

Protecting Minority Investors in Philippines

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Dear Contributor,

We would like to thank you for your participation in the *Doing Business* project. Your expertise is essential to the success of the *Doing Business* report, which benchmarks business regulations in 189 economies worldwide and is one of the four flagship publications of the World Bank Group. The protecting minority investors indicator measures legal protections afforded to minority shareholders of domestic corporations, and is one of the 11 indicator sets published by the report.

The report attracts much attention around the world. The latest edition, *Doing Business 2015: Going Beyond Efficiency*, received over 4,000 media citations within two weeks of its publication on October 29, 2014. The coverage spanned major global, regional and local media outlets, from print and broadcast to the web. The *Doing Business* website had over 800,000 page views and more than 54,000 downloads in the first two weeks after the report's launch.

Governments worldwide read the report with interest every year, and your contribution makes it possible to disseminate regulatory best practices that continue to inspire their reform efforts. In the past ten years the project recorded 149 reforms in 98 economies improving the protection of minority shareholders.

We are honored to be able to count on your expertise this year by completing the following:

- Please review the assumptions of the case study before updating last year's consolidated information in the questionnaire;
- Please describe any reform that has affected the rights of minority shareholders since June 1, 2014;
- Please update your contact information if necessary, so that we can mail you a complimentary copy of the report.

Sincerely,

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Primary Contributor Information: Please check the box next to information you **do not** want us to **publish**.

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Please e-mail me an electronic copy of the report and my certificate of appreciation, rather than mailing me a paper copy.

■ **Did any reform** (e.g. a new act, code, law, decree, order, supreme court decision, amendment, stock exchange listing rule) affecting the internal governance of corporations, the regulation of related-party transactions, disclosure obligations, liability of company executives or access to evidence in civil litigations enter into force **between June 1, 2014 and June 1, 2015**? If yes, please provide the information below.

Name of the legislation: SEC Memorandum Circular No. 11 and 18, Series of 2014

Date of adoption:

Date of entry into force: December 31, 2014

Link to electronic copy:

Description of the reform: Publicly-listed companies are required to post on their websites pertinent company information, among which are the following: Company Business or Corporate Profile, Board of Directors, Management Team and Executive Officers, Organizational Structure, Conglomerate Map, Shareholding Structure, Manual on Corporate Governance, Annual Corporate Governance Report, all SEC, PSE and other regulatory agency's filings and disclosures, Company's policies on Whistle-blowing, Insider Trading, Related Party Transactions and Investor Relations information.

I. GENERAL CORPORATE MATTERS

Buyer Co. ("**Buyer**") is a manufacturing company that has not adopted specific bylaws or articles of association that differ from default corporate law or securities regulations, and does not follow any code of corporate governance, model charter, or code of good practice, unless it is mandatory.

Buyer is assumed to be a publicly traded listed corporation or its functional equivalent under the economy's legislation. Examples include JSC, PLC, C Corp, SE, AG and SA.

For a subset of the questions, we also ask what the answer would be if Buyer were a private limited company or its functional equivalent. Examples include Ltd, LLC, SPE, GmbH, SRO and SARL.

1. Shareholder Rights

■ **Does the sale of 51% of Buyer's assets require approval of shareholders?**

| | <i>Last year</i> | This year |
|--|------------------|-------------------|
| If Buyer is a publicly traded listed corporation | | Yes |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: Section 40 and 76 of the Corporation Code

Comments (please specify the triggering percentage): Subject to the provisions of existing laws on illegal combinations and monopolies, a corporation may, by a majority vote of its board of directors or trustees, sell, lease, exchange, mortgage, pledge or otherwise dispose of all or substantially all of its property and assets, including its goodwill, upon such terms and conditions and for such consideration, which may be money, stocks, bonds or other instruments for the payment of money or other property or consideration, as its board of directors or trustees may deem expedient, when authorized by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock. Written notice of the proposed action and of the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder may exercise his appraisal right under the conditions provided in this Code.

A sale or other disposition shall be deemed to cover substantially all the corporate property and assets if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated.

Should the sale constitute a merger or consolidation, Section 76 of the Corporation Code states that upon approval by majority vote of each of the board of directors or trustees of the constituent corporations of the plan of merger or consolidation, the same shall be submitted for approval by the stockholders or members of each of such corporations at separate corporate meetings duly called for the purpose. Notice of such meetings shall be given to all stockholders

or members of the respective corporations, at least two (2) weeks prior to the date of the meeting, either personally or by registered mail. Said notice shall state the purpose of the meeting and shall include a copy or a summary of the plan of merger or consolidation. The affirmative vote of stockholders representing at least two-thirds (2/3) of the outstanding capital stock of each corporation in the case of stock corporations or at least two-thirds (2/3) of the members in the case of non-stock corporations shall be necessary for the approval of such plan. Any dissenting stockholder in stock corporations may exercise his appraisal right in accordance with the Code: Provided, That if after the approval by the stockholders of such plan, the board of directors decides to abandon the plan, the appraisal right shall be extinguished.

Any amendment to the plan of merger or consolidation may be made, provided such amendment is approved by majority vote of the respective boards of directors or trustees of all the constituent corporations and ratified by the affirmative vote of stockholders representing at least two-thirds (2/3) of the outstanding capital stock or of two-thirds (2/3) of the members of each of the constituent corporations. Such plan, together with any amendment, shall be considered as the agreement of merger or consolidation.

