THE CORPORATE GOVERNANCE REVIEW

ELEVENTH EDITION

Editor
Willem J L Calkoen

THE LAWREVIEWS

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 11th edition, we can see that corporate governance is becoming a more vital and all-encompassing topic, especially this year with covid-19 as well as climate issues, political instability, technological change, environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, European Commission, US Securities and Exchange Commission (SEC), Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports and 17 social development goals, the media, supervising national banks, more and more shareholder activists, proxy advisory firms, the Business Roundtable and all stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working very diligently. Nevertheless, there have been failures in some sectors and trust must be regained.

How can directors do all their increasingly complex work and communicate with all the parties mentioned above? What should executive directors know? What should non-executive directors know? What systems should be set up for better enterprise risk management? How can chairs create a balance against imperial chief executive officers (CEOs)? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? Is diversity and inclusion actively being pursued? Is the remuneration policy fair? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal, inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, Business Roundtable, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust: one-on-ones. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top and work at complying with demands and trends for a better society?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances when CEOs have gradually amassed too much power, or companies have not developed new strategies and have incurred bad results – and sometimes even failure. More are failing since the global financial crisis than before, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, stewardship codes for shareholders and shareholder activists, and requirements for reporting on non-financial issues. The European Commission has developed regulation for these areas as well. We see governments wanting to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship. Business Roundtable, with about 180 signatories, has embraced stakeholder corporate governance.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in research and development. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management, with new risks entering, such as the increasingly digitalised world and cybercrime, is an essential part of directors' responsibilities, as is the tone from the top.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that this Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who have helped with this project. I hope this book will give you food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2021

Chapter 8

GHANA

NanaAma Botchway and Emmanueler Ewurabena Quaye[1]

I OVERVIEW OF GOVERNANCE REGIME

The principal legislation affecting the governance of listed companies is the Companies Act 2019 (Act 992). The Companies Act includes general provisions relating to the organisational framework of all companies, both public and private, and special provisions for public companies only, concerning invitations to the public for the acquisition or disposal of listed securities, standards for financial reporting, procedures for appointing directors, among other things. Apart from the Companies Act, other relevant legislation that affects the governance of listed companies includes the Securities Industry Act 2016 (Act 929) and the Securities and Exchange Commission Regulations 2003 (LI 1728), which regulate public invitations for and trading in listed securities, and disclosure obligations and financial reporting standards for listed companies.

The Listing Rules of the Ghana Stock Exchange (the Listing Rules), the Code on Takeovers and Mergers (the Takeover Code) issued by the Securities and Exchange Commission (SEC), the SEC's Corporate Governance Code 2020 (the Corporate Governance Code), the SEC's Guidelines on the Registration of Auditors and Accountants Reporting for Public Companies and SEC Licensees (the SEC Guidelines) and the Anti-Money Laundering Act 2020 (Act 1044), are also key to the governance regime of listed companies.

The Listing Rules sets out comprehensive rules and guidelines on the governance of companies listed on the Ghana Stock Exchange (GSE). It prescribes mandatory disclosure obligations for issuers of listed securities, rules on board governance, and practices and protections in respect of shareholders' rights. The Takeover Code regulates takeovers and mergers by, between or affecting public companies. The Corporate Governance Code contains rules and guidelines for ensuring the effective governance of listed companies. The SEC Guidelines sets out registration requirements applicable to auditors' and accountants' reporting for public companies.

Sector-specific legislation, such as the Banks and Specialised Deposit Taking Institutions Act 2016 (Act 930), the Insurance Act 2006 (Act 724), and their respective regulations, also contain important provisions that affect listed companies operating within the relevant sectors, particularly in relation to board composition and governance. The Corporate Insolvency and Restructuring Act 2020 (Act 1015) provides a regulatory framework for rescuing distressed companies through administration, temporary management and restructuring proceedings to enable them to continue as a going concern, as well as official liquidation and cross-border

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insolvency services. Act 1015, however, does not apply to companies in the banking and insurance sectors, or other businesses that are subject to special legislation providing for rescue options.

The SEC, with the GSE and the Registrar of Companies, bear the primary responsibility for overseeing the listed company regime in Ghana. However, there are other supervisory bodies (such as the Bank of Ghana for the banking sector and the National Insurance Commission for the insurance industry) that regulate listed companies operating in specific sectors of the economy. The SEC is empowered under its enabling law to impose administrative penalties for non-compliance with its codes, directives, guidelines and circulars. With respect to instances of non-compliance that also constitute criminal offences, prosecutorial powers are administered by the Attorney General, who may authorise the SEC to prosecute such offences on his or her behalf.

