

Changes to the Singapore Companies Act (Cap.50)

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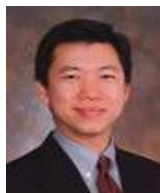
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Changes to the Singapore Companies Act (Chapter 50)

Introduction

The Singapore Companies Act (Chapter 50) (the "**CA**") is the primary legislation regulating corporate entities in Singapore. Ensuring the CA is kept up-to-date in order to efficiently reflect the realities of business in Singapore and maintain Singapore's strength as a global business hub, whilst at the same time providing appropriate safeguards for stakeholders, is a key concern of policy makers.

In 2013, the Ministry of Finance and the Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**") consulted extensively on draft amendments to the CA. On 8 October 2014, the amendments to the CA were passed in Parliament and the Companies (Amendment) Bill No.25 of 2014 (the "**Bill**") was enacted to implement the recommendations of the Steering Committee for the Review of the Companies Act.

In April 2015, ACRA announced that the legislative changes will be implemented in two phases, the first being effective 1 July 2015 ("**Phase One**") and the second being effective Q1 2016 ("**Phase Two**"). For the full list of changes, please see Annex 1.

What is the aim of the amendments?

The Bill introduces wide-ranging amendments to the CA, seeking to:

- reduce the regulatory burden on companies, making it easier for them to do business in Singapore;
- promote greater business flexibility, accommodating different types of business and ways of raising capital; and
- improve the corporate governance landscape, ensuring greater accountability and transparency.

Various stakeholder groups such as public companies, private companies, small-and-medium enterprises ("**SMEs**") and retail investors will benefit from the changes set out in the Bill.

What are the key changes?

Abolition of financial assistance (Phase One)

Importantly, the prohibition on giving financial assistance will no longer apply to private companies, meaning a private company will be free to provide financial assistance for the purchase of shares in itself and in its private holding company. This reflects the changes made to the UK Companies Act in 2006, providing greater flexibility and simplifying many corporate transactions, including group re-organisations and leveraged buy-outs. The Bill will also render redundant the so-called "whitewash procedure", including auditors' responsibilities thereunder.

The main rationale for the restriction is to protect creditors and preserve the capital of a company. Whilst the restriction is not an everyday concern for companies, it often leads to convoluted deal structures in order to avoid financial assistance, or, if this proves impossible, the company carrying out the expensive "whitewash procedure". Even identifying whether a particular transaction involves financial assistance has been problematic in the past, with ambiguous case law and a wide variety of innocuous transactions possibly being prohibited (from the straightforward provision of a loan, to the payment of fees, to the granting of security over the company's assets or the giving of a guarantee). As such, the abolition will be welcomed by private companies in Singapore.

Public companies will benefit from being permitted to provide financial assistance for the acquisition of their own shares provided that doing so would not materially prejudice the interests of the company, its shareholders or the company's ability to pay its creditors. In doing so, the directors of the company must deem the terms of the assistance to be fair and reasonable.

However, the Bill does not mean that private companies can simply undertake transactions which previously would have been restricted without thought. There will still need to be legal and financial analysis relating to the effect of the transaction and directors will still need to consider whether a transaction would be most likely to promote the success of the company for the benefit of its members.

Exemptions from audit (Phase One)

Currently, Singapore companies with an annual turnover of less than S\$5 million who have less than 20 non-corporate shareholders (i.e. individuals) are exempt from statutory audit requirements (known as "Exempt Private Companies", or "EPCs"). Instead of filing audited annual accounts, EPCs simply submit a declaration of solvency signed by the directors and company secretary. If, for any reason, the EPC is unable to submit the declaration, it must submit its unaudited accounts to ACRA. There is no need for an EPC to appoint auditors.

Under the new regime, SMEs stand to benefit if they qualify under a new, broader criteria for exemption from statutory audit. To qualify as a "small" company, a company must fulfil at least two of the following three criteria:

- total revenue of not more than S\$10 million;
- total assets of not more than S\$10 million; and
- total number of employees of not more than 50.

Note that a company no longer needs to be "exempt" – this means that it may have corporate shareholders and/or more than 20 members (the former qualification under the existing regime usually being the bar to a company qualifying as an EPC). However, certain safeguards will remain, including allowing shareholders with at least 5% voting rights to require a company to prepare audited accounts.

The intention is to reduce the regulatory burden on small companies and move further towards a risk-based approach. In addition, the qualification criteria has been brought in line with that used for the Singapore Financial Reporting Standards for Small Entities.

It is expected that an additional 25,000 companies will benefit from this change.

Greater powers for ACRA (Phase One)

Company auditors of public interest companies (i.e. companies listed on the SGX, financial institutions and large charities) will no longer be able to resign prematurely at will, but will instead have to seek approval from ACRA. ACRA will use this power to both facilitate an auditor's resignation where the company is being obstructive by refusing to hold a general meeting to appoint a replacement, as well as stay the resignation until the end of the term where the premature resignation is not in the public interest.