■ **Can shareholders owning 10% of Buyer's share capital call for an extraordinary meeting of shareholders?**

| | | |
|--|----|-------------------|
| If Buyer is a publicly traded listed corporation | No | Yes |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: *Section 50 of the Corporation Code* SRC Rule20(11)(a)(vi), Article 6, last paragraph of the Revised Code of Corporate Governance

Comments (please specify the percentage needed): *Special meetings of stockholders or members shall be held at any time deemed necessary or as provided in the by-laws: Provided, however, That at least one (1) week written notice shall be sent to all stockholders or members, unless otherwise provided in the by-laws. Notice of any meeting may be waived, expressly or implicitly, by any stockholder or member. Whenever, for any cause, there is no person authorized to call a meeting, the Secretaries and Exchange Commission, upon petition of a stockholder or member on a showing of good cause therefor, may issue an order to the petitioning stockholder or member directing him to call a meeting of the corporation by giving proper notice required by this Code or by the by-laws. The petitioning stockholder or member shall preside thereat until at least a majority of the stockholders or members present have been chosen one of their number as presiding officer.*

SRC Rule 20(11)(a)(vi) states that the Commission en banc may, moto proprio, or upon the written request of any stockholder, direct the calling of an annual stockholders' meeting under its supervision, if the corporation fails or refuses to call said meeting for any justifiable reason.

The last paragraph of Article 6 of the Revised Code of Corporate Governance provides that although all stockholders should be treated equally or without discrimination, the Board should give minority stockholders the right to propose the holding of meetings and the items for discussion in the agenda that relate directly to the business of the corporation.

■ **Must Buyer obtain shareholder approval to issue unissued share up to its authorized share capital?**

| | | |
|--|-----|-------------------|
| If Buyer is a publicly traded listed corporation | Yes | No |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: *Corporation Code* Sections 23, 36(6) and 60

Comments: *Section 38 of CC*

Under the Corporation Code, there is no specific provision if stockholders approval is required for the issuance of unissued shares of stock of a corporation. However, the law provides in part thus:

Section 23. The board of directors or trustees. - Unless otherwise provided in this Code, the corporate powers of all corporation formed under this Code shall be exercised, all business conducted and all property of such corporation controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year until their successors are elected and qualified.xxx

Section 36. Corporate powers and capacity. - Every corporation incorporated under this Code has the power and capacity:

xxx

6. In case of stock corporation, to issue or sell stocks to subscribers and to sell treasury stocks in accordance with the provisions of this Code; and to admit members to the corporation if it be a non-stock corporation;

Section 60. Subscription contract. - Any contract for the acquisition of unissued stock in an existing corporation or a corporation still to be formed shall be deemed a subscription within the meaning of this Title, notwithstanding the fact that the parties refer to it as a purchase or some other contract,

It can be deduced from the above-quoted provisions of law that the Board of Directors is the governing body of the corporation. Thus, in the absence of specific provision requiring stockholder approval, the Board of Directors of the corporation has the sole power to issue unissued shares of stocks anytime at their option.

Section 38 of the Corporation Code would apply to an increase in the authorized capital stock, in which case, stockholders approval is required.

■ Are shareholders automatically granted subscription (preemption) rights on new shares?

| | | |
|--|-----------|-------------------|
| If Buyer is a publicly traded listed corporation | <i>No</i> | Yes |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: *Section 39 of the Corporation Code*

Comments: *The pre-emptive right may be waived by the Articles of Incorporation (AOI) or an amendment thereto: Provided, That such pre-emptive right shall not extend to shares to be issued in compliance with laws requiring stock offerings or minimum stock ownership by the public; or to shares to be issued in good faith with the approval of the stockholders representing two-thirds (2/3) of the outstanding capital stock, in exchange for property needed for corporate purposes or in payment of a previously contracted debt.*

Section 39 of the Corporation Code provides that all stockholders of a stock corporation SHALL enjoy pre-emptive right to subscribe to all issues or disposition of shares of any class, in proportion to their respective shareholdings, UNLESS the right is DENIED by the articles of incorporation or an amendment thereto. This presupposes that the pre-emptive right is automatically granted to stockholders unless specifically denied in the articles of incorporation.

■ Must shareholders approve the election and dismissal of the external auditor?

| | | |
|--|-----------|-----|
| If Buyer is a publicly traded listed corporation | <i>No</i> | Yes |
|--|-----------|-----|

Applicable provisions: *SRC Rule 68 - Special Accounting Rules*

Comments: *No law/statute requires the shareholders to approve the election and dismissal of the external auditor. It is usually the bylaws of a company that provides that the shareholders shall appoint the external auditor. Article 5(B) of the Revised Code of Corporate Governance requires the board to "recommend to the shareholders an external auditor", which implies that it is the shareholders who appoint the external auditor. However, the Revised Code of Corporate Governance is not a law/statute, and it only serves as a framework of rules for covered companies (such as listed companies) in forming their own code of governance. Article 5(B) of the Revised Code of Corporate Governance is a mandatory provision, meaning that covered companies must adopt and comply with the same, otherwise they will be subject to the administrative sanctions provided under Article 11 of the Revised Code of Corporate Governance.*

■ Must changes to the voting rights of a series or class of shares be approved only by the holders of the affected shares?

| | | |
|--|-----------|-------------------|
| If Buyer is a publicly traded listed corporation | <i>No</i> | No |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: *CC Section 6, 76-77, 81*

Comments: Corporations may divide shares of stock into classes or series of shares, but in no case shall the holders of any of the shares be deprived of voting rights, except "preferred" and/or "redeemable" shares. In any case, there shall always be a class or series of shares with complete voting rights. Any change to the articles of incorporation of a corporation that has the effect of changing or restricting rights of any stockholder shall require the vote of stockholders representing at least two-thirds (2/3) outstanding capital stock.