The GSE enforces compliance with its rules through sanctions such as the suspension or delisting of listed companies. A listed company may be suspended from the exchange or its securities delisted for non-compliance with the GSE's rules on disclosure and its policy on quality management of listed companies. If a listed company has disposed of its principal assets or discontinued a significant portion of its operations without shareholder approval, or persistently failed to comply with GSE and SEC rules and directives, it could also be suspended or delisted. The Registrar of Companies is also authorised, under the Companies Act, to impose penalties on companies in respect of breaches of the mandatory provisions of the Companies Act, and by so doing ensure compliance with the Companies Act. The Registrar of Companies may also go to court to compel compliance with the requirements of the Companies Act. The Insolvency Services Division, established under the Office of the Registrar of Companies, is responsible for regulating insolvency practice under the Companies Act, the Corporate Insolvency Act and any other relevant enactment.

The corporate governance regime for listed companies in Ghana is essentially a combination of statutory law, subsidiary legislation and regulatory guidelines and directives. The new Corporate Governance Code is binding on all listed companies, unless exempted from compliance, and companies are mandated to comply with the provisions of the Code within a year after its publication or face penalties. Similarly, regulators in the financial services sector have developed detailed mandatory guidelines on governance structures and control systems for regulated companies, non-compliance with which could have adverse implications on their licences. For instance, the National Insurance Commission has developed governance and risk management guidelines for both life and non-life insurers. The detailed framework provides the minimum standards for the corporate governance structures and internal control systems with which insurers must comply: these include board composition, mandatory board committees and their composition, their mandate and responsibilities, and audit and risk control functions.

Another sector that has seen steady development in corporate governance practices is the banking sector. The Bank of Ghana (BoG) issues notices and directives on governance structures and control systems for banks and specialist deposit-taking institutions in line with the corporate governance principles of the Basel Committee on Banking Supervision. Following the collapse of a number of banks, in December 2018 the BoG released its own comprehensive corporate governance code for the banking industry (the BoG Directive), specifically banks, savings and loans companies, finance houses and financial holding companies licensed or registered under the Banks and Specialist Deposit Taking Institutions Act 2016 (regulated financial institutions). In July 2019, the BoG – as part of its efforts in supporting sound corporate governance practices and preventing ineligible persons from engaging in any licensed activities – released the Fit and Proper Persons Directive (the BoG Fitness Directive). This Directive provides the criteria to be used by regulated financial institutions in assessing the suitability of significant shareholders, directors and key management personnel within the institution. Like the Corporate Governance Code, compliance with the BoG Directive and the BoG Fitness Directive is mandatory, and in some cases it provides deadlines for its implementation. In addition to these, compliance with the various laws and constitutions relevant to listed companies is strictly compulsory, subject to certain special circumstances when waivers in respect of some specific provisions or requirements may be granted by the appropriate supervisory body under conditions imposed by the supervisory body.

Increasing multinational interests in Ghanaian companies have led to a growing advocacy for the adoption of international standards and best practices in the governance of Ghanaian companies. In response to this, the government passed Act 1044 in December 2020 to update the existing anti-money laundering (AML) regulatory framework for the governance of accountable companies to prevent infractions and transnational organised crime. Companies with foreign shareholders, particularly institutional investors with significant or controlling shareholdings, are also greatly influenced by the corporate governance practices of these investors. Government-led efforts aimed at developing mandatory corporate governance rules for Ghanaian companies has been successful with the issuance of the Corporate Governance Code, and sector-specific corporate governance guidelines or manuals. A national corporate social responsibility (CSR) policy, which seeks to change the traditional focus of CSR activities on charity, was launched in 2016.

II CORPORATE LEADERSHIP

i Board structure and practices

Ghanaian boards do not have a two-tier structure. The normal practice is for a single-tier board, made up of executive and non-executive directors, to collectively manage the business of the company.

The company's constitution may prescribe a minimum or maximum number of directors, subject to the requirement under the Companies Act for every company to have at least two directors and for at least one director to be ordinarily resident in Ghana. Public companies whose constitution authorises cumulative voting in the appointment of directors are required to have a minimum of three directors on their board. In addition to any other disqualifications specified under the constitution of a company, infants, body corporates, persons of unsound mind, fraudulent persons and undischarged bankrupts are disqualified from being appointed to the board. The BoG Fitness Directive requires persons nominated for directorship and key management positions in regulated financial institutions to comply with the fit and proper assessment criteria to be appointed to act. Non-executive directors must make up the majority of the board of a listed company; in addition, there shall be at least two independent non-executive directors, one of whom shall be responsible for relations with minority shareholders and protection of their interests. Sector-specific legislation and constitutions may also specify additional requirements concerning the competencies and qualifications of members of the board, as well as representation of non-executive or independent directors on the board. The Corporate Governance Code requires that a board is not too large to undermine an interactive discussion during meetings or too small to compromise the inclusion of a wider expertise and skills needed to improve the effectiveness of the board. It recommends that a board is constituted of between five and 13 members and has a balanced representation of executive, non-executive and independent non-executive directors, failing which the board must provide an explanation in its annual report as to why it considers the number appropriate. The BoG Directive also requires that the boards of regulated financial institutions have a minimum of five and a maximum of 13 members, with the majority being non-executive directors who are ordinarily resident in Ghana. In addition, regulated financial institutions boards must be composed of 30 per cent Ghanaian nationals who are ordinarily resident in Ghana, and at least 30 per cent independent directors.

