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AMENDMENTS TO THE *COMPANIES CODE* AND PROPOSALS FOR REFORM *

by

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INTRODUCTION

After diligent and excellent preparatory work by Professor L C B Gower, comprising a detailed explanatory report and draft legislation, the President and the National Assembly enacted the *Companies Code,* 1963 (Act 179). Since 1963, the *Code* has been in force without undergoing any major amendment. Most of the amendments that have been made have been targeted at, and have revised upward, the financial provisions of the *Code.* In particular, the amendments have generally tended to raise the minimum capital requirement (section 28 of the *Code)* and the fees listed in the Eighth Schedule of the *Code.* Only few amendments have been made that do not directly deal with the financial provisions. The effluxion of time is one justification for a review of the *Code which* has been in operation for forty years.

In this paper, we shall briefly catalogue and discuss the amendments made so farto the *Code.* We shall then point out some of the drafting inelegances of the *Code.* We shall next proceed to review some of the policy considerations that have informed the *Code* as presently drafted, and in the light of the policy review we shall offer some proposals for policy reform. We shall also make proposals for institutional reform. The final section of the paper shall reflect on the process for reform.

NATURE OF THE AMENDMENTS TO DATE

The following four observations may be made about the amendments thus far made

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to the *Companies Code.* First, the *Companies Code has* not been substantially amended since its passage in 1963.

Second, most of the amendments to the *Code* by the several pieces of legislation that have been passed, have affected the financial provisions in that they have increased the minimum capital requirements (section 28) and the fees listed in the Eighth Schedule. For example, Act 531 of 1997, Act 609 of 2001 and Act 627 of 2002, which are all called *Companies Code (Amendment) Act,* all make changes to financial provisions of the *Code.*

Third, the only substantial amendments - six in all - were made by the 1994 Companies Code *(Amendment) Act* (Act 474). Five of the six amendments made by Act 474 relate to invitations to the public by public companies, the stock exchange and the securities industry. The sixth amendment enhances the ability of the Registrar of Companies to undertake investigations into the ownership of shares.

Fourth, the *Securities Industry Law,* 1993 (PNDCL 333) has also made some amendments to the *Code* relative to the registration of prospectuses, the meanings of "approved stock exchange" and "exempted dealer", and unit trusts.

It is thus sufficient to observe that although some amendments have been made to the *Code,* those amendments have not reflected any policy shift. But if the *Code* must be reviewed, the review must accomplish four objectives, namely, (1) it must address all *drafting inelegances;* (2) it must take a second look at certain *policy matters;* (3) it must make certain *institutional reforms;* and (4) it must employ the most effective *processes* to ensure that a most desirable, useful and up-to-date *Code* is enacted that is relevant to Ghana and is mindful of global developments.

DRAFTING CONSIDERATIONS

There are at least seven drafting considerations that warrant a re-draft of the Code, namely: First, the Code makes difficult reading and it is thus appropriate for the Code to be re-written in simpler and more comprehensible language.

Second, there are instances of equivocal or confusing terminology or phraseology. For example, by the provisions of the *Code,* should one understand the phrase "the business of a general meeting" to refer to all "items of the agenda" set out in the notice of meeting, or is a distinction drawn between the business of a meeting and an item of the agenda? (See sub-sections 153 (1) and (2) and contrast with SUb-section 161 (1». There is also at least one instance where a ridiculous result may flow from the Code in its present form. For instance, when must the instrument of proxy have to be deposited in order to allow a member to be represented

at a general meeting by his proxy? More than 48 hours before the meeting, less than 48 hours before the meeting, or exactly 48 hours before the meeting? (see section 163 (4)).

Third, all the fees stated.in the *Code* should be made the subject of delegated legislation and the fines should be denominated in penalty units. This would avoid a situation where the fees and fines become unrealistic; it would also avoid the need for frequent amendments to reflect economic realities.

Fourth, there must be one comprehensive "definitions provision" of the *Code,* arranged in alphabetical order, and not divided into separate sections.

Fifth, the Second Schedule of the *Code* is simply captioned 'Tables A and 8"; it has no other name, and this caption does not give the reader any idea as to the contents.
It is suggested that all tables be given clear captions to signify their contents. It is further suggested that the revised *Code* should have six separate schedules (or six parts of one schedule) providing precedent or model Regulations for the six types of companies, namely: (i) private company limited by shares;
(ii) private company limited by guarantee; (iii) unlimited private company; (iv) public company limited by shares; (v) public company limited by guarantee; and (vi) unlimited public company.

Sixth, the *Code* must provide a separate
schedule that specifies the contents of the Short Prospectus.

Seventh, since the *Code* is intended to codify the law, the whole law, and nothing but the law on companies, all subjects relating to companies should be brought within its compass - from incorporation, through operational and governance requirements, to insolvency, and ending with liquidation. One statute, namely the *Companies Code,* should cover all matters relating to the company - from its birth, through good health and ill- health, to its death.

