Amendments to the Companies Act Facilitate Ease of Doing Business in Singapore

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INTRODUCTION

Singapore's Companies Act (Chapter 50, Revised Edition 2006) (the "Act") regulates the activities of Singapore-incorporated companies. Significant amendments—the largest made since the Act's 1967 enactment—were passed and approved in 2014 under the Companies (Amendment) Act 2014 (the "Amendment Act"). The Amendment Act's primary goals are to ease regulatory burdens, provide greater flexibility, and improve corporate governance for Singapore-incorporated companies.

ACRA implemented the amendments in two phases. One group of amendments came into effect July 1, 2015, and the other on January 3, 2016.

This article provides a review of key provisions of these amendments and insights, the last of which came into effect from the first quarter of 2016. We analyse how the amendments may impact companies doing business in Singapore.

AMENDMENTS IMPLEMENTED IN PHASE ONE

Abolition of Prohibition on Financial Assistance for Private Companies

The amendments have eliminated the Act's earlier prohibition on private companies to provide financial assistance for the purchase of its own shares or the shares of its private holding company. The rationale for the prohibition was simple enough: protect the shareholders and creditors from misuse of the company's capital. Avoiding triggering the financial assistance prohibition, however, was not simple at all. Seemingly innocuous transactions, such as making a loan, would inadvertently be deemed "financial assistance," thus making the transaction subject to the prohibition. Furthermore, companies would engage in convoluted and complex deals just to avoid triggering the financial assistance prohibition.

Where a transaction was deemed to be "financial assistance," companies could avail of an exception if it implemented so-called "whitewash procedures." But these procedures are expensive, time-consuming, and complex. With the prohibition on financial assistance no longer in place, private companies can engage in transactions—and not worry about whitewash procedures—a bit more freely. That being said, however, the abolition should not be viewed as a carte blanche: companies—and their directors—should still review proposed transactions and ensure that the companies' capital is not being misused or abused and that directors are observing their fiduciary duties.

It is important to note that the amendments do not abolish financial assistance prohibition for public companies or their subsidiaries: the original Act's safeguards have generally been retained for these entities due to the large number of shareholders and the limited control such shareholders would possess. Such safeguards serve to ensure that shareholders and creditors of public companies be sufficiently protected. Nevertheless, the amendments do provide certain exceptions for public companies: for example, the prohibition does not apply if the financial assistance does not materially prejudice the interest of the company or its shareholders, or the company's ability to pay its creditors.

Introduction of Small Company Audit Exemption

Under the original Companies Act, a company was exempted from having its accounts audited if it was an "exempt private company" with annual revenues of $5 million or less or has been dormant since formation. An "exempt private company" is a special type of private company that has 20 members or less and no corporation holds a beneficial interest in the company's shares.

The Amendment Act introduced a new "small" company exemption to reduce the audit burden on a greater number of small companies. Under the Amendment Act, a company is a "small" if it satisfies any 2 of the following criteria for each of the 2 financial years immediately preceding the financial year:

a. the revenue of the company for each financial year does not exceed $10 million;

b. the value of the company's total assets at the end of each financial year does not exceed $10 million; or

c. it has at the end of each financial year not more than 50 employees.

Such exemptions aim to reduce costs for "small" companies. Nevertheless, the amendments retain certain safeguards. For example, "small" companies will still be required to file basic financial information with ACRA and will be required to keep proper accounting records. And shareholders with at least 5% voting rights have the right to require the company to prepare audited accounts. It should also be noted companies which are part of a group will have a different set of criteria to benefit from such audit exemption, namely the group must be a "small" group under the definition of the Companies Act in addition to the company being a "small" company.

AMENDMENTS IMPLEMENTED IN PHASE ONE

CEO Disclosures

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Under the Amendment Act, Chief Executive Officers ("CEOs") are now subject to the same disclosure requirements as a company's directors, given the increasingly important role they play in managing companies and directing their businesses. For example, CEOs are now required to disclose any conflict of interests in the company's transactions and also their shareholdings in the company and its related corporations. Such disclosures bring the Act in line with the Securities and Futures Act, which already requires similar disclosures by both CEOs and directors.

Multiple-Proxies Regime

Before the amendments took effect, a member of a company was not permitted to appoint more than two proxies to attend and vote at a company meeting unless provided for by the company's articles of association. Despite the ability to alter the number of proxies that could be appointed, few companies in fact altered their articles of association to remove this limit.