An act of the board of directors or the managing director of the company while carrying on the usual business of the company is regarded as an act of the company itself, and the company shall bear civil and criminal liability for that act unless it can be shown that the person with whom the board or managing director was dealing had actual or constructive knowledge at the time of the transaction that the managing director or the board did not have the power to act in the transaction. A single director, other than the managing director, can represent the company only with the board's express or implicit approval.

The board is responsible for directing and administering company business. In managing the company's business, the board may not exceed the powers granted to it under the Companies Act or the company's constitution, or exercise those powers for a purpose other than those for which they were granted, whether or not it may be in the best interests of the company to do so. The board has a legal duty to not act on the directions or instructions of any other person, and to ensure that the affairs of the company are being managed in accordance with law and the company's constitution. In filling a casual vacancy on the board, the directors have a duty to satisfy themselves that any person they intend appointing to the vacant office is suitable and has the requisite integrity to be a director of the company.

Unless otherwise specified by the company's constitution, the board may elect one of their number to act as chair at their meetings for a specified period. The BoG Directive, however, makes specific requirements for the board chair: that is, the position must be occupied by an independent director who is also ordinarily resident in Ghana, and the term of office is restricted to three years, renewable for only one additional term. The Corporate Governance Code provides that the board chair of a listed company must be an independent director. It is prohibited for persons to act as chair of more than one listed company. Subject to a contrary provision in the constitution of the company, the chair has a casting vote in the event of an equality of votes during the decision-making process of the board, and also presides at meetings of shareholders. The chair is required to sign minutes of board and shareholders' meetings at the end of the meeting or on the next adjourned date, and if duly signed, the minutes are *prima facie* deemed to be a true record of the proceedings at the meeting. Audited accounts and balance sheets of companies may be signed by any two directors with the approval of the board. Regulatory filings may also be signed by the company secretary and any director of the company.

The board of directors may delegate any of their powers to a committee consisting of one or more of their number. The board may also appoint one or more directors to the office of managing director and entrust any of the powers exercisable by the board to the managing director or managing directors, subject to any restrictions or conditions that they deem fit. The delegation of its responsibilities to a committee or managing director does not absolve the remaining directors of any liability that may arise in the performance of the delegated duties by the committee or managing director. Directors must ensure, therefore, that they have proper oversight over their delegated responsibilities.

The Companies Act provides for the executive office of managing director of the company. The managing director is appointed from the board members, and may exercise all or any of the powers of the board that the board may confer. There is no requirement under the Companies Act that the role of board chair and managing director be performed by two different directors. However, the Corporate Governance Code requires a separation of the two roles and it is standard practice for the two positions to be occupied by different people. A combination of the roles may be allowed for a limited period and for exceptional reasons by the SEC and a simple majority of the shareholders after considering the motion. For regulated financial institutions, and per the BoG Directive, the separation of these roles is a requirement and not a recommendation. Further, the position of managing director can be held for a maximum of 12 years only, split into three terms, each of which should not exceed four years. The chair's traditional role is to act as leader of the board and to chair board and shareholders' meetings. Other than general meetings of the company, direct communications by directors (the chair included) with shareholders are not common, although not prohibited under the Companies Act.

Fees and other remuneration payable to directors in their capacity as directors may be determined only by the ordinary resolution of members. The remuneration of executive directors in respect of the executive positions that they hold at the company may be fixed by the board as part of the board's terms of employment; however, these terms must be approved by ordinary resolution of the members of the company prior to any payments being made. Unless the company's constitution provides otherwise, the board has the power to determine the remuneration of senior management. Directors' remuneration may not be paid free of income tax; nor can it be calculated by reference to or varying with the amount of income tax payable by directors.

