Republic of the Philippines
Department of Trade and Industry
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

FIRST PHILIPPINE HOLDINGS CORPORATION,
Appellant,

- **versus** -

CORPORATION FINANCE DEPARTMENT,
Appellee.

SEC En Banc Case No. 07-08-139
For: Review of CFD Letter-Order dated 20 June 2008

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DECISION

For consideration is the Appeal[1] dated 22 July 2008 filed by First Philippine Holdings Corporation ("FPHC") on 24 July 2008 from the *Letter-Order* dated 20 June 2008[2] issued by the Corporation Finance Department ("CFD") of the Commission, which reprimanded FPHC for violation of SRC Rule 38(6)(B)(iii) of the Amended Implementing Rules and Regulations ("IRR") of the Securities Regulation Code ("SRC")[3] and directed it to replace Washington G. Sycip ("Sycip") as its independent director.

Sycip, independent director of FPHC, was found by the CFD to have attended only five (5) out of twelve (12) board meetings during the calendar year of 2007, based on the corporation's Sworn Secretary's Certificate on the attendance of its directors in board meetings for 2007.[4] Under the corporation's Amended Manual on Corporate Governance ("Manual", for brevity)[5], non-attendance in more than half of the Board meetings is a ground for temporary disqualification.

In the instant appeal, FPHC prays that Sycip be allowed to continue in office as an Independent Director of the corporation, or in the alternative, serve as regular director, and that the reprimand issued by the CFD be withdrawn and expunged from the records of the corporation.

FACTS OF THE CASE

On 29 January 2008, FPHC filed its Sworn Secretary's Certificate on the attendance of directors in board meetings during the calendar year 2007, wherein Sycip is shown to have attended only five (5) out of the twelve (12) board meetings.[6]

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[1]Memorandum on Appeal dated 22 July 2008.
[2]Annex "A", Memorandum on Appeal.
[3]Republic Act No. 8799 (2000).
[4]Annex "C", CFD's Reply Memorandum dated 26 August 2008.
[5]Annex "G", Memorandum on Appeal.
[6]Supra, Note 4.

Subsequently, on 3 April 2008, FPHC filed with the Commission its Preliminary Information Statement ("PIS," for brevity) as well as its Management Report for its 19 May 2008 annual stockholders' meeting.[7]

In a letter dated 11 April 2008, CFD informed FPHC that its PIS and Management Report were not in full compliance with the requirements of SRC Rule 20 and directed it to amend the same in accordance with the checklist of requirements provided by the CFD and to file its Definitive Information Statement and report not later than the date of distribution of the same to the company's holders, with clearance from the Commission prior to distribution.[8] In the checklist, the CFD made the following comment in the remarks section:

> "Based on the company's Sworn Certification filed with this Commission on January 1, 2008, ***Mr. Washington Z. Sycip has only attended five out of twelve meetings conducted last year***. Per company's Manual on Corporate Governance, this is a ground for temporary disqualification. Explain why he is still included in the list of nominees."

On 17 April 2008, FPHC filed its Definitive Information Statement without removing Sycip as a final nominee for independent director for the 19 May 2008 annual stockholders' meeting.[9]

Thereafter, FPHC sent a letter-explanation dated 18 April 2008, which extolled the many credentials of Sycip, and argued that:

> "It should be noted that absences *per se* are not what are covered in the above provision. Rather, it is absence without any justifiable reason which is contemplated. Thus, a mathematical summation of Mr. Sycip's attendance by itself does not necessarily fall thereunder.
>
> xxx xxx xxx
>
> More importantly, please note that the above quoted provision is simply a 'ground' for temporary disqualification and does not result in an outright disqualification of a director, or a nominee for that matter. A 'ground' is defined as a foundation or basis [Black's Law Dictionary (1979)] and as such, we submit is subject to further action by the appropriate person. In this case, it is the Board which can make the final decision on temporary disqualification of a director.
>
> xxx xxx xxx."[10]

[7]Memorandum on Appeal, p. 2; Reply Memorandum, p. 1.
[8]Annex "C", Memorandum on Appeal.
[9]Annex "D", Reply Memorandum.
[10]Annex "E", Memorandum on Appeal.

On 20 May 2008, FPHC filed its Current Report (SEC Form 17-C) with the CFD, disclosing the list of its newly elected directors, including Sycip as an independent director.[11]

On 20 June 2008, the assailed *Letter-Order* was issued by CFD.

The CFD filed its Reply Memorandum on 28 August 2008, while FPHC filed its Rejoinder on 16 September 2008.

The arguments presented by FPHC in support of its Appeal can be summarized as follows: (1) its Manual allows the nomination and election of Sycip as independent director and he remains eminently qualified as such; (2) three of his absences were justified due to a change in schedule initiated by the corporation; (3) the validity of its Manual has continuously been recognized by CFD; (4) under SRC Rule 38, disqualification, if at all, is only during the tenure of a director; (5) the will of the stockholders should be honored; and (6) there was lack of due process on the part of CFD by not notifying and hearing the corporation and by failing to notify Sycip of the disqualification.

On the other hand, the arguments posited by the CFD can be summarized as follows: (1) change in schedule of the board meetings of FPHC is not a valid excuse for Sycip's absences; (2) the disqualification of Sycip has bases in law; and (3) there was no violation of due process because FPHC was sufficiently informed of the disqualification of Sycip and notice to Sycip himself was not necessary.