Rights of shares (Phase Two)

Under the Bill, public companies will enjoy greater freedom to decide what rights attach to new shares, reflecting the existing regime for private companies whereby shares in private companies may be issued with different voting rights. Subject to certain safeguards, the restriction on public companies giving only one vote to each equity share will be lifted, allowing public companies to offer a broader range of voting rights to shareholders. In addition, both private and public companies may authorise in their constitutions the conversion of one class of share into another class of share.

The intention is to engender greater trust in allowing public companies to manage their shareholders' voting rights as the company sees fit, providing flexibility in raising capital and capital management. Other jurisdictions such as the UK, US and Australia already have a similar regime in place.

Currently, the Monetary Authority of Singapore and the Singapore Stock Exchange ("**SGX**") are reviewing whether dual-class share structures should be permitted for listed companies.

Changes to proxy voting (Phase Two)

Indirect investors, such as those with shareholdings through nominee companies, custodial banks or the Central Provident Fund agent bank, may participate more fully at general meetings by virtue of the appointment by shareholders of multiple proxies. At present, the CA only allows for the appointment of a maximum of two proxies unless a greater number is stipulated in the company's articles of association. Once the changes come into force, companies will not be permitted to opt out of this multiple proxy regime and indirect investors will be given the same rights as direct investors to vote at shareholders' meetings.

As this will engage a greater number of shareholders, the cut-off time for submission of proxy forms will be extended from 48 hours to 72 hours and a six month transitional period will be allowed to give companies more time to prepare for meetings and implement the changes.

Wider acceptance of electronic communication (Phase Two)

Under the Bill, companies will be given greater freedom to use electronic communication as a formal means of communicating with shareholders, provided this mode of communication is stated in the company's constitutional documents. Both private and unlisted public companies may pass written resolutions by email, as well as send documents and notices to shareholders electronically.

This reform reflects the changing reality of business, with most companies conducting their businesses almost solely through electronic means. The wider adoption of electronic communication provides flexibility to companies, particularly in allowing resolutions to be passed by email, saving time and process costs.

Disclosure regime for CEOs (Phase Two)

Chief Executive Officers ("**CEOs**") will be required to comply with certain disclosure requirements which are already applicable to directors. For example, CEOs will be compelled to disclose their and their family members' interests in securities and any conflict of interest which may arise in proposed transactions arising from their offices held or property possessed by them. This reflects the widely held belief in the public mind that CEOs are held to the same, if not higher, standards of scrutiny than directors given their key role in company decision-making. This change is also consistent with the approach already adopted for listed companies under the Securities and Futures Act, under which similar disclosures by both directors and CEOs are required.

Registrar given power to debar (Phase Two)

In an effort to promote greater compliance by companies with their filing requirements, the Registrar's powers to punish individual officers of non-compliant companies will be enhanced, including granting the Registrar the power to debar any director or company secretary who has failed to lodge any documents within three months of the deadline prescribed by the CA. Once debarred, an officer will be prohibited from accepting any new appointment, although may continue with existing appointments. If the defaults are rectified, the debarment will be lifted.

Constitutional documents (Phase Two)

Private companies will no longer be obliged to keep a register of members. Instead, ACRA's electronic register will be authoritative as the register. A transfer of shares in a private company will therefore not take effect until ACRA's register is updated, the date of filing to be taken as the effective date of entry or removal of a shareholder. This is in marked contrast to the current position by which ACRA's register is only as accurate as the information provided by company secretaries or officers to ACRA, and as such, it is the company's register of members that reflects legal title to the shares. This should ease the administrative burden on private companies and create a reliable one-stop-shop of online company registers.

Additionally, the Memorandum and Articles of Association will be merged and renamed the "Constitution". Private companies and companies

limited by guarantee can choose to adopt the whole or part of several model constitutions prescribed for different types of businesses, available on the ACRA website. If a company adopts the model constitution in its entirety, there is no need to file the model constitution with ACRA. However, existing companies will not be required to incur additional costs by being required to merge the documents and can instead choose to switch over to the new form of constitution or simply to continue with their current M&A.

Changes to foreign companies (Phase Two)

Foreign companies in Singapore must currently appoint a minimum of two authorised representatives (or agents). Subject to certain safeguards, the Bill will reduce this requirement to one, minimizing the regulatory burden and bringing Singapore in line with the requirements of the UK, Hong Kong, Australia and New Zealand.

Additionally, the Registrar will be given new powers to strike a foreign company off the register on three new grounds, in addition to one already existing ground. Under the Bill, a foreign company may now be struck off if:

- the Registrar has reasonable cause to believe that it has ceased to carry on business in Singapore or is being used for an unlawful purpose;
- the sole authorised representative has given notice of his resignation to the company and lodged a notice with the Registrar, but the foreign company has failed to respond or appoint another authorised representative within the period of 12 months;
- an authorised representative of a foreign company has received no instructions from the company within 12 months of a request made by the authorised representative as to whether the foreign company intends to continue its registration in Singapore; or
- the foreign company does not appoint a replacement authorised representative within 6 months after the death of the sole authorised representative.