The board may exercise any of its powers through committees consisting of one or more of its number. The Corporate Governance Code requires the constitution of at least an audit committee, a risk committee, a remuneration committee and a nominating committee composed of a majority of independent non-executive directors. It also allows for the establishment of other committees and delegation of specific mandates to those committees or executives that the board considers appropriate to effectively discharge their functions so long as the responsibility for decision-making remains with the directors on the committees. However, the BoG Directive makes it a requirement for regulated financial institutions to have at least two board committees – an audit committee and a risk committee – which must be chaired by independent directors.

Directors of a listed company are guided by the tenets of the SEC's Takeover Code. The board of a target company is required to make a recommendation to shareholders on the acceptance or rejection of any takeover offers made by third parties. on receipt of a takeover offer, the board must appoint an independent adviser, who shall advise the board and the company on all relevant issues and information relating to the takeover for the purpose of enabling shareholders to make an informed assessment of the takeover offer.

ii Directors

Under the Companies Act, no distinction is made between executive and non-executive directors of the company with respect to their duties and liabilities. Directors' duties and liabilities are the same irrespective of whether they are non-executive directors or otherwise. In addition, directors may exercise any power that has not been reserved for the members under the Companies Act or the company's constitution. Further, to the extent that a person is described as a director, with or without a qualifying title, that person is deemed to be a director, whose role and involvement is expected to be the same as all other directors of the company.

Companies are required to circulate information to all directors, including non-executive directors, at the same time. Non-executive directors are not prohibited from conducting on-site visits of subsidiaries of the company. They are also at liberty to interact freely with lower management. In practice, it is usual, especially at the board committee level, for directors to work directly with the relevant management team to achieve their mandate. For example, directors on a risk subcommittee of the board may freely interact with the head of finance or another relevant department of the company, and may make enquiries with respect to reports or other information submitted to the board or board committee.

The generally applicable legal duties and best practice for directors in Ghana are summed up in Sections 190 to 198 of the Companies Act. Essentially, a director of a company is deemed to stand in a fiduciary relationship with the company and must at all times observe the utmost good faith towards the company whether in a transaction on behalf of the company or with it. Further, the actions of a director must at all times be what he or she believes is in the best interests of the company to preserve its assets and further its business, and the purpose for which it was formed. Directors must act in the faithful, diligent and careful manner in which an ordinarily skilful director would be expected to act. They may not place themselves in any position in which their duty to the company conflicts with their personal interests.

A director is liable to compensate the company for any loss that it suffers as a result of a breach of the director's duties to the company. Directors must also account to the company for any profits they make from transactions involving a breach of their duties to the company. Contracts entered into between the company and a director who acts in breach of his or her duty to the company are subject to rescission.

Directors are appointed by ordinary resolution of members. The Corporate Governance Code provides that the appointment of directors in a listed company shall be overseen by the nominating committee. The board is required to adopt an appointment policy that includes the terms and conditions of each appointment and the minimum time in which to achieve an appropriate gender balance on the board. The constitution of a company may validly provide for the appointment of one or more directors by a class of shareholders, debenture holders, creditors, employees or any other person. The board may also appoint a director to fill a casual vacancy on the board. A director of a private company shall continue in office until he or she vacates the office or is removed in accordance with the law and the company's constitution. At regulated financial institutions, however, the BoG has the power to remove a director if the board considers that the appointee is not fit and proper after hearing a representation made by the institution. Directors of public companies, except the managing director, are subject to retirement by rotation – usually one-third of the board must retire every year.

There are formal processes and default rules regulating the appointment and removal of directors of both private and public companies. With respect to public companies limited by shares, a resolution for the appointment of two or more directors shall not be moved as a single resolution except with unanimous approval of the shareholders. Nonetheless, the company's constitution may authorise cumulative voting for appointing directors.

Directors are prohibited from putting themselves in situations in which a conflict arises between their duty to the company and their own personal interests or the interests of other persons. In very limited circumstances, the company may consent to a conflict situation following full disclosure of all relevant information to the board or members in a general meeting. These include instances in which a director is directly or indirectly personally interested in a transaction entered into by the company or in a competing business with that of the company, or intends to use for personal advantage money or property belonging to the company or confidential information obtained in his or her capacity as a director of the company. Sector-specific laws may also require directors to disclose conflict situations to the company. For instance, directors of banks, specialist deposit-taking institutions or financial holding companies must declare annually any personal interests and business or investment interests that they may have in the company, and notify their board in the event of any changes to that declaration.

The Corporate Governance Code requires that the board has a policy with respect to conflicts of interest that provides, among other things, the procedure for considering which matters and appointments amount to a material conflict, the actions to resolve these conflicts and the timing of disclosure by directors (i.e., when being considered for appointment, and annually thereafter or in the event of significant changes in any financial, economic or other interest).