To facilitate indirect investors to attend and vote at shareholders' meetings as proxies and to enhance corporate governance and encourage more active shareholder participation, the Amendment Act introduced a Multiple-Proxies regime that allows specified intermediaries, such as banks and capital market services companies providing custodial services for securities, to appoint more than two proxies. This has the effect of allowing indirect investors, such as investors of funds, to be appointed as proxies to attend and vote at company meetings.

Liberalization of Electronic Transmission of Notices and Documents

To increase efficiency and speed in communications and to reduce cost for companies in sending out documents and notices to its members, the amendments have liberalized the provisions regarding electronic transmission of notices and documents. Prior to the amendments, a company could utilise electronic means of transmission but subject to a catalogue of conditions. Now, companies can dispense with the conditions and simply authorize communication by electronic means in their constitutions. Nonetheless, certain safeguards have been put into place by the regulations:

- Where a member has an option to ask for physical copies, the member must be notified of this option;
- If documents are published on a website, the company must notify its members by such means specified in the company's constitution; and
- Important documents such as those relating to takeovers and rights issues must still be sent to members in physical copy instead of electronically.

The amendments recognize that most companies nowadays conduct the majority of their business electronically.

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Dormant, Unlisted Companies Exempt from Requirement to Prepare Financial Statements

Prior to the amendments, a dormant, unlisted company was exempt from the audit requirement but was still required to prepare financial statements. To reduce costs for dormant companies that have very minimal impact on the public, the amendments exempt dormant, unlisted companies from preparing financial statements, provided the company possesses assets of less than $500,000 and the company has been dormant since the end of the previous financial year.

The exemption, however, does not apply to listed companies or a subsidiary of a listed company.

Reporting Alternate Address Permissible

In light of privacy concerns, and subject to certain safeguards, the amendments permit directors, CEOs, and company secretaries to report an alternate address at which such person may be located. Prior to the amendments, such individuals were required to report their residential address.

Register of Members

Under the Amendment Act, private companies no longer need to keep a physical register of members. Rather, ACRA's Electronic Register Of Members ("EROM") will serve as the conclusive register of a company's members. As such, companies are required to file information relating to the companies' members with ACRA, including changes in share ownership (e.g., through share transfers or returns of allotment of shares). The date such information is filed in the EROM will be deemed the effective date of entry of a person into the EROM as a member of the company (or the date a person ceases to be a member, as the case may be). By consolidating such information and placing such information with ACRA, the amendments seek to relieve a company's administrative burden and also provide a single, definitive source regarding a company's membership.

Memorandum of Association & the Articles of Association Merged into the "Constitution"

The Amendment Act merges the company's charter documents, the Memorandum of Association and the Articles of Association, into a single document now called the Constitution. Fortunately, companies incorporated prior to the amendments' taking effect need not take any affirmative steps to merge their charter documents: the law deems them merged to form the Constitution of the company.

ACRA also has provided a model Constitution (which is available on the ACRA website) that can be adopted by private companies. If a company chooses to adopt the model constitution, without alterations, it can simply indicate the acceptance of the model Constitution during registration.

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Removal of the One-Share-One-Vote Restriction for Public Companies

The Amendment Act gives public companies greater flexibility in determining what voting rights attach to which shares by removing the one-share-one-vote restriction under the previous Act. This greater flexibility engenders greater investment opportunities for investors. Subject to certain conditions, other jurisdictions like the United States, United Kingdom, and Australia, already allow companies to issue different classes of shares with different voting rights, and the amendments bring Singapore more or less in line with these jurisdictions. Notwithstanding the abolition of the restriction, the Amendment Act does have safeguards in place to protect the rights of existing shareholders and to ensure that investors are fully informed of the rights attaching to the shares.

CONCLUSION

The Amendment Act supports Singapore's goal to become an international business hub by updating legislation to meet ever-changing business realities. In that regard, the amendments afford companies greater flexibility and freedom to conduct their businesses (subject to safeguards and qualifications) by reducing certain regulatory burdens, removing certain restrictions, and easing administrative compliance. At the same time, they afford appropriate safeguards and strengthen corporate governance to promote investor confidence. The amendments also bring Singapore's legislation in alignment with other major jurisdictions.