■ **Are restrictions on trading of shares prior to a major corporate action or meeting of shareholders (shareblocking) disallowed?**

| | | |
|--|-----|-----|
| If Buyer is a publicly traded listed corporation | Yes | Yes |
|--|-----|-----|

Applicable provisions: SRC Sections 24-27

Comments: Qualifications of insider trading, fraudulent acts and manipulation are included in the Philippine Securities Regulation Code as well as restrictions thereof.

■ **Must Buyer distribute profits or pay dividends within a set maximum time period from the declaration date?**

| | | |
|--|--|-------------------|
| If Buyer is a publicly traded listed corporation | | Yes |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: SEC Amended Rules Governing Pre-emptive and other Subscription Rights and Declaration of Stock or Cash Dividends of Corporations Whose Securities are Registered Under the Revised Securities Act or Listed in the Stock Exchange; PSE Disclosure of Record and Payment Dates for Dividend Declaration

Comments (please specify the time period): For publicly traded listed corporations, the stock and cash dividends shall be remitted to the Philippine Central Depository (now Philippine Depository and Trust Corporation) for immediate distribution to its Participants no later than eighteen (18) trading days from record date, provided that in case of stock dividends, the credit of the stock dividend shall be on the Payment Date which in no case shall be later than the stock dividends listing date.

2. Ownership and Control

■ **Is the CEO barred from also serving as chair of the board of directors?**

Answer yes if the majority of companies follow a 2-tier board structure.

| | | |
|--|-----|-------------------|
| If Buyer is a publicly traded listed corporation | Yes | No |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: Revised Code of CG Article 3, C) and CC Section 25

Comments: While permitted for listed companies, it is encouraged that the CEO and the Chairman positions be separately held. A clear delineation of the functions of CEO and Chairman should be made and if the positions are unified, the proper checks and balances should be laid down.

■ **Must the board of directors (or supervisory board) include independent and non-executive board members?**

- Independent board members are defined as not owning shares in the company, and otherwise not having any material or pecuniary relationship with the company directly or indirectly through related persons, except for sitting fees.

- Non-executive board members are defined as not being employees of the company or affiliated with it in any way whether directly or indirectly, and more generally not being involved in its day-to-day activities.

| | | |
|--|-----|-----|
| If Buyer is a publicly traded listed corporation | Yes | Yes |
|--|-----|-----|

Applicable provisions: Revised Code of CG Article 3, A) Section 38 of the Securities Regulation Code and Rule 38 of its Implementing Rules and Regulations

Comments (please specify the number or percentage): There is a minimum of two (2) or twenty percent (20%) which ever is less, but in no case less than two (2), independent directors in the board. The minimum number of independent directors, by definition, also represents the minimum number of non-executive directors. Philippine laws do not classify directors between executive or non-executive.

■ **Can shareholders remove members of the board of directors before the end of their term? (members of the supervisory board in a 2-tier structure)**

| | | |
|--|-----|-------------------|
| If Buyer is a publicly traded listed corporation | Yes | Yes |
| If Buyer is a private limited company | | -Click to Select- |

Applicable provisions: *Section 28 of the Corporation Code*

Comments (please specify if a showing of cause or good reason to dismiss is required, or if terms are limited to 1 year): *Any director or trustee of a corporation may be removed from office by a vote of the stockholders holding or representing at least two-thirds (2/3) of the outstanding capital stock, or if the corporation be a non-stock corporation, by a vote of at least two-thirds (2/3) of the members entitled to vote: Provided, That such removal shall take place either at a regular meeting of the corporation or at a special meeting called for the purpose, and in either case, after previous notice to stockholders or members of the corporation of the intention to propose such removal at the meeting. A special meeting of the stockholders or members of a corporation for the purpose of removal of directors or trustees, or any of them, must be called by the secretary on order of the president or on the written demand of the stockholders representing or holding at least a majority of the outstanding capital stock, or, if it be a non-stock corporation, on the written demand of a majority of the members entitled to vote removal without cause may not be used to deprive minority stockholders or members of the right of representation to which they may be entitled under Section 24 of this Code.*

■ **Must Buyer have a separate audit committee?**

An audit committee is defined as a subcommittee of the board of directors, composed exclusively of board members.

| | | |
|--|----|-----|
| If Buyer is a publicly traded listed corporation | No | Yes |
|--|----|-----|

Applicable provisions: *Corporation Code; Article 3(K)(i) of the Revised Code of Corporate Governance*