There are no provisions regulating the manner of interaction between executive and non-executive directors. In practice, directors cooperate fully with each other for the purpose of ensuring the effective management of the company.

III DISCLOSURE

Comprehensive disclosure obligations, both periodic and event-driven, are imposed on listed companies especially under the Companies Act, the GSE Listing Rules and the SEC Act and Regulations, and the BoG Directives in the case of regulated financial institutions. Shareholders and directors of listed companies also have significant disclosure obligations.

i Disclosure by the company

Generally, companies are required to file, with the Registrar of Companies, annual and other periodic returns of particulars of the company, including when there is a change in the board of directors, of the company secretary, of the auditors or the shareholding structure. Annual returns must state the current position of the company with regard to such information as its name, address, authorised business, directors and secretary, subsidiaries, shareholdings and beneficial ownership structure, and are required to be filed within 36 days of the day on which the company's financial statements, accounts and reports are circulated to members and debenture holders.

Under the GSE's rules, the disclosure obligations require that a listed company makes full and timely disclosure to the public of all information necessary to enable an investor to make informed investment decisions, and information that is likely to have a material effect on the market activity and price of its listed securities. Disclosure of significant corporate events and price-sensitive information cannot be made selectively. Corporate disclosure covers:

a periodic financial reporting and prompt announcements of changes in management;
b control or capital investment plans of the company;
c labour or contractor disputes;
d insolvency events;
e issuance of additional securities;
f restructuring of the company;
g default on loans;
h imposition of fines or sanctions by regulators;
i profit or revenue-related matters; and
j acquisition of significant interests in another company.

If considered material by the board, a listed company shall also immediately disclose:

a the acquisition or loss of a contract;
b borrowing of funds by the company;
c the purchase or sale of an asset;
d changes in the corporate purpose;
e judicial and quasi-judicial actions initiated by or against the company; and
f other material events.

Further, listed companies are mandated by the Corporate Governance Code to keep an active website that is accessible to the general public and specifies all the information required under the law as well as any other material information necessary for shareholders to monitor the company's performance.

Disclosure of material information may be delayed by the company in very limited circumstances, such as if immediate disclosure would be prejudicial to the company's ability to pursue its corporate objectives, if the facts requiring disclosure are in a state of flux and a more appropriate moment for disclosure is imminent, and when negotiations regarding the subject matter for disclosure are continuing and an agreement in principle has not yet been reached. A listed company that withholds the disclosure of material information must ensure that strict confidentiality is maintained, and the company shall immediately disclose the relevant facts if rumours about the withheld information surface.

ii Disclosure by shareholders

Shareholders of listed companies are required to disclose to the public the acquisition or disposal of any interest in the company that causes the shareholder's stake in the company to attain, exceed or fall below each 5 per cent threshold between 10 per cent and 50 per cent plus one share. This announcement must be made within 48 hours of the transaction, and shall indicate the number of shares sold or purchased and the percentage of the share capital and votes in the company held by the shareholder after the transaction.

iii Disclosure by directors

A director of a listed company has a duty to disclose to the members of the company the terms of any payment made or proposed to be made to that director in connection with a takeover bid by any person. The nature and extent of the holdings of a director in respect of the company's securities or the securities of an associated company must also be disclosed to the company and recorded in a register to be produced at the company's general meetings and made available for inspection by members. Under the Companies Act, directors who have an interest that is likely to create a conflict of interest that may undermine their position are also required to enter the details of their interest in an interests register established by the company and disclose the same to the board immediately after becoming aware.

iv Financial reporting and accountability

Listed companies must provide quarterly reports to the GSE at least 48 hours before they are published in the newspapers. Companies are required also to circulate annual reports to their members comprising financial statements, with the reports of directors and auditors on the same, prepared in strict compliance with the requirements of the Companies Act and International Financial Reporting Standards adopted by the Institute of Chartered Accountants Ghana. A company's annual report must be laid before the company at an annual general meeting held by the company within three months of the annual report being circulated, and must include or indicate:

a a statement of each director's holdings in the issued shares of the company;
b a statement on the CSR of the company and an associated company and the amounts spent during the financial year;
c a statement of the amount payable by way of audit fees;
d particulars of the steps taken to build the capacity of the directors to discharge their duties;
e particulars of material contracts in which directors are interested and entries in the interest register;
f the aggregate number of directors' emoluments;
g the aggregate amount of directors' or past directors' pensions;
h the aggregate amount of compensation to directors or past directors in respect of loss of office; and
i the aggregate amount of monies due to the company or an associated company from its officers at the end of the financial year, as well as the maximum amount that was due to it from officers at any time during the financial year.