ISSUE

After a careful reading of the pleadings and arguments put forth by the parties, the issue to be resolved is: whether or not the CFD erred in imposing sanctions on FPHC for its alleged violation of SRC Rule 38 as embodied in the Manual of the corporation.

RULING

The Commission is vested with broad regulatory powers as part of its mandate under the SRC in order to:

> "(E)stablish a socially conscious, free market that regulates itself, encourage the widest participation of ownership in enterprises, enhance the democratization of wealth, promote the development of the capital market, protect investors, ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market."[12]

[11] Supra, Note 1, p. 3.
[12] Section 2, SRC. The rule-making authority of the Commission is pursuant to Section 5(g) of the SRC.

The Commission is tasked to monitor and regulate public and listed corporations for the benefit and protection of the public. Thus, the Code of Corporate Governance ("CCG")[13] was promulgated[14] to actively promote corporate governance reforms and help achieve high sustained growth for the corporate sector and the economy, and in pursuance of these objectives, the corporations are directed to promulgate and adopt their own corporate governance rules and principles in accordance with the CCG.[15]

Under its by-laws then applicable[16], **the annual stockholders' meeting of FPHC for the election of directors** and for the transaction of such other businesses **shall be held every 3rd Monday of May of each year.**[17] Based on the 2007 General Information Sheet submitted by FPHC, **the annual stockholders' meeting for 2007 was conducted on 21 May 2007.**[18]

It appears that the CFD relied on the Sworn Secretary's Certificate of FPHC in issuing its reprimand. However, **the said Sworn Secretary's Certificate**, on its face, **refers to** the attendance of the directors at regular and special meetings for **the calendar year 2007**.

SRC Rule 38(6)(B)(iii) of the IRR implementing Section 38 of the SRC provides:

> "No person enumerated under Section II (5) of the Code of Corporate Governance shall qualify as an independent director. He shall likewise be disqualified during his tenure under the following instances or causes:
> (iii) ***Fails, without any justifiable cause, to attend at least 50% of the total number of Board meetings during his incumbency***, xxx."

The requirement to attend Board meetings and the consequences of non-attendance or non-participation of an incumbent director can be found specifically in Section II(5) of the CCG, which provides:

> "The Board may also provide for the temporary disqualification of a director for the following reasons:
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> b. Absence or non-participation for whatever reason/s for more than fifty percent (50%) of all meetings, both regular and special, of the Board of directors ***during his incumbency, or any twelve (12) month period during***

[13]SEC Memorandum Circular No. 2, Series of 2002, as amended by SEC Memorandum Circular No. 6, Series of 2009.
[14]The rule-making authority of the Commission is pursuant to section 5(g) of the SRC.
[15]Part VII of the CCG.
[16]Amended By-Laws approved by the Commission on 1 February 2005.
[17]Ibid, Section 1, Article I.
[18]General Information Sheets submitted on 20 June 2007 and 15 February 2008.

> ***said incumbency***. This disqualification applies for purposes of the succeeding election."

The provision is likewise reproduced in the Manual of FPHC.[19]

The provisions on non-compliance with such attendance requirements as a ground for disqualification of an independent director in the Amended IRR, CCG and the Manual of FPHC clearly refer to the non-attendance in board meetings held during the incumbency or any twelve month period during the incumbency, or tenure of the director.

Thus, it is necessary first to determine the proper period contemplated by the 'incumbency' of a director, during which, s/he may be disqualified in the succeeding election, for failure to attend or participate in at least fifty per cent (50%) of the regular and special Board meetings. The period contemplated by the rules refers to the tenure of the director that usually commences upon his or her election at the annual stockholders' meeting and usually continues until the next annual stockholders' meeting where a successor is qualified and elected.

Applying the same to the instant case, the calendar year indicated in FPHC's Sworn Secretary's Certificate, i.e., calendar year 2007, does not appear to coincide with the tenure or period of incumbency of Sycip as an independent director. Since Sycip was being considered for a new term starting from 19 May 2008 to 19 May 2009, then the twelve month period that has to be examined is the twelve months prior to such election, i.e. May 2007 – May 2008, and not from January to December, 2007.

Thus, the CFD's reliance on the said Sworn Secretary's Certificate, in imposing the penalty of REPRIMAND upon FPHC and in directing the corporation to replace Sycip as its independent director, is erroneous.

WHEREFORE, premises considered, the Appeal is hereby **GRANTED**. The *Letter-Order* dated 20 June 2008 of the Corporation Finance Department is hereby **SET ASIDE.** The Corporation Finance Department is directed to further investigate and determine proper compliance by First Philippine Holdings Corporation with SRC Rule 38(6)(B)(iii) of the Amended Implementing Rules and Regulations of the Securities Regulation Code, Section II(5) of the Code of Corporate Governance and the corporation's Amended Manual on Corporate Governance, and to resolve the matter with dispatch.

Let a copy of this **DECISION** be furnished to the Company Registration and Monitoring Department of the Commission for its information.

SO ORDERED.

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[19] Specifically, paragraph 6.1.4(d) thereof.

Mandaluyong City, 16 June 2011.

TERESITA J. HERBOSA
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA *
Commissioner

* On Leave