What other legislation will be affected by these changes?

A simultaneous and complementary bill, the Statutes (Miscellaneous Amendment) (No.2) Bill, will be passed to align the provisions of the following Acts with the changes made to the CA:

- the Accountants Act

- the Limited Liability Partnerships (LLP) Act
- the Limited Partnership (LP) Act

Conclusion

The changes set out in the Bill will largely be welcomed by Singapore companies and directors, on the whole providing greater flexibility and aligning Singapore with other sophisticated jurisdictions.

The abolition of the financial assistance prohibition will be a particular relief to many.

However, the Bill also introduces safeguards to ensure that these changes are not to the detriment of stakeholders. Instead, the Bill will allow for a more efficient but regulated business environment, further confirming Singapore's commitment to improving its business and regulatory landscape.

ANNEX 1**PHASE 1 – LIST OF KEY AMENDMENTS TO BE IMPLEMENTED 1 JULY 2015**

S/N	Key Amendments	Section number in Companies (Amendment) Act 2014
(a)	Shareholders' approval not required for payment of compensation up to a year's emoluments to executive director for termination of his employment.	Section 86
(b)	Relaxing conditions for nominee directors to disclose information to nominating shareholders.	Section 80
(c)	Empowering the Court hearing a winding-up application to order a buy-out instead of ordering winding-up.	Section 150
(d)	Expanding the scope of the statutory derivative action in Section 216A to allow a complainant to apply to the court for leave to commence / intervene in arbitration.	Section 146
(e)	Extending application of Section 216A such that the statutory derivative action is applicable to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.	Section 146
(f)	Allowing listed companies to make selected off-market acquisition of shares in itself in accordance with an agreement authorised by the Company.	Section 45
(g)	Removal of prohibition against financial assistance by private companies and introducing new exceptions to financial assistance.	Section 41
(h)	Permitting use of capital for share issues and buybacks for brokerage, commissions.	Section 35
(i)	Allowing companies to issue shares for no consideration.	Section 35
(j)	Consolidating provisions relating to auditor independence under the Accountants Act.	Section 9
(k)	Introduction of small company audit exemption.	Sections 128, 184
(l)	Auditors of non-public interest company may resign upon giving notice to the company. Auditors of public interest companies and their subsidiaries to obtain ACRA's consent for premature resignation.	Section 126
(m)	Determination of requirement to prepare consolidated financial statements to be determined by financial reporting standards and not the Companies Act.	Sections 112, 113, 116 (and other related amendments)
(n)	Repeal of Companies Act requirement relating to alignment of financial year between parent and subsidiary.	Section 115
(o)	Company secretaries of private companies need not be physically present at the company's registered office.	Section 88
(p)	Prescribing the requirements of a company secretary of a public company in regulations.	Section 88
(q)	Abolition of transitional arrangements for share warrants	Section 34

- (r) Update limit on preferential payments to employees of insolvent companies. Section 151

PHASE 2 – LIST OF KEY AMENDMENTS TO BE IMPLEMENTED IN Q1 2016

S/N	Key Amendments
(a)	Removing the requirement for shareholders' approval to re-appoint directors aged 70 and above.
(b)	Extension of the types of loans permitted to directors to include quasi-loans, credit transactions and related arrangements.
(c)	Extension of directors' disclosures requirements to Chief Executive Officers.
(d)	Allowing a company to provide indemnity against liability incurred by directors to third parties.
(e)	Power of Registrar to debar directors and secretaries.
(f)	Lowering the threshold of 10% of total voting rights for the eligibility of shareholders to demand a poll to 5%.
(g)	Introduction of multiple proxies regime to enfranchise indirect investors.
(h)	Liberalising rules on electronic transaction of documents by companies.
(i)	Extension of procedures for passing written resolutions by written means to unlisted public companies.
(j)	Removal of one-share-one-vote for public companies.
(k)	Introduction of statutory mechanism for redenomination of shares.
(l)	Refinements to the amalgamation process.
(m)	Clarification that shares redeemed out of proceeds of a fresh issue of shares are not treated as having been redeemed out of capital.
(n)	Transfer of the provisions relating to the Central Depository System to the Securities and Futures Act.
(o)	New exemption from preparation of financial statements for dormant non-listed companies.
(p)	Provisions relating to the revision of defective accounts.
(q)	Extension of summary financial statements to all companies.
(r)	Electronic registers of members of private companies to be kept by ACRA.
(s)	Electronic registers of directors and other officers of all companies to be kept by ACRA.
(t)	Memorandum and articles will be merged into a single constitution.
(u)	Removal of requirement for charities registered under the Charities Act to apply to omit the word "limited" from their names.
(v)	Allowing directors and other persons to report on alternate address.
(w)	Updating of striking-off provisions for local companies (except the prescription of circumstances under which the Registrar may consider a company to not be carrying on business or not in operation).
(x)	Amendments relating to reservation / protection of company names.
(y)	All amendments relating to foreign companies.

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