Listed companies must further include a statement from the board confirming the adequacy of the company's internal control mechanisms and the degree of compliance with the corporate governance practices specified in the Corporate Governance Code and any regulatory requirements. Similarly, regulated financial institutions are required to include a certification in their annual reports as to their compliance or otherwise with the contents of the BoG Directives.

v Auditors' role, authority and independence

Auditors perform a fundamental role in ensuring the accountability of listed companies. They are not regarded as officers or agents of the company but stand in a fiduciary relationship with the members of the company. Hence, they are required to act with due care, skill and diligence, and may incur liability for a breach of their duties to the company. To safeguard the independence of auditors, a person does not qualify to be an auditor of a listed company if that person is an officer of the company or an associated company, or is a partner of or in the employment of an officer of the company or an associated company. Further, under the

SEC Guidelines, auditors are to comply with the code of ethics for professional accountants of the International Federation of Accountants and be independent of the auditee firm. Auditors cannot simultaneously act as reporting accountants of the same public company, and accountants who have provided reporting services for a public company cannot act as auditors for the same company within 12 months. The appointment of a person as an auditor of a listed company must also be approved in writing by the SEC. Duly appointed auditors may serve a maximum term of six years and shall only be re-eligible for appointment following a cooling-off period of at least six years. Auditors are entitled to attend general meetings of the company, receive notices and other communications relating to a general meeting, and be heard at a general meeting on any part of the business of that meeting that concerns them in their role as auditors of the company. Auditors of a company are guaranteed a right of access at all times to the accounting records and financial statements of the company and may require any information that they deem necessary from officers of the company to fully carry out their functions.

vi The comply or explain model and mandatory disclosure

In the area of corporate disclosure, Ghana operates a prescriptive regulatory model. Therefore, all disclosure obligations under the Listing Rules, the Takeover Code, the Corporate Governance Code, the BoG Directives and the Companies Act are mandatory. If a listed company wishes to be exempt from the application of a particular obligation, on very limited and specific grounds, it must seek and be granted a waiver from the appropriate regulator before taking any action that would result in non-compliance with a specific obligation.

vii One-on-one meetings of directors with shareholders

One-on-one meetings between directors and shareholders are not common.

IV CORPORATE RESPONSIBILITY

It is normal practice in the financial services industry to have a risk subcommittee of the board of directors, and a risk department with a functional head. In other sectors, the appointment of a special risk officer or the constitution of a risk committee may be necessary depending on the business of the company and its exposure to various risks in the sector. The risk management culture of the company is usually dictated by its risk policy and the general attitude and practices of top-level management.

Companies whose activities require AML monitoring are required to formulate AML policies, and train and monitor their employees for compliance with the internal AML policy and the applicable AML laws. Under the new AML Act (Act 1044), a designated AML reporting officer must be appointed to report suspicious transactions to regulatory authorities. The obligation to monitor for AML compliance under the new law has been extended to include additional measures aimed at satisfying the recommendations of the Financial Action Task Force.

Companies also adopt appropriate policies on bribery and corruption, data protection and other areas of risk relevant to their operations. In addition, the Corporate Governance Code requires the adoption of a code of ethics and statement of business practices, whose implementation shall be monitored by the audit committee and reviewed regularly. In carrying out this function, the committee shall appoint an independent director or a third party to whom whistle-blowers can make reports anonymously.

Legally, the board's overriding obligation to always act in the best interests of the company as a whole may impose an implicit obligation on directors to consider other factors beyond the maximisation of shareholder value. The Companies Act provides that in deciding whether a particular transaction or course of action is in the best interests of the company as a whole, the directors may consider the interests of not just shareholders but also employees and creditors. Beyond employees and creditors, there is no legal obligation, express or implied, to consider the interests of any other stakeholders.

A national CSR policy was launched in 2016. Compliance with the policy, which focuses on, *inter alia*, human rights, employee welfare, the environment, safety, accountability and transparency, and ethical practices, is entirely voluntary. In practice, however, CSR activities of Ghanaian companies and multinationals tend to focus on philanthropy and charity. In this regard, shareholder approval must be obtained by the directors of a company before any voluntary contributions to charitable or other funds in excess of 2 per cent of the retained earnings of the company can be made.

V SHAREHOLDERS

i Shareholder rights and powers

A company's constitution may provide for different classes of shares by attaching special rights, including voting rights, to those shares. Each equity share in a company carries the right to one vote for each share, notwithstanding any contrary provision in the company's constitution. Preference shares shall also carry the right to one vote per share, except that, in certain circumstances relating to a variation of the rights of their holders, winding up of the company replacement of the auditors, among other circumstances, preference shares may carry the right to more than one vote for each share. A company's constitution may validly provide for the suspension of a shareholder's voting rights in respect of shares on which there are unpaid calls.