Comments (please specify if it must include independent directors and if it must be chaired by an independent director): *Under Article F(2)(i) the Revised Corporate Code of Governance, the Board of Directors duties and functions include constituting an Audit Committee and such other committees it deems necessary to assist the Board in the performance of its duties and responsibilities. The Audit Committee is mandatory under the Revised Code of Corporate Governance. It shall consist of at least three (3) director, one of whom shall be an independent director. The Chair of the Audit Committee should also be an independent director.*

■ **Is there a percentage of acquired shares which triggers a mandatory bid rule, requiring a potential acquirer to make a tender offer to all remaining shareholders?**

| | | |
|--|-----|-------------------|
| If Buyer is a publicly traded listed corporation | Yes | Yes |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: *Section 19 of the Securities Regulation Code (SRC) SRC Rule 19*

Comments (please specify the triggering percentage): Mandatory tender offer is required in the following instances:

A. Any person or group of persons acting in concert, who intends to acquire thirty five percent (35%) or more of equity shares in a public company shall disclose such intention and contemporaneously make a tender offer for the percent sought to all holders of such class, subject to paragraph (9)(E) of this Rule.

In the event that the tender offer is oversubscribed, the aggregate amount of securities to be acquired at the close of such tender offer shall be proportionately distributed across both selling shareholder with whom the acquirer may have been in private negotiations and minority shareholders.

B. Any person or group of persons acting in concert, who intends to acquire thirty five percent (35%)¹ or more of equity shares in a public company in one or more transactions within a period of twelve (12) months, shall be required to make a tender offer to all holders of such class for the number of shares so acquired within the said period.

C. If any acquisition of even less than thirty five percent (35%) would result in ownership of over fifty one percent (51%) of the total outstanding equity securities of a public company, the acquirer shall be required to make a tender offer under this Rule for all the outstanding equity securities to all remaining stockholders of the said company at a price supported by a fairness opinion provided by an independent financial advisor or equivalent third party. The acquirer in such a tender offer shall be required to accept any and all securities thus tendered.

D. In any transaction covered by this Rule, the sale of the shares pursuant to the private transaction shall not be completed prior to the closing and completion of the tender offer. Transactions with any of the seller/s of significant blocks of shares with whom the acquirers may have been in private negotiations shall close at the same time and upon

the same terms as the tender offer made to the public under this Rule. For paragraph (2)(B), the last sale meeting the threshold shall not be consummated until the closing and completion of the tender offer.

■ **Is cross-shareholding between two independent companies limited to 10% of outstanding shares?**

Assume Buyer owns 11% of another incorporated entity. Is that entity restricted from later purchasing 11% of Buyer's shares?

| | | |
|--|----|----|
| If Buyer is a publicly traded listed corporation | No | No |
|--|----|----|

Applicable provisions: Sections 36(7) and 42 of the Corporation Code

Comments: Sec. 36. Corporate powers and capacity. - Every corporation incorporated under this Code has the power and capacity:

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7. 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;

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Sec. 42. Power to invest corporate funds in another corporation or business or for any other purpose. - Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation or business or for any purpose other than the primary purpose for which it was organized when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of non-stock corporations, at a stockholders' or members' meeting duly called for the purpose. Written notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary.

■ **Is a subsidiary barred from acquiring shares issued by its parent company?**

Assume Buyer owns more than 50% of another separate incorporated entity. Is that entity restricted from becoming the record owner of Buyer's shares?

| | | |
|--|-----|----|
| If Buyer is a publicly traded listed corporation | Yes | No |
|--|-----|----|

Applicable provisions: Section 42 of the Corporation Code

Comments: *There is no Philippine law restricting the acquisition of parent company shares by its subsidiary.*

Sec. 42. Power to invest corporate funds in another corporation or business or for any other purpose. - Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation or business or for any purpose other than the primary purpose for which it was organized when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of non-stock corporations, at a stockholders' or members' meeting duly called for the purpose. Written notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary.

3. Corporate Transparency

■ **Can shareholders who hold 5% of Buyer's share capital put items on the general meeting agenda?**

| | | |
|--|--|-------------------|
| If Buyer is a publicly traded listed corporation | | Yes |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: last paragraph of Article 6(B) of the Revised Code of Corporate Governance

Comments (please specify the percentage needed): The Board should give minority stockholders the right to propose the holding of meetings and the items for discussion in the agenda that relate directly to the business of the corporation.

■ **Must the notice of shareholder meeting be published 30 days in advance and contain sufficient information?**

Sufficient information is defined as clearly stating the matter which is to be brought before the meeting for resolution, and all of the following: i) reference information required regarding any external acts; ii) location, day and time of the meeting; iii) the type of meeting, whether general or extraordinary; iv) requirements relating to participation and exercise of voting rights; v) meeting's agenda; vi) description of the way in which postal voting is processed including the address, physical or electronic, safety measures, the deadline for receiving the voting ballots and the date for their count.