POLICY CONSIDERATIONS

There are also at least four policy considerations that require that a second look be taken of the *Codes* provisions, namely:
(1) the types of companies and their designation;
(2) the possibility of sole directors for sole-member companies;
(3) the qualifications of directors or at least the company secretary; and
(4) the appointment, duties of, and fixing of remuneration of auditors. Under the above-noted sub-heading, we recommend the following:

Types of companies and their designation
1. That public limited liability companies adopt the suffix-abbreviation "PLC;
2.That private guarantee companies adopt the suffix-abbreviation "GC";
3.That Public Guarantee Companies adopt the suffix-abbreviation "PGC"

4. That the current practice whereby guarantee companies are exempted from the payment of income tax simply by virtue of the type of company they are, ought to be re-considered. Exemption from the payment of income tax ought not to be simply by virtue of the type of company formed but should be determined by the Internal Revenue Service taking into account the charitable objects and activities of the particular company.

The possibility of *sole directors for so/e-member companies* **55.8,38, 161** *(2)(a)*

If the *Code* permits sole-member companies (see sections 8 and 38 of the *Code),* it should also allow these sole-member companies to have sole-directors. It has become a farce for the *Code* to insist on two directors, since promoters can readily get, and in practice have readily got their spouses, children, relatives and friends to become nominal directors! A concession appears to be in order: Sole-member companies which have sole directors must however have substitute directors (section 187).

The qualifications of *directors or at least the company secretary*

In order to ensure compliance with the provisions of the *Code,* it is proposed that company directors or at least company secretaries be required to have training or experience in company law and practice.

One may draw inspiration from the *Stock Exchange (Ghana) Membership Regulations,* 1991 (LI 1510) which provides that directors of all companies to be admitted as members of the Ghana Stock Exchange must have recognized academic or professional qualifications or experience in banking, law, accountancy, economics, business administration, secretarial practice, dealing in securities or any other relevant qualification or experience acceptable to the Council of the Ghana Stock Exchange.

The appointment, duties of, *and fixing* of *remuneration* of *auditors*

One recalls the auditing and accounting scandals in USA in 2002 - Enron, Arthur-Andersen, Xerox, Worldspace, and others. Yet section 136 (7) of the *Code* provides that:

> "The auditors, in addition to their statutory duties to the members under subsection (1) of this section, may under the terms of their contract with the company, expressly or impliecly undertake obligations to the company in relation to the detection of defalcations, and advise on accounting, costing, taxation, raising offinance and other matters."

This provision to too wide and involves auditors in conflicts of interest. We therefore recommend:

1. That the practice of directors appointing, and determining the

Remuneration of, auditors be forbidden by law and that these two functions be performed by members. After all, the auditors are to report to members and they must be appointed, removed and remunerated by members. When directors undertake these two responsibilities, a cozy relationship develops between the directors and the auditors who are to audit the financial transactions of the directors.

2. That auditor is limited to perform only audit or incidental and related functions, statutorily to be enumerated, with respect to the companies they audit. For example, they should not be permitted to undertake obligations to the companies that they audit in relation to "taxation, raising of finance and other matters" as presently permitted by the *Code.*

INSTITUTIONAL REFORM

We propose the establishment by law of Regional (and later, District) offices of the Registrar of Companies. (Compare with section 10 of Commission on Human Rights and Administrative Justice Act, 1993 (Act 456), which also establishes Regional and District branches of CHRAJ)

The functions of Regional offices of the Registrar of Companies should by law include:

a. Re-registering companies in the regions upon submissions of their Certificates of Incorporation, Certificates to Commence Business, true copies of their Regulations, and cu rrent return rns on shareholdings, directors and the company secretary;

b. Registration of new companies in the regions;

c. Serving as Regional filing centre for the Registrar of Companies;

d. Serving as Regional offices for imputing all data into a nationwide computer network;

e. transmitting hardcopies of all relevant documents to headquarters;

f. Undertaking inspection, compliance and enforcement activities

THE PROCESS FOR REFORM

Finally, a word shall be said about the *process* for reform. It is respectfully suggested that a 3-5 member committee of Company Law experts, assisted by an able draftsman as secretary, be established to provide draft legislation and an explanatory report which will then form the basis for public comment and subsequent parliamentary debate.

The Committee should consult widely with all stakeholders - for example, the Registrar-General's Department, the Ghana

Bar Association, the Institute of Chartered Accountants, the Institute of Directors, the Securities and Exchange Commission, the Ghana Stock Exchange, leading academics and practitioners of company law, practice and administration etc. etc. - before it comes out with the draft legislation.

The draft legislation should then be subject to public comment before a final, revised draft is prepared for consideration by cabinet and parliament.

It is better that an excellent job be slowly done than that a hasty job be done in the zeal for reform.

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This paper is a very-much abridged version of a more detailed article in preparation. The author has on two occasions made an oral presentation of the contents of this paper: first, at a workshop organized by the Attorney-General S Department at Elmina on May 23, 2002 on the theme "Review of the Companies Code. 1963 (Act 179) ": and second, at a seminar organized by the Institute of Economic Affairs at Accra on February 26, 2003. on the topic "Highlights of Amendments to the Companies Code and Proposals for Reform ". The author wishes to thank participants for their constructive contributions on both occasions.

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