Directors, collectively and individually, have a duty to act in accordance with what they believe to be in the best interests of the company and are not bound to follow the directions or recommendations of shareholders. This restricts the power of shareholders to influence the board, other than in respect of the holding of extraordinary general meetings – directors must proceed to hold a meeting at the request of shareholders holding at least 5 per cent of the total voting rights in a public company or 10 per cent of the total voting rights in a private company.

A company's constitution may reserve certain decisions for shareholders' action only. Under the Companies Act, shareholders alone have the power to:

a appoint and remove auditors;
b appoint directors (other than in respect of a casual vacancy) and remove them;
c determine the remuneration of directors;
d declare dividends; and
e decide to wind up the company.

Shareholders may also act in matters that fall within the powers of the board, such as when there is a deadlock, and as such the directors cannot act; commencing legal action in the name of the company if the directors have failed to do so; and acting for the purpose of ratification of acts of the directors.

Shareholders make decisions by voting in the general meeting and then passing resolutions to give effect to their decisions. In spite of this, a dissenting shareholder has the right to pursue an action in court if he or she is of the opinion that any decision, action or transaction of the company is illegal, irregular, *ultra vires* or contravenes the provisions of the constitution of the company. Additionally, a dissenting shareholder on special resolutions seeking to vary or dispense with the business of the company or approve a major transaction, arrangement, merger or division of the company or variation of class rights may require the company to purchase his or her shares and those of other members.

There is no legal mechanism that expressly permits the implementation of loyalty programmes for long-term shareholders. Given the underlying principle of one share, one vote in Ghanaian company law, equity shareholders cannot be granted additional votes for their existing equity shares without a corresponding and proportionate increase in the number of equity shares that they hold in the company. However, it would be possible to issue preference shares and attach additional voting rights to those shares.

Directors have very broad powers with respect to the management of the company's business. However, these powers are limited when shareholder approval is required before any action can be taken in the following instances:

a the acquisition or disposition of the company's assets, the value of which is more than 75 per cent of the value of the assets of the company before the disposition or acquisition;

b the entering into of any transaction that has or is likely to have the effect of the company acquiring rights or interests, obligations or liabilities, the value of which is 75 per cent of the value of the assets of the company before the transaction;

c issuance of new or unissued shares other than treasury shares, unless these have been offered on the same terms to all existing shareholders or classes of shareholders;

d making voluntary contributions to charity of an amount exceeding 2 per cent of the retained earnings of the company recorded for the immediately preceding financial year;

e borrowing money or charging the company's assets as security for any loan, where the amount to be borrowed, with the outstanding balance of any existing loans, will exceed the stated capital of the company;

f allotment of shares to executive directors as part of an employee share scheme; and

g related party transactions that are considered sufficiently material in listed companies.

ii Shareholder duties and responsibilities

Controlling shareholders do not have any special responsibilities to the company, other than the duty shared by all shareholders to pay any outstanding liability on shares in the event of a call being made and on the winding up of the company. All shareholders are mandated to disclose the particulars of the beneficial owners of their shares, details of the arrangement giving rise to the beneficial ownership and a confirmation as to whether they are politically exposed persons.

Institutional investors also do not owe any obligations to the company, although owing to recent advocacy for improved corporate governance methods, institutional investors are encouraged to increase their level of engagement with, and monitoring of, the board and management.

There is no code of best practice for shareholders.

iii Shareholder activism

Shareholders must approve the amount of remuneration payable to directors in their capacities as directors or as executive officers of the company.

Shareholders are mandated to commence legal action in the name of the company if the directors refuse or neglect to do so. A shareholder may bring an action against a third party or against a director who acts in breach of his or her duty to the company. If an action is brought by a shareholder to enforce an obligation owed under the constitution of the company to that shareholder and any other shareholders, that shareholder shall sue in a representative capacity for himself or herself and on behalf of any others affected by the act complained about, and the shareholder is not required to seek the consent and approval of any other affected shareholder before doing so.

Shareholders are not prohibited from soliciting proxy votes prior to a general meeting of the company. However, proxy battles are not very common in Ghana.