If Buyer is a publicly traded listed corporation

If Buyer is a limited company

-Click to Select-

-Click to Select-

Applicable provisions: Sections 47 (2,3,4 &6), 50 and 51 of the Corporation Code; Rule 20 of the SRC

Comments (please specify the notice period):

Sec. 47. Contents of by-laws. - Subject to the provisions of the Constitution, this Code, other special laws, and the articles of incorporation, a private corporation may provide in its by-laws for:

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2. The time and manner of calling and conducting regular or special meetings of the stockholders or members;

3. The required quorum in meetings of stockholders or members and the manner of voting therein;

4. The form for proxies of stockholders and members and the manner of voting them;

xxx

6. The time for holding the annual election of directors of trustees and the mode or manner of giving notice thereof;

Sec. 50. Regular and special meetings of stockholders or members. - Regular meetings of stockholders or members shall be held annually on a date fixed in the by-laws, or if not so fixed, on any date in April of every year as determined by the board of directors or trustees: Provided, That written notice of regular meetings shall be sent to all stockholders or members of record at least two (2) weeks prior to the meeting, unless a different period is required by the by-laws.

Special meetings of stockholders or members shall be held at any time deemed necessary or as provided in the by-laws: Provided, however, That at least one (1) week written notice shall be sent to all stockholders or members, unless otherwise provided in the by-laws.

Notice of any meeting may be waived, expressly or impliedly, by any stockholder or member.

Whenever, for any cause, there is no person authorized to call a meeting, the Securities and Exchange Commission, upon petition of a stockholder or member on a showing of good cause therefor, may issue an order to the petitioning stockholder or member directing him to call a meeting of the corporation by giving proper notice required by this Code or by the by-laws. The petitioning stockholder or member shall preside thereat until at least a majority of the stockholders or members present have been chosen one of their number as presiding officer.

Sec. 51. Place and time of meetings of stockholders or members. - Stockholders' or members' meetings, whether regular or special, shall be held in the city or municipality where the principal office of the corporation is located, and if practicable in the principal office of the corporation: Provided, That Metro Manila shall, for purposes of this section, be considered a city or municipality.

Notice of meetings shall be in writing, and the time and place thereof stated therein.

All proceedings had and any business transacted at any meeting of the stockholders or members, if within the powers or authority of the corporation, shall be valid even if the meeting be improperly held or called, provided all the stockholders or members of the corporation are present or duly represented at the meeting.

STATEMENT OF THE PURPOSE OF THE MEETING (Corporation Code)

1. Election of Directors (see Sec. 24, last sentence);

2. Removal of Directors (Sec. 28);

3. Filling of vacancies in the office of the director (Sec. 29, par. 2);

4. Ratification of contract of the corporation with a director (Sec. 32, par. 2);

5. Extension or reduction of corporate term (Sec. 37);
6. Increase or decrease of capital stock (Sec. 38, par. 1);
7. Creation or increase of bonded indebtedness (Sec. 38, par. 1);
8. Sale or other disposition of all or substantially all of the corporate assets (Sec. 40, par. 1);
9. Investment of corporate funds in another corporation or business or for any other purpose (Sec. 42);
10. Declaration of Dividends (Sec. 43);
11. Entering into a management contract with another corporation (Sec. 44);
12. Amendment to, or repeal of, any by-laws or adoption of new by-laws (Sec. 48, par. 1);
13. Fixing the issued price of no par value shares (Sec. 62, last par.);
14. Plan of merger or consolidation (Sec. 77, par. 1);
15. Amendment of the articles of incorporation in a close corporation (Sec. 103);
16. Voluntary dissolution of the corporation where no creditors are affected (Sec. 118);
17. Voluntary dissolution of the corporation where creditors are affected (Sec. 119); and
18. Dissolution by shortening corporate term (Sec. 120).

Rule 20(3)(C)(iv) states that the information statement, proxy form and management report shall be distributed to security holders at least fifteen (15) business days from the date of the stockholders' meeting.

■ Must Buyer disclose ultimate beneficial ownership stakes (i.e. direct and/or indirect) representing 5%?

Including disclosure whenever an existing shareholder has now reached 5% through the purchase of additional shares.

| | | |
|--|-----|-----|
| If Buyer is a publicly traded listed corporation | Yes | Yes |
|--|-----|-----|

Applicable provisions: SRC Sections 17 and 18 SRC Rule 17 and 18

Comments: *The Philippine Securities Regulation Code provides for reportorial requirements and procedures thereof of any person who acquires five percent (5%) or in excess of such percentage as prescribed by the Securities and Exchange Commission.*

■ Must information on other activities and directorships held by board members as well as on their primary employment be disclosed?

| | | |
|--|-----|-----|
| If Buyer is a publicly traded listed corporation | Yes | Yes |
|--|-----|-----|

Applicable provisions: *Annual Corporate Governance Report, SRC Section 17, CC Section 141*

Comments: *These are subject to the reportorial requirements as indicated in the Annual Corporate Governance Report (ACGR) of the Securities and Exchange Commission for publicly-listed companies. Part A(1)(d) of the ACGR requires disclosure of the other directorships of the company's directors. Any other material information shall be reported in SEC Form 17-A or 17-C.*

■ Must the compensation of individual directors and high-ranking officers be disclosed, including bonuses and incentive schemes? (or members of the supervisory board and the management board)

| | | |
|--|----|-----|
| If Buyer is a publicly traded listed corporation | No | Yes |
|--|----|-----|

Applicable provisions: *SEC Memorandum Circular No. 5, series of 2013, Annual Corporate Governance Report*

