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KEY AMENDMENTS TO THE COMPANIES ACT

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The Companies (Amendment) Bill 2014 was recently passed by the Parliament of Singapore on October 8, 2014. However, the first set of changes was only recently implemented on July 1, 2015. The bill comprises more than 200 changes to the Companies Act (Chapter 50 of Singapore). This represents the most extensive legislative amendments to date since the Companies Act was enacted in 1967.

Impetus for the review dates back to 2007 where the Ministry of Finance (MOF) appointed a Steering Committee to look into areas of reform. A series of public consultations followed during 2011 to 2013 before the bill was eventually passed on October 8, 2014.

Changes to the Companies Act will be implemented in two phases. Phase 1, which was implemented on July 1, 2015 as mentioned earlier, has since come into effect. Phase 2 on the other hand is expected to be operative only in the first quarter of 2016. The reason for this approach is to accommodate certain consequential changes which are linked to registration and filing processes in the Accounting and Corporate Regulatory Authority (ACRA), which serves as the Companies Registrar in Singapore. This article seeks to highlight some of the main areas of reform to the Companies Act.

In introducing the changes to the Companies Act, the MOF had sought to reduce the regulatory burden on companies to meet evolving business realities. Accordingly, one major area of reform has been to abolish the prohibition against financial assistance by private companies.

Previously, a company (whether private or public) was prohibited from providing financial assistance for the purpose of acquiring its own shares or those of its holding company. Financial assistance could take several forms, such as the provision of a loan, the giving of a guarantee, the provision of security, the release of an obligation or the release of a debt. To be exempted from this restriction, companies had to undergo a "whitewash" procedure which required, among others, a declaration of solvency by the company's directors and proper shareholders' authorizations being sought. Since July 1, 2015, Phase 1 of the changes has operated to lift the restrictions on financial assistance for private companies such that a time consuming whitewash exercise will no longer be required.

Even though the prohibitions on financial assistance have been relaxed for private companies, directors of companies are still under a fiduciary duty to guard against transactions which are of no commercial benefit to the company or detrimental to the interests of the company's shareholders and creditors as a whole.

Notwithstanding the above, the prohibition against financial assistance continues to apply to public companies and their subsidiaries. Unlike private companies, public companies have a larger number of shareholders and they have limited control over the company's decision to give financial assistance. However, a new exemption has been introduced to the Companies Act. Hence, a public company may provide financial assistance for the acquisition of its own shares so long as it does not materially prejudice the interests of the company or its shareholders, or the ability of the company to pay its creditors. This exemption is subject to further conditions as prescribed under the Companies Act.

Other changes designed to reduce regulatory burden on companies include the abolishment of shareholders' approval for the payment of directors' compensation of up to a year's emoluments for termination of employment. These changes were also part of Phase 1 which came into effect on July 1, 2015.

Another aim of the bill has been to enhance the corporate governance landscape in Singapore where necessary. In particular, many of these changes pertain to company directors. These changes are significant because they represent a liberalization in some areas, while enlarging existing restrictions in others.

As part of the liberalization regime, Phase 2 of the Companies Act amendments will repeal the current age limit of 70 years for directors of public companies and subsidiaries of public companies. According to the MOF, a person's ability to act as a company director should not be determined based on his age. Consequently, shareholders of such companies will be granted the autonomy to decide whether to approve the appointment of a director, regardless of age.

Phase 2 of the Companies Act amendments will also allow a director to disclose an alternate address instead of his residential address at which he can be located in ACRA's public records. This change seeks to protect the privacy

of directors. However, safeguards will be implemented to prevent fraudulent reporting and filing of invalid addresses. Accordingly, an address is required to satisfy certain conditions in order to be a valid alternate address. For example, a post office address would not qualify to be an alternate address. Also, an alternate address must be in the same jurisdiction as the director's residential address.

The bill also introduces further provisions to exonerate directors from liability, such as third party liability. Currently, the Companies Act prohibits any attempt by the company to exempt or indemnify directors from any legal liability that they may be subject to for any negligence, default, breach of duty or breach of trust that they be guilty of in relation to the company. However, there appears to be some uncertainty as to whether a company is prohibited from providing indemnity for claims brought by third parties.

As companies in Singapore become more globalized, the risk of them being exposed to third party liability is imminent. As such, the bill will introduce a new provision allowing a company to indemnify its director against third party liability. However, the indemnity cannot be provided for the following:

- payment of fines in criminal proceedings;
- payment of penalties in respect of regulatory non-compliance; and
- defending criminal proceedings where the director is convicted, and defending civil proceedings brought by the company or a related company in which judgment is given against the director.

These changes will come into effect under Phase 2 in Q1 2016.

As mentioned, some of the changes to the Companies Act also represent enhanced restrictions on directors. As such, Phase 2 of the Companies Act amendments will include an additional ground for disqualification as a director. Currently, the Companies Act provides that the following categories of persons would commit an offense under the Companies Act if they acted as directors:

- undischarged bankrupts;
- unfit directors of insolvent companies;
- persons convicted of certain offenses; and
- persistent default in delivering documents.

Following Phase 2 of the amendments which takes effect in Q1 2016, a five-year disqualification period will be imposed on a director if he acted as one in at least three companies which were struck off by ACRA within a five-year period. The five-year period commences after the last of the three companies were struck off. However, such disqualified directors may apply to the Singapore Court for leave to act as company directors or take part in the management of a company.

The bill also seeks to tighten the current restrictions on loans to directors. Under the Companies Act, loans to directors or to companies in which directors have an interest are generally prohibited, subject to limited exceptions. Following Phase 2 of the Companies Act amendments, these restrictions will be extended to cover quasi-loans, credit transactions and related arrangements. Given that many new types of financial instruments and arrangements have developed over time, the MOF decided that the regulatory regime should be updated to keep pace with the changing business environment. These changes will now bring Singapore on par with leading jurisdictions such as the United Kingdom and Australia.

Other than the foregoing, additional changes seeking to impose higher responsibilities on directors include a new debarment regime. Under the new debarment regime, ACRA is empowered to debar any director (or company secretary) of a company that has failed to lodge any documents that are required to be lodged with ACRA at least three months after the specified deadlines. Consequently, a debarred director (or company secretary) will be prevented from accepting any new appointment as a director (or company secretary). The debarment order may be lifted once the default has been cured or on other prescribed grounds. These changes will likewise come into effect under Phase 2 in Q1 2016.

In summary, the changes to the Companies Act represent a positive development to Singapore company law. According to the MOF, the ultimate aim of the amendments was to make the legislation comprehensible and coherent. More importantly, the changes to the Companies Act represent an advancement of Singapore's corporate regulatory framework, aligning it with major financial jurisdictions, such as Hong Kong, the United Kingdom and the United States.

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