The Companies Act allows a shareholder to propose a resolution on any matter and to provide to the company a statement on the proposed resolution for circulation to persons entitled to attend and vote at meetings. Shareholders are also permitted to provide statements on any issue already on the agenda of a proposed meeting for circulation to all shareholders prior to the meeting being held. These provisions allow shareholders to engage the board on issues that directors may want to avoid discussing for various reasons. They encourage shareholders to be proactive, and to monitor and hold management accountable.

iv Takeover defences

The provisions of the Companies Act, the Listing Rules and the Takeover Code are generally non-facilitative of the use of most defensive mechanisms that a company may use to protect itself from a hostile takeover. Under the Takeover Code, the target company in a takeover is precluded from issuing new shares or granting options over unissued shares on receipt of a takeover offer or if the board has reason to believe that a takeover of the company is imminent. This prevents a target company from embarking on a shareholder rights plan as a means of thwarting a hostile takeover. The use of voting rights plans are also precluded because although preferential shareholders may be issued with special voting rights that entitle them to more than one vote per share, these rights are exercisable in very limited circumstances prescribed under the Companies Act, and voting against a hostile takeover is not one of those circumstances. The use of staggered boards as a takeover defence is also not effective as, under the Companies Act, the shareholders of a company may remove directors from the board at any time, and hence a person that gains control of a company through a hostile takeover is at liberty to change the entire board on completion of the takeover. On the other hand, the Takeover Code permits a competing offer to be made during the pendency of a takeover offer by another person, thus permitting the use of the white-knight defence by a board in the event of a hostile takeover.

v Contact with shareholders

The reporting obligations of a company mainly concern periodic financial reporting and event-driven announcements, which must be made to all shareholders within certain time limits or on the occurrence of certain events discussed above.

Selective disclosure of price-sensitive information to shareholders, individually or collectively, is not permitted under the Listing Rules. Listed companies must ensure that shareholders and the general investing public have simultaneous and equal access to the same information on their website. Meetings and communications with individual shareholders following the public disclosure of price-sensitive information is not prohibited. Thus, it is possible for a board to approach and engage particularly influential shareholders to obtain their views and court their approval on certain key issues that are in the public domain before proposing resolutions on them at shareholders' meetings.

All shareholders are entitled to receive the same information at the same time. The disclosure of price-sensitive information to any person prior to its release to the public automatically precludes that person from dealing in any securities of a listed company.

Standstill agreements are purely contractual and may be made between the company and its controlling shareholders, particularly in respect of the disposal of large blocks of control shares to outsiders. As long as they do not contain any unlawful provisions, they are enforceable.

Shareholders are entitled to receive information at least 21 days before shareholders' meetings. The constitution of the company may provide for longer notice periods. Proxy solicitation is permitted, although it is not widely used in practice.

Shareholders are able to give their views in advance of meetings, to a certain extent. The Companies Act permits shareholders to send statements to the company for circulation to shareholders on any business to be dealt with at a proposed meeting. This is usually circulated with the notice of the meeting, or soon thereafter, at the particular shareholder's cost. There are no relevant issues regarding large blocks of shareholders.

VI OUTLOOK

The Ghanaian corporate governance space is in a burgeoning state. The passage of the new Corporate Governance Code, which specifies mandatory rules on corporate governance issues, is particularly significant in ensuring that minimum standards are met by companies in line with widely recognised international practices. With the failure of a number of Ghanaian indigenous banks, the shutdown and revocation of licences by regulators of some microfinance institutions and the hostile takeover of the country's premier mortgage finance institution by a Caribbean banking conglomerate, interest in the adoption of policies that protect wider stakeholder interests in Ghanaian companies has been generated. The banking sector has been particularly responsive on the subject, understandably. With the laissez-faire attitudes of most individual shareholders, the active engagement and involvement of institutional investors is critical in shaping the governance culture of local companies. The current BoG Directives and Corporate Governance Code reflect the changing attitude towards the importance of corporate governance in sustaining various sectors of the Ghanaian economy.

Appendix 1

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NanaAma Botchway is the founder of N Dowuona & Company. She is ranked as a leading lawyer in *The Legal 500*, *Chambers and Partners* and *International Financial Law Review*. She has advised on numerous significant investments and divestments in Ghana and in other parts of Africa, including the US$200 million sale of Fan Milk International, the acquisition, development and divestment of the Mövenpick Ambassador Hotel and Leapfrog Strategic African Investment's US$180 million investment in the Enterprise Insurance Group.

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Ewurabena's recent work with the firm includes advising the Ghana and Burkina Faso governments on the legal and regulatory framework for the Railway Interconnectivity Project, and international petroleum companies seeking to set up local subsidiaries and joint ventures on regulatory compliance and governance issues.

Ewurabena obtained her bachelor of laws (LLB) degree from Kwame Nkrumah University of Science and Technology and a qualifying certificate in law from the Ghana School of Law. She also holds an LLM degree from Columbia University in New York, where she served as the board secretary to the Law in Africa Student Society. Ewurabena is licensed to practise law in Ghana and the State of New York.

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