Comments: *For listed companies, the TOP 4 highest paid management officers remuneration are required to disclose (as a group) under SEC Memorandum Circular No. 5, series of 2013, Annual Corporate Governance Report. Part D of the ACGR requires disclosure of remuneration matters.*

■ Must annual financial statements be audited by an external auditor?

| | | |
|--|-----|-------------------|
| If Buyer is a publicly traded listed corporation | Yes | Yes |
| If Buyer is a limited company | | -Click to Select- |

Applicable provisions: *Section 141 of the Corporation Code*

Comments: *SRC Rule 68, as amended Rules and Regulations covering Form and Content of Financial Statements Rule 68 provides that the SEC will not accept financial statements required to be audited unless such financial statements are*

accompanied by auditors report issued by an independent auditor. - This applies even if the company were not listed.
This applies to all registered corporation in the Securities and Exchange Commission.

■ Must audit reports be disclosed to the public?

If Buyer is a publicly traded listed corporation

Yes

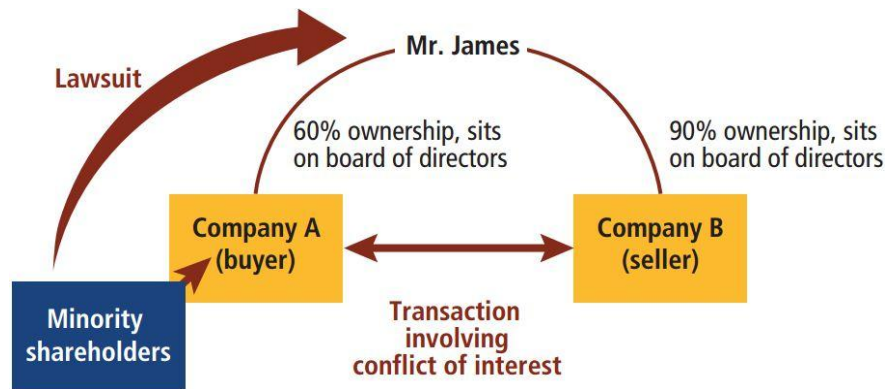
Yes

Applicable provisions: *Section 141 of the Corporation Code* Section 17 of the Securities Regulation Code and SRC Rule 17

Comments: *Section 141 of the Corporation Code requires all companies to file their audited financial statements with the SEC. Once filed with the SEC, audited financial statements are accessible by the public. Under the Revised Disclosure Rules of the Philippine Stock Exchange, listed companies are also required to submit their audited financial statements with the Philippine Stock Exchange. Once submitted to the Exchange, the same are accessible by the public. Section 17 and Rule 17-A also requires submission of an Annual Report, which includes the audited financial statements, to the Commission.*

II. CONFLICT OF INTEREST CASE STUDY

- Our manufacturing company Buyer is not state-owned and has issued stock that is publicly traded and is **listed on your country's largest stock exchange**. If there is no stock exchange in your country, or if there are fewer than 10 firms actively traded on your country's stock exchange, please assume that Buyer is a privately held joint-stock company with a large number of shareholders.
- Buyer **does not follow any code of corporate governance**, model charter, or code of good practice, unless it is mandatory (i.e. unless its non-observance results in sanctions from the stock exchange regulator or creates a cause of action for shareholders in civil jurisdictions).
- **Mr. James owns 60% of Buyer. He sits on the 5-member board of directors** together with 2 other directors whom he elected. Please note that Mr. James is not the CEO.
- If your country requires a supervisory board that is appointed at least in part by shareholders, assume that Mr. James has elected 60% of the shareholder-elected members of the supervisory board. Assume also that the 5-member board of directors then includes Mr. James himself as well as 2 other members who were designated or proposed by Mr. James's members on the supervisory board.
- **Mr. James also owns 90% of Seller Co.** ("Seller"), which operates a chain of retail stores. Seller is facing financial problems and recently shut a large number of its stores. As a result, many of its trucks are not being used.
- **Mr. James proposes to Buyer** that Buyer purchase Seller's unused fleet of trucks to expand Buyer's distribution of its products. Buyer agrees and enters into the transaction.
- **All required approvals are obtained and all mandatory disclosures are made.** Under the final terms of the transaction, Buyer pays Seller a cash amount equal to **10% of Buyer's assets** to acquire the trucks. If Mr. James can lawfully vote on the transaction as a member of Buyer's board of directors or as a shareholder please assume he is the deciding vote in favor of the transaction.
- Assume that the transaction is part of Buyer's **ordinary course of business** and is **not ultra vires** (i.e. is not outside the power or authority of Buyer).
- **The price of the trucks is above market value and the transaction causes damages to Buyer.** Minority shareholders of Buyer sue Mr. James and the parties who approved the transaction.



1. Approval and Disclosure

■ **Who must provide the final approval to authorize Buyer's acquisition of Seller's trucks? The CEO or managing director alone.**

The board of directors including Mr. James.

Applicable provisions: *Section 23 and 25 of the Corporation Code (CC)* Section 32 and 33 of the Corporation Code

Sec. 32. Dealings of directors, trustees or officers with the corporation. - A contract of the corporation with one or more of its directors or trustees or officers is voidable, at the option of such corporation, unless all the following conditions are present:

1. That the presence of such director or trustee in the board meeting in which the contract was approved was not necessary to constitute a quorum for such meeting;
2. That the vote of such director or trustee was not necessary for the approval of the contract;
3. That the contract is fair and reasonable under the circumstances; and
4. That in case of an officer, the contract has been previously authorized by the board of directors.

