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COMMENTARY

Amendments to Singapore Companies Act Intended to Modernize Regulations

The Companies (Amendment) Act 2014 ("Amendment Act") was passed by the Singapore Parliament and assented to by President Tony Tan Keng Yam in 2014. On April 15, 2015, the Accounting and Corporate Regulatory Authority of Singapore ("ACRA") announced that the amendments will be implemented in two phases: the first on July 1, 2015, and the second in the first quarter of 2016.

Whilst the amendments are intended to simplify and modernize existing law rather than make any significant shift in the Singapore company law regime, they have nonetheless introduced a number of changes which may have a wide-ranging impact on various stakeholders.

Key Amendments in Phase 1

This section highlights certain key amendments which came into effect on July 1, 2015:

Abolition of Financial Assistance Prohibition for Private Companies. The 2006 Singapore Companies Act prohibited a company from giving financial assistance for the acquisition of its own shares or the shares of its holding company. The largely accepted basis for this prohibition was the preservation of a company's capital. This prohibition had in practice restricted or delayed many transactions due to its wide impact, even though such transactions arguably did not prejudice the creditors or adversely affect the capitalization of the company. A "whitewash" procedure was required before a company could provide financial assistance.

This prohibition has now been removed altogether for private companies (other than subsidiaries of public companies). This is in line with the amendments to the United Kingdom Companies Act, from which a similar prohibition was removed in 2009. Consequently, an acquisition of the shares of a private company can now be financed with loans secured on the company's assets without having to undertake a "whitewash" procedure.

Exceptions Introduced to the Financial Assistance Prohibition for Public Companies and their Subsidiaries. Whilst the prohibition against the financial assistance regime continues to apply to public companies and subsidiaries of public companies, the following key new exceptions to this prohibition have been introduced under the Amendment Act. These exceptions apply: (i) where the giving of assistance does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors (subject to the company satisfying

certain prescribed conditions); (ii) to distributions made in the course of the company's winding up; (iii) to the allotment of bonus shares; and (iv) to the redemption of redeemable shares of a company in accordance with its constitution.

One of the main drawbacks in a "whitewash" procedure is the requirement for the directors to make a solvency statement as this exposes the directors to additional personal liability. Under the "no material prejudice" exception introduced by the Amendment Act, directors are not required to give the solvency statement and will only need to determine whether there is material prejudice to the interests of the company and if the terms and conditions of the proposed financial assistance are fair and reasonable.

Disclosures by Nominee Directors. Nominee directors owe fiduciary duties to the company, but many such nominee directors are also employees of their appointer—which often puts them in a situation of potential conflict of interest. Previously, a nominee director required approval to disclose company information to his or her appointer in each instance of intended disclosure.

Now, as long as there is a general approval mandate in place, nominee directors are no longer required to obtain specific approval for each disclosure, subject to the overarching consideration that there should not be any prejudice caused to the company. This does not completely address the conflict of interest issues, but it will make reporting within a corporate group more streamlined and reduce risk for directors.

Derivative Actions Against Directors. The statutory derivative action previously introduced under the 2006 Singapore Companies Act provided that only the company (and not its shareholders) could obtain damages from its directors for breach of directors' duties. However, the scope of the statutory derivative action has been expanded to allow a complainant (e.g., a shareholder) to apply to the court for leave to commence an arbitration (this was previously limited only to actions in Singapore Courts). It has also been extended to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas (this was previously limited to companies which were not listed on the Singapore securities exchange). This gives shareholders increased protection and also additional flexibility, for example, to bring a derivative action through a confidential arbitration process.

Buyout Order in Winding-Up Application. The court hearing a winding-up application is now empowered to order a buyout by a shareholder of another shareholder's shares in the company instead of ordering a winding-up of the company. The rationale behind this amendment is an attempt to avoid "practical injustice" by conferring the courts with the flexibility to order a share buyout instead of a winding-up in cases where companies are still economically viable, notwithstanding the breakdown in relationship between shareholders.

This is an interesting development which has not been adopted in other common law jurisdictions and has not been tested. In theory, this may incentivize shareholders to bring a winding-up application in hope of the court ordering a buyout remedy—which in itself may have repercussions on the company. For example, dispositions of a company's property after the commencement of a winding-up may be voided by a company. Further, the filing of a winding-up application can often trigger an event of default under contracts into which the company may have entered, including financings.

Key Amendments in Phase 2

This section aims to highlight certain key amendments which are scheduled to be effective in the first quarter of 2016:

CEOs to Disclose Interests in Securities of Company and Conflict of Interests. A chief executive officer of a non-listed Singapore-incorporated company will be required to disclose (i) his or her and his or her family members' interests in securities of the company, and (ii) any conflicts of interest in transactions and proposed transactions with the company or arising from any offices held or properties possessed by him.

Shareholders Demanding Poll. The shareholding threshold entitling a shareholder to demand a poll is to be lowered from 10 percent to 5 percent of the issued share capital of a company.

Multiple Proxies to Allow Indirect Investors and CPF Investors to Vote. Companies incorporated in Singapore will be required to allow certain members to appoint more

than two proxies. This is to enable indirect investors who hold shares through a nominee company or custodian bank or through capital markets services licence holders which provide custodial services to attend and vote at shareholder meetings. This could be procedurally fairer for shareholders as the specified intermediaries would no longer have to vote as an entire block, discounting the individual views of their approving and dissenting shareholders, as the case may be.

Issuing Shares with Different Voting Rights. The current restriction on public companies having only one vote for each equity share will be removed. Subject to prescribed safeguards, a public company will be allowed to issue shares with different voting rights (special, limited, conditional or no voting rights). This should provide greater flexibility for corporate structuring.

Electronic Registers. Private companies will no longer be required to keep a register of members, directors, chief executive officers, secretaries or auditors.

The electronic register maintained by ACRA will be used as the main and authoritative register of members (previously, the physical register of members kept by the company was *prima facie* evidence of any matters inserted therein). The electronic register maintained by ACRA will also be used as the main and authoritative register of directors, chief executive officers, secretaries and auditors.

Any allotment, buyback, transfer, redemption or consolidation of shares in a private company will not take effect until the ACRA electronic register of members is updated.

These changes will affect due diligence sign-offs and completion steps for mergers and acquisitions transactions.

Conclusion

The changes under the Amendment Act should largely be welcomed by Singapore companies and directors and investors in Singapore as they provide greater flexibility. However, given the nascent stage of the implementation of such amendments, Singapore companies, officers and auditors should consult their advisers to fully understand these changes and their possible application to particular situations.

Lawyer Contacts

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