FOREWORD

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The Revised Corporation Code ("the Code") is a reenactment of the old Corporation Code containing the retained, edited or amended provisions of the latter together with completely new provisions. Thus, the Code remains aligned with the doctrines, principles, concepts, theories and applications underlying our general law on corporations. Expressly mentioned in Section 130 of the Code is the *doctrine of piercing the corporate veil.* While other doctrines are not mentioned in the Code, they nevertheless form the bases for many of the new provisions as well as the amended ones.

The doctrine of piercing the corporate veil appears in the same section as the concept of *limited liability* of a one person corporation. While the intention of the lawmakers in allowing the formation of one person corporations stemmed from the desire to vest businesses which were formerly sole proprietorships with limited liability, said section however provides that a sole shareholder claiming limited liability for his one person corporation has the burden of showing that it was adequately financed. This means that if the single stockholder cannot prove that the property of the one person corporation is independent of his personal property, he shall be jointly and severally liable for the debts and other liabilities of the one person corporation. A similar consequence is provided for in Section 20 of the Code regarding a corporation by estoppel. In that provision, persons who assume to act as a corporation, knowing it to be without authority to do so, shall be liable as general partners for all debts, liabilities and damages incurred or arising as a result thereof.

The doctrine of piercing the corporate veil and concept of limited liability are closely intertwined with the foundational *doctrine of separate juridical personality.* A corporation by estoppel has no separate juridical personality thus no limited liability. On the other hand, a one person corporation, having been issued a certificate of registration, is vested with a separate juridical personality from the date of incorporation and thus has limited liability. Why then is the burden of affirmatively showing that the one person corporation was adequately financed, and with limited liability, on the single stockholder? In the absence of jurisprudence on the matter, one can only surmise that perhaps it is due to the fact that the single stockholder may be the only one who can discharge such burden to the satisfaction of the court. Based on the pertinent provisions of the Code on one person corporations, where the

one person corporation has strictly complied with all these requirements for its formation and operation as a separate juridical person, there is no reason why its corporate veil should be presumptively pierced and limited liability disregarded.

Another amendment in the Code which has garnered as much attention as one person corporations is section 11 on corporate term. Not only does the Code provide that all existing corporations in good standing as of its effectivity date automatically acquires perpetual existence, but it also allows those whose corporate term has expired to file for revival of its corporate existence. Those who opt not to adopt a perpetual term may notify the Securities and Exchange Commission (hereinafter "the Commission") accordingly. The Corporation Law, which the Corporation Code had repealed, did provide for a perpetual term. Thus, this amendment merely reverts to the concept of corporate existence being perpetual, which is more in keeping with the retained definition of a corporation as "an artificial being created by operation of law, having the right of succession and the powers, attributes, and properties expressly authorized by law or incidental to its existence." Why limit corporate existence to 50 years, *albeit* renewable, which is even shorter than the average life expectancy of its natural person-shareholders? Precisely, being an artificial being, a corporation is expected to have sustainability for the benefit of multigenerational shareholders and stakeholders.

The entirely new Title XVI on Investigations, Offenses and Penalties is probably the most controversial amendment in the Code. Sections 159 to 170 enumerating the specific violations of the Code that subject corporations to criminal liability are intended to foreclose the interpretation that a corporation cannot be imprisoned and thus cannot be criminally liable. Only its directors, trustees, officers, employees or stockholders who are natural persons and are responsible for, or participated in, the unlawful acts were supposed to be criminally liable. *Corporate criminal liability* is a concept recognized and espoused by the United Nations Convention against Corruption. Similar to the Rome Statute which Messrs. Juan Emmanuel P. Batuhan and Anton Miguel A. Sison tackled in their article entitled *Willing and Able? A General Application of the Rome Statute and an Analysis of the Principle of Complementarity*, the UNCAC's goal is to reduce criminality. Considering that the corporation is an artificial being, the Code prescribes only fines for the commission of any of the violations under sections 159 to 170. However, even where the offender is the corporation, the penalty of a fine, at the discretion of the court, may still be imposed not only upon such corporation but also upon its directors, trustees,

stockholders, members, officers or employees responsible for the violation or indispensable to its commission.

Relatedly, another *penalty* that a corporation may be subjected to is involuntary dissolution under section 138 (e). A corporation may be dissolved by the Commission *motu proprio* or upon filing of a verified complaint:

a. Upon finding by final judgment that the corporation:

1. was created for the purpose of committing, concealing or aiding the commission of securities violations, smuggling, tax evasion, money laundering or graft and corrupt practices act;
2. committed or aided in commission of securities violations, smuggling, tax evasion, money laundering or graft and corrupt practices and its stockholders knew of the same ; and,
3. repeated and knowingly tolerated the commission of graft and corrupt practices or other fraudulent or illegal acts by its directors, trustees, officers or employees.