Where any of the first two conditions set forth in the preceding paragraph is absent, in the case of a contract with a director or trustee, such contract may be ratified by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock or of at least two-thirds (2/3) of the members in a meeting called for the purpose: Provided, That full disclosure of the adverse interest of the directors or trustees involved is made at such meeting: Provided, however, That the contract is fair and reasonable under the circumstances.

Sec. 33. Contracts between corporations with interlocking directors. - Except in cases of fraud, and provided the contract is fair and reasonable under the circumstances, a contract between two or more corporations having interlocking directors shall not be invalidated on that ground alone: Provided, That if the interest of the interlocking director in one corporation is substantial and his interest in the other corporation or corporations is merely nominal, he shall be subject to the provisions of the preceding section insofar as the latter corporation or corporations are concerned.

Stockholdings exceeding twenty (20%) percent of the outstanding capital stock shall be considered substantial for purposes of interlocking directors.

■ **Must an independent body, external to the company, review the transaction prior to its execution (e.g. external auditor, outside financial advisor, stock exchange or regulator)?**

If yes, what is its name? *No*

Applicable provisions: *Section 33 of the CC* Part K(3) of the Annual Corporate Governance Report asks the company to name the independent party the board of directors appointed to evaluate the fairness of the transaction price.

■ **What information about the Buyer-Seller transaction must Mr. James disclose to the board of directors before the transaction is concluded? *None.***

-Click to Select-

Applicable provisions: *Section 32 of the CC* Article 3(G) of the Revised Code of Corporate Governance states that a director should conduct fair business transactions with the corporation and ensure that his personal interest does not conflict with the interests of the corporation. The basic principle to be observed is that a director should not use his position to profit or gain some benefit or advantage for himself and/or his related interests. He should avoid situations that may compromise his impartiality. If an actual or potential conflict of interest may arise on the part of a director, he should fully and immediately disclose it and should not participate in the decision-making process.

■ Which information about the Buyer-Seller transaction must be disclosed by Buyer (i) to the public, the regulator or the stock exchange immediately (within 72 hours of closing the transaction), and (ii) in its annual financial statement?

| | A description of the assets purchased by Buyer | The nature and amount of consideration paid by Buyer to Seller | Mr. James' ownership interest and/or director position in Buyer | The fact that Mr. James owns 90% of Seller | Applicable provisions |
|-----------------------------------|--|--|---|--|---|
| Within 72 hours to the public | No -Click to Sele | No -Click to Select- | No -Click to Select- | No -Click to S | <i>Article 8 of the Revised Code of Corporate Governance ("RCCG") Section 4.1 of PSE Disclosure Rules Disclosure of Material Information In addition to the reportorial requirements under the Securities Regulation Code, Issuers are hereby required to disclose to the Exchange once they become aware of any material information or corporate act, development or event, within ten (10) minutes from receipt of such information or the happening or occurrence of said act, development or event. Disclosure must be made to the Exchange prior to its release to the news media</i> |
| In the annual financial statement | Yes -Click to Sele | Yes -Click to Select- | Yes -Click to Select- | Yes -Click to S | <i>Section 141 of the CC; Rule 17.1.1.A.i, Rules Implementing the Securities Regulation Code SRC Rule 68</i> |

2. Shareholder Action

■ Can a shareholder (or a group of shareholders) representing 10% of Buyer's shares sue Mr. James for harm caused to Buyer by the transaction? *Yes, derivatively.*

-Click to Select-

Applicable provisions: *Section 31 of the CC*

■ What is the lowest degree of wrongdoing or least demanding cause of action that would be sufficient for shareholders to hold Mr. James liable for the damage that the Buyer-Seller transaction causes to the company? *That Mr. James was grossly negligent, committed fraud, or acted in bad faith.*

-Click to Select-

Applicable provisions: *Section 31 of the CC*

■ What is the lowest degree of wrongdoing or least demanding cause of action that would be sufficient for shareholders to hold the rest of the board of directors liable for the damage that the Buyer-Seller transaction causes to the company? *That they were grossly negligent, committed fraud, or acted in bad faith.*

-Click to Select-

Applicable provisions: *Section 31 of the CC*

■ **If shareholders are successful in their action(s) against Mr. James, what remedies are available?**

| | <i>Last year</i> | <i>This year</i> |
|--|------------------|------------------|
| Mr. James pays damages: | <i>Yes</i> | <i>Yes</i> |
| Mr. James repays personal profits made from the transaction: | <i>Yes</i> | <i>Yes</i> |

Applicable provisions: Section 31 of the Corporation Code

■ **Assuming no fraud was committed and that Mr. James complied with all disclosure and approval mechanisms required by law, will Mr. James be fined, sentenced to jail or disqualified (forbidden by court order from becoming involved in the management of any company for at least 1 year)?**

| | | |
|--|-----------|-------------------|
| Mr. James pays punitive fines to the government: | <i>No</i> | -Click to Select- |
| Mr. James is put in jail: | <i>No</i> | -Click to Select- |
| Mr. James is disqualified: | | -Click to Select- |

Applicable provisions: Since no fraud was committed and Mr. James complied with all disclosure and approval mechanism, there is no basis for a fine, jail term or disqualification.

