Companies (Amendment) Act 2017 – The Challenges of the New Registers

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INTRODUCTION

Since the new Part XIA of the Companies Act (Cap 50, 2006 Rev. Ed) (the "**Companies Act**") took effect on 31 March 2017, companies and their service providers have been in a race against time to comply with the deadlines to set up the various registers of controllers for companies, foreign companies and limited liability partnerships ("**LLP**"), and the register of nominee directors of companies. This article examines the practical issues faced in complying with the provisions of Part XIA.

OBLIGATION OF ENTITY

The provisions in Part XIA are drafted such that the obligations to create and maintain the registers are imposed on the company, foreign company or LLP, and their respective controllers. The obligation to provide information on the status and nominator of a nominee director is imposed on the nominee director of a company, not the company itself.

In practice, entities that have engaged service providers, such as corporate service providers ("**CSP**"), would have relied on the CSPs to notify them of the changes to the law, and the obligations under Part XIA. CSPs that are registered filing agents ("**RFA**") would already be subject to the provisions of Part VIA of the Accounting and Corporate Regulatory Authority Act (Chapter 2A) ("**ACRA Act**"), and specifically, the First Schedule to the Accounting and Corporate Regulatory Authority (Filing Agents and Qualified Individuals) Regulations 2015 ("**ACRA RFA Regulations**") to perform customer due diligence checks. Such measures include identifying the ultimate beneficial owners of their clients and of the entities incorporated or registered by their clients.

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This means that entities administered by CSPs should already have most of the pertinent information, would have relied on the CSPs to notify them of the changes to the law, and the obligations under Part XIA. LLPs that are engaging CSPs who are also RFAs need not send the RFAs a notice, since section 32G(4) of the Limited Liability Partnership Act provides that the LLP need not send a notice to a person believed to be a registrable controller if information about that person's identity had been previously provided to the entity or its RFA. That said, the provisions relating to registrable controllers under the Companies Act and those relating to customer due diligence under the ACRA Act are different. CSPs should not assume that the information prescribed for the purposes of the register of controllers will be the same as the information required under the ACRA RFA Regulations. Entities that wish to rely on their CSP's records should nonetheless ensure that the information is current and complete for the purpose of the notice that would otherwise be sent out under section 386AG of the Companies Act. It bears repeating that it is the obligation of the company, foreign company or the LLP to create the register and take reasonable steps to ascertain the identity of its controllers, not third parties like their service providers.

CONTROLLERS VERSUS MEMBERS

There was some initial confusion as to the difference between registrable controllers and the members of a company (or partners of an LLP). Companies are already required to report and update the Electronic Register of Members maintained by ACRA ("**EROM**"). What additional transparency does a register of controllers provide that the EROM, which is publicly accessible, does not?

A registrable controller may not be a member, and a member may not be a registrable controller. Just as there are shadow directors, there can also be shadow members who have control over the company, foreign company or LLP. A controller is defined as one who has significant interest in or significant control over the company, foreign company or LLP. Even if the controller is not on record as a member, that controller may still be able to exert control over the members whose names appear in the EROM (in the case of companies), and over the partners of an LLP.

It may also be that there are several members of a company or partners in an LLP with minority interests who would not be deemed to have a significant interest in the entity. In such cases, they may also fall outside the definition of "controller". This argument is less defensible when the number of members or partners is small. Every company must have at least one member, and every LLP, by definition, must have at least two partners.

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Unless there are shadow members or partners, it is difficult to argue that the sole member or a LLP partner who owns the majority stake is not a controller.

In its guidelines for companies and for LLPs, ACRA had stated in paragraph 5.3 that:

Companies [Limited Liability Partnerships] that are confident that they do not have registrable controllers may enter the following statement in their register:

"As of [date], the company [limited liability partnership] knows or has reasonable cause to believe that there are no registrable controllers in relation to the company."
Companies, foreign companies and LLPs should exercise caution and not be over-confident is stating that they have no registrable controllers.

TIMELINES

Companies, foreign companies and LLPs were given very little time to comply with Part XIA (Part VIA for LLPs) that came into force on 31 March 2017, and required had compliance within 60 days. Contrast this tight timeline with that given for the EROM.

To its credit, ACRA had published detailed guidelines on the new provisions and the "reasonable steps" to be taken to investigate the identity of the controllers are not onerous, requiring only a notice to be sent to persons believed to be registrable controllers, and then recording their responses or lack thereof. But this does not mean that such steps are easy to implement or that there are no preliminary or preparatory steps needed before sending out the notice.

The company would need to have the knowledge to form a belief that a person is a registrable controller. CSPs who have performed their customer due diligence can rely on their existing records to assist their clients. Even so, time and effort has to be expended to undertake these background checks, unless the company simply sends out the notices to all members of the company, which is itself a laborious task. Up to now, companies only needed to recognise their legal owners and not delve further as to the identities of the beneficial owners of the shares of the company: section 195(4).

CSPs acting on behalf of their clients have had and continue to wrestle with the Herculean task of sending out notices, keeping track of responses and setting up systems and processes to update the information received in the first round of notices. While 60 days may seem adequate in theory, there have been practical problems in summarising the new obligations into bite-sized digestible form for clients before the notices could even be sent out. After the notices were sent, CSPs had to field queries from clients as to how to determine if they were indeed controllers. its shareholders, or the company's ability to pay its creditors.

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CONCLUSION

The rationale for the new provisions relating to the registers of controllers and nominee directors is touted as increasing transparency of companies, and help to combat money-laundering and other illegal activities. Given that the information on the controllers and nominee directors depends largely on their own declaration, it remains to be seen how effective the registers will be as a means to improve transparency.