Moreover, if the corporation is ordered dissolved pursuant to the above provision, its assets, after payment of its liabilities, shall, upon petition of the Commission with the appropriate court, be forfeited in favor of the national government. Such forfeiture shall be without prejudice to the rights of innocent stockholders and employees for services rendered. Indeed, innocent employees must not be adversely affected by this or the exercise of management prerogatives as discussed in the article of Mr. Jan Franz Norbert Joselito A. Chan entitled *The Adverse Effects on Employees of the Unbridled Exercise of Certain Management Prerogatives.*

The Code is further aimed at empowering the Commission to exact compliance from its regulated persons and entities. As Ms. Gemelee G. Hirang in her article said in her article entitled *The Persistence of Non-Tariff Measures in ASEAN: A Question of Compliance,* "[T]he lack of effective enforcement and dispute settlement mechanisms, such as in the form of a supranational body, complicates this compliance problem". Thus, under sections 178-179 of the code, the enforcement powers of the Commission have been expanded to include the coercive power to issue cease and desist

orders to prevent imminent fraud or injury to the public, exercise visitorial power, hold corporations in direct and indirect contempt. Moreover, under section 156 of the same code, the commission may also proceed administratively and/or transmit evidence to the Department of Justice for preliminary investigation or criminal prosecution and/or initiate criminal prosecution for any violation of the Code. Although not applicable to criminal offenses, the Code provides for an alternative to court action by way of the arbitration of civil disputes between the corporation, and its stockholders or members, which arise from the implementation of the articles of incorporation or bylaws, or from intra-corporate relations. The Code also provides that arbitration agreement must be in the articles or by-laws of the corporation to be available as a dispute resolution mechanism.

Unlike in the law affecting GOCCs which Mr. Jose Maria L. Marella dealt with in his note entitled *Towards a Competition-Oriented Privatization of Government Owned and Controlled Corporations*, the term *corporate governance* is mentioned for the first time, not only once but several times, in our general law on corporations. Its principles and international best practices may be inferred in many amended and new provisions. For example, "corporations vested with public interest" under section 22 of the Code which is not a new term and has been mentioned in the old Corporation Code, are now distinguished from other corporations in that there are applicable provisions aimed toward their observance of good corporate governance practices. Among others, the said provision requires that corporations vested with public interest are mandated to have independent directors comprising 20% of the board members. The Commission has to issue rules and regulations governing their qualifications, disqualification, voting requirements, duration of term and term limit, maximum number of board memberships and other requirements that the Commission will prescribe to strengthen their independence. Moreover, the Commission is empowered to identify and determine which other corporations are engaged in businesses vested with public interest for the purpose of requiring the election of independent directors and adoption of international best practices. For sure, a public utility such as that discussed in the article of Mr. Joseph Emmanuel L. Angeles entitled *Revisiting Republic v Meralco, The Public Utility Definition, and the Reasonable Rate of Return* falls under the definition of business vested with public interest.

Further, under the Code corporations vested with public interest are required to: (a) elect a compliance officer under section 24 and may be required to have an independent transfer agent under section 73; (b) submit to their shareholders and the Commission an annual report of the total

compensation of each of their directors or trustees under section 29 and a director or trustee appraisal or performance report and the standards or criteria used to assess each director or trustee under section 177; and, (c) to have material contracts or related party transactions approved by at least two-thirds of the entire membership of the board with at least a majority of the independent directors under section 31. These and other provisions, aligned with the "*business judgement rule,*" contribute to strengthening the boards of corporations vested with public interest in order that their directors could judiciously exercise their discretion in making decisions and delegating their authority to corporate officers, the executive committee and other special committees that they can now form at will.

For corporations other than those vested with public interest, there are likewise provisions to promote good corporate governance that are of general application. Section 26 of the Code provides for the expansion of the grounds for disqualification and consequent removal of a disqualified director; section 31 provides for the inclusion of the said director's wife and relatives within the fourth civil degree of consanguinity and affinity in the provision on self-dealing transactions; section 52 discusses the recusal of a director who has a potential interest in any related party transaction; proscription against directors or trustees from taking part in the determination of their own per diem or compensation is now provided for under section 29; and, finally section 49 provides for the submission of their profiles including qualification, relevant experience, length or service, trainings and continuing education attended, board representation in other corporations, attendance report in committee meetings or stockholders and board meetings and appraisal and performance reports for the board and criteria and procedure for assessment are some of these provisions.

This Foreword is a briefer on the major amendments in the Code. For an extended and very analytical discussion, the note of Mr. George Mitchell S. Guerrero entitled *Corporate Consequences: Liabilities, Penalties, Actions, and Sanctions under the Revised Corporation Code* is highly recommended.