■ **Can Buyer's shareholders undo or rescind the transaction?** *The court will not override the business judgment of the board of directors of a company unless it was proven that such board acted maliciously or arbitrarily. The CC is silent regarding the possibility of rescission of a transaction by a court in the event of a successful claim by a shareholder plaintiff on the basis that the terms of the transaction caused economic loss to the company or that the management of the company was negligent in concluding said transaction* Section 32 of the Corporation Code provides that a contract of the corporation with one or more of its directors or trustees or officers is voidable, at the option of such corporation.

Applicable provisions: *San Miguel v. Kahn 176 SCRA 447 (1989) Civil Code Art. 2198 CC Sec 31 Rules of Court Rule 133 Sec 1* Section 32 of the Corporation Code

Sec. 32. Dealings of directors, trustees or officers with the corporation. - A contract of the corporation with one or more of its directors or trustees or officers is voidable, at the option of such corporation, unless all the following conditions are present:

1. That the presence of such director or trustee in the board meeting in which the contract was approved was not necessary to constitute a quorum for such meeting;
2. That the vote of such director or trustee was not necessary for the approval of the contract;
3. That the contract is fair and reasonable under the circumstances; and
4. That in case of an officer, the contract has been previously authorized by the board of directors.

Where any of the first two conditions set forth in the preceding paragraph is absent, in the case of a contract with a director or trustee, such contract may be ratified by the vote of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock or of at least two-thirds (2/3) of the members in a meeting called for the purpose: Provided, That full disclosure of the adverse interest of the directors or trustees involved is made at such meeting: Provided, however, That the contract is fair and reasonable under the circumstances.

■ **What is the standard of proof or level of certainty that courts must reach in order to hold defendants liable in a civil action brought by shareholders** (e.g., beyond a reasonable doubt, clear and convincing evidence, intimate conviction, preponderance of the evidence, balance of probabilities):

For a civil claim? *Preponderance of evidence*

For a criminal claim? *Beyond reasonable doubt.*

Applicable provisions:

3. Access to Evidence

■ **Before filing a suit, can shareholders (or a group of shareholders) owning 10% of Buyer's shares access internal company documents in connection with Buyer's acquisition of the trucks, such as minutes of board meetings, contracts or purchase agreements? Yes, both directly and through an inspector.**

-Click to Select-

Applicable provisions: *Section 74 of the CC*

■ **In a civil trial, what is the scope of information that the plaintiff can ask the judge to compel?**

From the defendant: *Any information that is relevant to the subject matter of the claim.*

-Click to Select-

■ **From an uncooperative witness:** *Any information that is relevant to the subject matter of the claim.*

-Click to Select-

Applicable provisions: *Rule 27 of the Rules of Court*

■ **How specific must the plaintiff's request to the judge be to compel evidence from a defendant or witness in a civil trial? The request must specifically identify the documents sought (i.e. list the title, author, date and contents).**

-Click to Select-

Applicable provisions: *Rule 27 of the Rules of Court.*

■ **Which statements best describe the process of questioning defendants and witnesses in civil trials?**

The defendant: *Plaintiff or plaintiff's lawyer performs the examination without prior approval by the court of the questions posed.*

-Click to Select-

Witnesses: *Plaintiff or plaintiff's lawyer performs the examination without prior approval by the court of the questions posed.*

-Click to Select-

Applicable provisions: *Rule 132 of the Rules of Court*

■ **Regardless of the outcome of a civil action brought by shareholders against their company's directors, and provided that it was decided on the merits, must the company or the defendant director reimburse all of plaintiff's legal expenses? The court decides the allocation of legal expenses at its sole discretion.**

-Click to Select-

■ **Are contingent or conditional fees allowed (i.e., plaintiff pays attorney's fees only if damages are awarded from a settlement or favorable verdict in a civil suit)?**

-Click to Select-

Applicable provisions: *Article 2208 of the Civil Code*

Comments: *It must be noted that the shareholders and its counsel may enter into a contract for the payment of legal fees. In which case, the applicable provisions of the Civil Code will apply. - Further, Article 2208 of the Civil Code enumerates the circumstances when the award of attorneys fees may be justified in the concept of damages. It must be noted that the Supreme Court stated, in the case of Philippine National Construction Corporation v. APAC Marketing Corporation, G.R. No. 190957 (2013), that the general rule is that attorneys fees cannot be recovered as part of damages because of the policy that no premium should be placed on the right to litigate. They are not to be awarded every time a party wins a suit. The power of the court to award attorneys fees under Article 2208 demands factual, legal, and equitable justification. Even when a claimant is compelled to litigate with third persons or to incur expenses to protect his rights, still attorneys fees may not be awarded where no sufficient showing of bad faith could be reflected in a party's*

persistence in a case other than an erroneous conviction of the righteousness of his cause. In order words, attorneys fees are not automatically awarded to the winning shareholder.

Thank you for completing the Protecting Minority Investors questionnaire. Kindly email it back to protectinginvestors@worldbank.org