, and cannot pass judgment on whether submitting a shortlist within the prohibited period violates the Constitution. Dean Leonen argued otherwise, noting that the preparation of the shortlist and its submission are part of the appointment process and there is no point in submitting a list when the appointment is prohibited.

Dean Leonen added that even if the President does not make an appointment after the list has been submitted, the list cannot be returned. He also pointed out that the President cannot make an appointment without the shortlist because no appointment to the Judiciary can be made without a JBC shortlist. Article VIII, Section 9 of the Constitution reads: “The Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy.”

ATTENTION IBP MAKATI MEMBERS!

To enable you to receive the latest news and information on IBP activities, please update us on your home or office addresses and telephone numbers, and any requests for transfers to or from the IBP Makati Chapter. Please send the information to the Chapter Office, UG 39 Cityland Dela Rosa Condominium, Dela Rosa Street, Makati City, Attention: Membership Committee, telefax no. 813-4744 or email: ibpmakati@gmail.com.

You can also visit our website at www.ibpmakati.com.



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IBP MAKATI JOINS MARCH FOR JUSTICE

BY: PETER MICHAEL DIZON

In commemoration of International Human Rights Day last December 10, 2009, the Integrated Bar of the Philippines Makati City Chapter joined their brethren in the legal profession in a "March for Justice" around Ermita, Manila and to the Supreme Court.

Members of the different IBP chapters and law students gathered in front of the National Library for the start of the early morning march. Black shirts and black armbands were worn signifying their outrage at the November 23, 2009 senseless massacre of 57 innocent persons in a caravan in Maguindanao. The march also expressed IBP's opposition to the short-lived imposition of martial law in the province.

There is a need for a unified stand to prosecute the perpetrators of the massacre, especially because lawyers Concepcion "Connie" Brizuela and Cynthia Oquendo were among those murdered while in the performance of their legal advocacy. The march culminated in the Supreme Court with the IBP filing a Motion for Intervention in the Petition questioning the imposition of martial law in Maguindanao.



Chapter representatives joined fellow IBP members in a March for Justice to condemn the Maguindanao Massacre.

Philippine REIT, What Is This All About? *from page 3*

corporation or a resident foreign corporation, whose dividend income from a domestic corporation (like a REIT) under the Tax Code is not subject to tax; or (c) an overseas Filipino, whose dividend income under the REIT Law is exempt from income tax within 7 years from the effectivity of the REIT's implementing regulations.

Safety measures under the REIT Law

In order to protect the investing public, the REIT Law provides several safety measures. It defines the allowable investments of a REIT, including a limitation on investment in synthetic investment products, the minimum percentage of its assets that may be invested in income generating real estate, the limitation on its property development activity, investment in foreign assets and extent of funds that may be invested in a single issuer. In case the REIT invests in real estate as a joint venture partner, the REIT Law mandates a minimum percentage of distributable profits that will be distributed to the REIT and some veto rights over key operational issues of the joint venture. It also prescribes the REIT's aggregate leverage limit, the stringent requirements for related party transactions, such as the requirement of a unanimous vote of independent directors that comprise at least 1/3 of the REIT's board

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of directors and a fairness opinion by an independent appraiser in case of an acquisition or disposition of real estate assets and similar transactions.

While the Fund Manager and the Property Manager may be affiliates of the REIT and/or the Sponsor, they must be "functionally" independent from each other. The Fund Manager and the Property Manager are considered functionally independent from the REIT if they comply with the rules on corporate governance and the Fit and Proper Rule.

To prevent excessive fees to the executive officers of the REIT, the Fund Manager and Property Manager (especially if they are related parties), the REIT Law prescribes the maximum fees that will be paid to them.

While the above measures may be considered too restrictive under certain circumstances, the REIT Law nevertheless authorizes the Securities and Exchange Commission (SEC) to relax the same. However, the SEC must first conduct a public hearing and take into account public interest, the need to protect investors and develop the country's real estate investment industry to make it globally competitive.

Implementing Rules and Regulations

The SEC, as the lead agency, is tasked to promulgate the REIT Law's Implementing Rules and Regulations (IRR) no later than May 10, 2010 (or 90 days from the effectivity of the REIT Law).

There are too many issues that the IRRs must address if the government wants the REIT Law to realize its objectives. These issues will be discussed in a separate article once the IRRs are issued.